

SOUTH AFRICAN LAW COMMISSION

**REPORT ON
THE REVIEW OF THE MARRIAGE ACT
25 OF 1961**

(PROJECT 109)

MAY 2001

**TO DR PM MADUNA, MINISTER FOR JUSTICE AND CONSTITUTIONAL
DEVELOPMENT**

I am honoured to submit to you in terms of section 7(1) of the *South African Law Commission Act, 1973 (Act 19 of 1973)*, for your consideration the Commission's report on *the Review of the Marriage Act 25 of 1961*.

MADAM JUSTICE Y MOKGORO

CHAIRPERSON: SOUTH AFRICAN LAW COMMISSION

MAY 2001

INTRODUCTION

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

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The project leader who was responsible for this project is Professor RT Nhlapo. He was the full-time member of the Commission until his resignation on 1 October 2000.

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CONTENTS

The page numbers refer to the hard copy and may differ in electronic versions PAGE

| | |
|----------------------------|---------|
| Introduction | (v) |
| Summary of recommendations | (xv) |
| Bibliography | (xxxiv) |

Chapter 1 1

| | | |
|-----|--------------------------------------|---|
| 1.1 | The background to this investigation | 1 |
| 1.2 | The Commission's media statement | 2 |
| 1.3 | Discussion Paper 88 | 3 |
| 1.3 | The way forward | 3 |

Chapter 2

| | | |
|-----|---|----|
| | Aspects contained in the Marriage Act requiring consideration | 6 |
| 2.1 | Introduction | 6 |
| 2.2 | <i>Ex officio</i> marriage officers and designation of persons in the public service as marriage officers | 10 |
| | (a) The provisions contained in the Marriage Act | 10 |
| | (b) The Department of Home Affairs' suggested provisions | 10 |
| | (c) Comments on the media statement | 11 |
| | (d) Evaluation contained in discussion paper 88 | 11 |
| | (e) Recommendation contained in discussion paper 88 | 17 |
| | (f) Comment on the discussion paper | 17 |
| | (g) Evaluation | 19 |
| | (h) Recommendation | 21 |
| 2.3 | The designation of ministers of religion and other persons holding responsible positions in religious organisations or denominations as marriage officers | 22 |
| | (a) The provisions contained in the Marriage Act | 22 |
| | (b) The Department of Home Affairs' suggested provision | 23 |
| | (c) Comments on the media statement | 23 |
| | (i) The Church of Scientology | 23 |
| | (ii) The Pagan Federation of South Africa | 34 |
| | (iii) The Campus Law Clinic of the University of Natal | 36 |
| | (iv) The Union of Orthodox Synagogues of South Africa | 36 |

| | | | |
|-----|--------|---|----|
| | (v) | The Federal Council of African Indigenous Churches | 36 |
| | (vi) | The Church of Jesus Christ of Latter-Day Saints | 36 |
| | (vii) | Mrs P Samjhawan on Hindu marriage officers | 37 |
| | (viii) | The Muslim Assembly | 37 |
| | (ix) | Mr Faizel Jacobs on Muslim marriages | 38 |
| | (d) | Evaluation contained in discussion paper 88 | 38 |
| | (e) | Recommendation contained in discussion paper 88 | 50 |
| | (f) | Comment on discussion paper 88 | 51 |
| | (g) | Evaluation | 58 |
| | (h) | Recommendation | 61 |
| 2.4 | | Marriage officers for customary unions | 61 |
| | (a) | The Department of Home Affairs' suggested provision | 61 |
| | (b) | Evaluation contained in discussion paper 88 | 61 |
| | (c) | Recommendation contained in discussion paper 88 | 62 |
| | (d) | Comment on discussion paper 88 | 62 |
| | (e) | Recommendation | 62 |
| 2.5 | | How designation as marriage officer to be made | 62 |
| | (a) | The provision contained in the Marriage Act | 62 |
| | (b) | The Department of Home Affairs' suggested Bill | 63 |
| | (c) | Evaluation contained in discussion paper 88 | 63 |
| | (d) | Recommendation contained in discussion paper 88 | 63 |
| | (e) | Comment on discussion paper 88 | 63 |
| | (f) | Evaluation and recommendation | 64 |
| 2.6 | | Marriage officers under laws repealed by the Marriage Act | 64 |
| | (a) | The provisions contained in the Marriage Act | 64 |
| | (b) | The Department of Home Affairs' suggested provision | 64 |
| | (c) | Evaluation contained in discussion paper 88 | 64 |
| | (d) | Recommendation contained in discussion paper 88 | 65 |
| | (e) | Comment on discussion paper 88 and evaluation | 65 |
| | (f) | Recommendation | 65 |
| 2.7 | | The <i>solemnisation</i> of marriages | 65 |
| | (a) | The provisions contained in the Marriage Act | 65 |
| | (b) | Comments on the media statement | 65 |
| | (c) | Evaluation contained in discussion paper 88 | 66 |
| | (d) | Recommendation contained in discussion paper 88 | 66 |

| | | |
|------|---|----|
| (e) | Comment on discussion paper 88 | 66 |
| (f) | Evaluation and recommendation | 67 |
| 2.8 | Certain persons may in certain circumstances be deemed to have been marriage officers | 67 |
| (a) | The provisions contained in the Marriage Act | 67 |
| (b) | The Department of Home Affairs' suggested provisions | 68 |
| (c) | Evaluation contained in discussion paper 88 | 68 |
| (d) | Recommendation contained in discussion paper 88 | 70 |
| (e) | Comment on discussion paper 88 | 70 |
| (f) | Evaluation and recommendation | 70 |
| 2.9 | Privatisation of authority to conduct marriages | 70 |
| (a) | Comment on the media statement | 71 |
| (b) | Evaluation contained in discussion paper 88 | 71 |
| (c) | Recommendation contained in discussion paper 88 | 72 |
| (d) | Comment on discussion paper 88 | 72 |
| (e) | Evaluation and recommendation | 73 |
| 2.10 | Change of name of religious denomination or organisation and amalgamation of religious denominations or organisations | 73 |
| (a) | The provisions contained in the Marriage Act | 73 |
| (b) | The Department of Home Affairs' proposed Bill | 73 |
| (c) | Evaluation contained in discussion paper 88 | 73 |
| (d) | Recommendation contained in discussion paper 88 | 75 |
| (e) | Comment on discussion paper 88 | 75 |
| (f) | Evaluation and recommendation | 75 |
| 2.11 | Revocation of designation as, marriage officer and limitation of authority of marriage officer | 76 |
| (a) | The provisions contained in the Marriage Act | 76 |
| (b) | The Department of Home Affairs' suggested provision | 76 |
| (c) | Evaluation contained in discussion paper 88 | 77 |
| (d) | Recommendation contained in discussion paper 88 | 79 |
| (e) | Comment on discussion paper 88 | 80 |
| (f) | Evaluation | 81 |
| (g) | Recommendation | 82 |
| 2.12 | Marriages conducted in a foreign country | 82 |
| (a) | The provisions contained in the Marriage Act | 82 |

| | | |
|------|--|-----|
| (b) | Comment on the media statement | 83 |
| (c) | Evaluation contained in discussion paper 88 | 83 |
| (d) | Recommendation contained in discussion paper 88 | 85 |
| (e) | Comment on discussion paper 88 | 85 |
| (f) | Evaluation and recommendation | 86 |
| 2.13 | Unauthorised marriage ceremonies | 87 |
| (a) | The provisions contained in the Marriage Act | 87 |
| (b) | The Department of Home Affairs' suggested provision | 88 |
| (c) | Evaluation contained in discussion paper 88 | 88 |
| (d) | Recommendation contained in discussion paper 88 | 90 |
| (e) | Comment on discussion paper 88 | 90 |
| (f) | Evaluation and recommendation | 91 |
| 2.14 | Failure to produce identity document or prescribed declaration | 92 |
| (a) | The provisions contained in the Marriage Act | 92 |
| (b) | The Department of Home Affairs' suggested provision | 93 |
| (c) | Evaluation contained in discussion paper 88 | 93 |
| (d) | Recommendation contained in discussion paper 88 | 95 |
| (e) | Comment on discussion paper 88 | 95 |
| (f) | Evaluation | 95 |
| (g) | Recommendation | 96 |
| 2.15 | Irregularities in publication of banns or notice of intention to marry or in the issue of special marriage licences | 97 |
| (a) | The provision contained in the Marriage Act | 97 |
| (b) | The Department of Home Affairs' Bill | 97 |
| (c) | Evaluation contained in discussion paper 88 | 98 |
| (d) | Recommendation contained in discussion paper 88 | 98 |
| (e) | Comment on discussion paper 88 | 98 |
| (f) | Evaluation and recommendation | 99 |
| 2.16 | Objections to marriage | 99 |
| (a) | The provision contained in the Marriage Act | 99 |
| (b) | The Department of Home Affairs' suggested provision | 100 |
| (c) | Comments on the media statement | 100 |
| (d) | Evaluation contained in discussion paper 88 | 100 |
| (e) | Recommendation contained in discussion paper 88 | 103 |
| (f) | Comment on discussion paper 88 | 103 |

| | | |
|------|--|-----|
| | (g) Evaluation and recommendation | 103 |
| 2.17 | Marriage of minors | 104 |
| | (a) The provisions contained in the Marriage Act | 104 |
| | (b) The provisions suggested by the Department of Home Affairs | 104 |
| | (c) Evaluation contained in discussion paper 88 | 104 |
| | (d) Recommendation contained in discussion paper 88 | 108 |
| | (e) Comment on discussion paper 88 | 108 |
| | (f) Evaluation and recommendation | 109 |
| 2.18 | Dissolution of marriage for want of consent of parents or guardians and its consequences | 112 |
| | (a) The provision contained in the Marriage Act | 112 |
| | (b) The Department of Home Affairs' suggested provision | 112 |
| | (c) Evaluation and recommendation contained in discussion paper 88 | 112 |
| | (d) Comment on discussion paper 88 | 113 |
| | (e) Evaluation and recommendation | 113 |
| 2.19 | When consent of parents or guardian cannot be obtained | 113 |
| | (a) The provision contained in the Marriage Act | 113 |
| | (b) The Department of Home Affairs' suggested provisions | 114 |
| | (c) Evaluation and recommendation contained in discussion paper 88 | 114 |
| | (d) Comment on discussion paper 88 | 114 |
| | (e) Evaluation and recommendation | 114 |
| 2.20 | Prohibition of marriage to persons under certain ages | 115 |
| | (a) The provision contained in the Marriage Act | 115 |
| | (b) The Department of Home Affairs' suggested provisions | 115 |
| | (c) Comments on the media statement | 116 |
| | (d) Evaluation contained in discussion paper 88 | 116 |
| | (e) Recommendation contained in discussion paper 88 | 117 |
| | (f) Comment on discussion paper 88 | 117 |
| | (g) Evaluation and recommendation | 118 |
| 2.21 | Marriages between a person and a relative of his or her deceased or divorced spouse | 118 |
| | (a) The provision contained in the Marriage Act | 118 |
| | (b) The Department of Home Affairs' suggested provisions | 119 |
| | (c) Comments on the media statement | 119 |
| | (d) Evaluation contained in discussion paper 88 | 119 |

| | | |
|------|---|-----|
| (e) | Recommendation contained in discussion paper 88 | 130 |
| (f) | Comment on discussion paper 88 | 130 |
| (g) | Evaluation and recommendation | 131 |
| 2.22 | Time and place of wedding ceremony: presence of parties and witnesses | 133 |
| (a) | The provisions contained in the Marriage Act | 133 |
| (b) | The Department of Home Affairs' suggested provision | 134 |
| (c) | Comments on the media statement | 135 |
| (d) | Evaluation contained in the discussion paper | 143 |
| (e) | Recommendation contained in discussion paper 88 | 157 |
| (h) | Comment on discussion paper 88 | 157 |
| (i) | Evaluation and recommendation | 159 |
| 2.23 | Registration of marriages | 160 |
| (a) | The provision contained in the Marriage Act | 160 |
| (b) | The Department of Home Affairs' suggested provision | 161 |
| (c) | Evaluation contained in discussion paper 88 | 161 |
| (d) | Recommendation contained in discussion paper 88 | 161 |
| (e) | Comment on discussion paper 88 | 161 |
| (f) | Evaluation and recommendation | 162 |
| 2.24 | Marriage formula | 164 |
| (a) | The provisions contained in the Marriage Act | 164 |
| (b) | The provisions suggested by the Department of Home Affairs | 165 |
| (c) | Comments on the media statement | 165 |
| (d) | Evaluation contained in discussion paper 88 | 165 |
| (e) | Recommendation contained in discussion paper 88 | 167 |
| (f) | Comments on discussion paper 88 | 167 |
| (g) | Evaluation and recommendation | 168 |
| 2.25 | Certain marriage officers may refuse to conduct certain marriages | 174 |
| (a) | The provision contained in the Marriage Act | 174 |
| (b) | The Department of Home Affairs' suggested provision | 175 |
| (c) | Comment on the media statement | 175 |
| (d) | Evaluation contained in discussion paper 88 | 175 |
| (e) | Recommendation contained in discussion paper 88 | 175 |
| (f) | Comment on discussion paper 88 | 176 |
| (g) | Evaluation and recommendation | 176 |
| 2.26 | Fees payable to marriage officers | 176 |

| | | |
|------|--|-----|
| (a) | The provision contained in the Marriage Act | 176 |
| (b) | The Department of Home Affairs' suggested provision | 177 |
| (c) | Evaluation contained in discussion paper 88 | 177 |
| (d) | Recommendation contained in discussion paper 88 | 177 |
| (e) | Comment on discussion paper 88 | 178 |
| (f) | Evaluation and recommendation | 178 |
| 2.27 | Blessing of marriage | 180 |
| (a) | The provision contained in the Marriage Act | 180 |
| (b) | The Department of Home Affairs' Bill | 180 |
| (c) | Evaluation contained in discussion paper 88 | 180 |
| (d) | Recommendation contained in discussion paper 88 | 181 |
| (e) | Comment on discussion paper 88 | 181 |
| (f) | Evaluation and recommendation | 182 |
| 2.28 | Religious rules and regulations | 182 |
| (a) | The provision contained in the Marriage Act | 182 |
| (b) | The Department of Home Affairs' suggested provision | 183 |
| (c) | Comments on the media statement | 183 |
| (d) | Evaluation contained in discussion paper 88 | 183 |
| (e) | Recommendation contained in discussion paper 88 | 183 |
| (f) | Comment on discussion paper 88 | 183 |
| (g) | Evaluation and recommendation | 183 |
| 2.29 | Penalties for conducting marriages contrary to the provisions of the Act | 184 |
| (a) | The provision contained in the Marriage Act | 184 |
| (b) | The Department of Home Affairs' suggested provision | 184 |
| (c) | Evaluation contained in discussion paper 88 | 184 |
| (d) | Recommendation contained in discussion paper 88 | 185 |
| (e) | Comment on discussion paper 88 | 185 |
| (f) | Evaluation and recommendation | 185 |
| 2.30 | Penalties for false representations or statements | 186 |
| (a) | The provision contained in the Marriage Act | 186 |
| (b) | The Department of Home Affairs' suggested provision | 186 |
| (c) | Evaluation contained in discussion paper 88 | 186 |
| (d) | Recommendation | 186 |
| 2.31 | Offences committed outside the Republic of South Africa | 187 |
| (a) | The provision contained in the Marriage Act | 187 |

| | | |
|-------------|---|-----|
| (b) | The Department of Home Affairs' suggested Bill | 187 |
| (c) | Evaluation contained in discussion paper 88 | 187 |
| (d) | Recommendation contained in discussion paper 88 | 188 |
| (e) | Comment on discussion paper 88 | 188 |
| (f) | Evaluation and recommendation | 188 |
| 2.32 | Repeal and savings | 189 |
| (a) | Evaluation | 189 |
| (b) | Recommendation | 189 |
| Annexure A: | The Commission's final Marriage Amendment Bill | 190 |
| Annexure B: | The proposed Marriage Amendment Bill as contained in discussion paper 88 | 207 |
| Annexure C: | List of respondents who commented on the Commission's Media Statement | 221 |
| Annexure D: | List of respondents who commented on the Commission's discussion paper 88 | 222 |

SUMMARY OF RECOMMENDATIONS

This investigation focuses mainly on whether the provisions contained in the Marriage Act of 1961 are adequate or whether they should be amended and, in that event, the way in which such amendments should be effected.

1. Some respondents pointed out that the Commission is dealing with four interrelated family law themes in separate investigations, such as the Review of the Marriage Act (project 109), Customary Marriages (project 90), Islamic Marriages and Related Matters (project 59) and Domestic Partnerships (project 118) and considered that this is not helpful. They suggest that the whole question of marriage be looked at holistically and not piecemeal. The Commission is not persuaded by these arguments that research on these other aspects should first be finalised in order to regulate all marriages in one Marriage Act. The Recognition of Customary Marriages Act was passed in 1998, and it is envisaged that a discussion paper on Islamic Marriages and Related Matters as well as an Issue paper on Domestic Partnerships will be published later this year. The Commission will therefore not be making specific recommendations relating to Islamic Marriages or Domestic Partnerships in this report. The Commission is of the view that the amendments which are identified in this investigation should be implemented and that the Marriage Act be consolidated in future to address civil, religious and customary marriages ultimately in one Marriage Act. The Commission does not agree that its proposed method will result in contradictions in provisions of different Acts drafted to regulate marriages or partnerships within different religions or culture groups. (See par 1.4.1 — 3 and 2.1.1 — 7.)
2. The Court decided in *Santos v Santos* that if the Legislature had intended to accord recognition to foreign embassy or consular marriages in South Africa it would undoubtedly have made provision for it in the Marriage Act, and that there is, equally, no indication that South African law has followed the practice of the United Kingdom and other countries in Western Europe of according recognition to foreign embassy or consular marriages. The question thus arose whether there is a need to accord recognition to foreign embassy or consular marriages in South Africa in view of the absence of such statutory recognition. It is recommended that the Marriage Act should provide for the Minister of Home Affairs to designate countries whose consular or diplomatic officers may conduct marriages in South Africa. The Act should then require

that neither of the parties contemplating marriage should be a South African citizen. Further, that the marriage should not be void because either of the parties is lawfully married to some other person; that the parties are within a prohibited relationship; or that either of the parties is under marriageable age. It is also recommended that the Marriage Act require that the marriage be recognised as a valid marriage by the law or custom of the foreign country, and that the marriage should be registered in terms of the Act. It is further recommended that a general provision should be inserted in the Marriage Act setting out the circumstances under which marriages will be void such as that either of the parties is lawfully married to some other person; that the parties are within a prohibited relationship; that either of the parties is under marriageable age; or that a party is mentally incapable of understanding the nature and effect of the marriage ceremony. The Bill should further provide that a marriage is voidable on application — by the coerced party where at the time of the marriage the consent of either of the parties was not real consent because it was obtained by duress; by the mistaken party where at the time of the marriage that party was mistaken as to the identity of the other party or as to the nature of the ceremony performed; by a spouse where at the time of the marriage the other spouse was afflicted with permanent impotence; or by the husband where at the time of the marriage the wife was pregnant by a person other than the husband. (See par 2.2.3 — 19.)

3. The term “Commissioner” is defined as follows in the Marriage Act: “‘Commissioner’ includes an Additional Commissioner, an Assistant Commissioner, a Native Commissioner, an Additional Native Commissioner and an Assistant Native Commissioner”. Enquiries made at the Department of Home Affairs established that there are no marriages presently being celebrated by Commissioners as contemplated in the Marriage Act. It is clear therefore that the Marriage Act does not reflect the present position in respect of the designation of Commissioners and special justices of the peace as marriage officers, and the Discussion Paper stated that it seemed clear that the Act should be brought into line with the prevailing position by the deletion of the terms “Commissioner” and “special justice of the peace” from section 2(1) of the Act. The Commission is not persuaded by arguments that special justices of the peace should still in future be marriage officers. The Commission therefore considers that the Marriage Act should be amended by the deletion of the words “Commissioner” and “special justice of the peace”. (See par 2.2.17 and 2.2.20.)

4. It was preliminarily recommended in the discussion paper that section 2 of the Marriage Act be amended further by providing in section 2(1) that certain persons in the diplomatic and consular service of the Republic, namely Ambassadors, High Commissioners and Consuls should, by virtue of their office and as long as they hold such office, be *ex officio* marriage officers for the area in which they hold office. There was no opposition to this recommendation. The Commission therefore considers that the Marriage Act should be amended as was proposed in the Discussion Paper. (See par 2.2.19.)

5. The Marriage Act permits the designation as a marriage officer of any minister of, or person holding a responsible position in, "any religious denomination or organisation". It is restrictive in that marriage officers can be designated only for the purpose of conducting marriages according to "Christian, Jewish or Mohammedan rites or the rites of any Indian religion." The Commission considered whether the suggested phrase "according to the rites of the religious denomination or organisation concerned", will remedy the situation. The Commission also considered the option suggested by the Department of Home Affairs to grant authority to the Minister of Home Affairs to appoint a person as a marriage officer who has been nominated by a religious denomination or organisation once the Minister is satisfied of the *bona fides* of the denomination or organisation concerned. The problem with this option is that it suggests no other grounds for the Minister to refuse to appoint the person concerned (eg that he or she is unfit to be a marriage officer) except for a defect in the *bona fides* of the organisation. A third option considered was to empower the Minister to designate by proclamation recognised religious groups or religious organisations. The Marriage Act could then provide that ministers or persons holding responsible positions in organisations recognised by the Minister by notice in the *Gazette*, may be designated by the Minister to be marriage officers. The Commission decided to leave the question to respondents and invited comment on these options. Comment was also invited as to whether criteria formulated to guide the Minister in the exercise of his or her powers should be included in the Act.

The Commission is of the view that the preferable option to follow is the third option. The Commission considers that it should follow the Canadian and Australian legislative examples in this regard. Only four respondents supported the setting out in the Bill of criteria to guide the Minister in determining whether to appoint someone as a marriage officer. Although the number of respondents calling for criteria is low, the Commission is persuaded by the argument that such criteria included in the Marriage Act would allow

for objective reference to identifiable factors, that it would serve to promote transparency and discourage arbitrary decision-making. The Commission further considers that provision should be made that persons should be nominated by religious organisations or denominations for designation by the Minister. The Act should require that any religious body may apply to the Minister of Home Affairs for recognition; that they may nominate persons for designation by the Minister as marriage officers, and that such applications for recognition should contain information setting out whether-

- C the religious body professes a belief in a religious doctrine, dogma or creed and is organised for religious worship;
- C the rites and usages of the marriage ceremony followed by the religious body fulfil the requirements of South African marriage law;
- C the religious body is sufficiently well established, both as to continuity of existence and as to recognised rites and usages respecting the conduct of marriages, to warrant the designation of its religious representatives as authorised to conduct marriages. (See par 2.3.55.)

The Commission further considers that the Act should require that any nomination by a recognised body of a person for designation by the Minister as a marriage officer, must set out particulars as to whether-

- C the person nominated is a religious representative ordained or appointed according to the rites and usages of the body;
- C that nominated person is, as a religious representative, recognised by the religious body to which he or she belongs as authorised to conduct marriages according to its rites and usages. (See par 2.3.56.)

6. The Commission also considered the question whether there is a need to reconsider the limitation placed on the authority of ministers of religion or persons holding responsible positions in religious bodies to join parties in marriage. The Act presently makes provision that such authority may be limited by the Minister to specified areas or specified periods. The Commission provisionally considered that there is no apparent reason why the Minister should be prevented from limiting the authority as is presently the case. The Commission is not persuaded that the present position should be changed. The Commission also noted the suggestion that applications for nominations as marriage officers should be published in order to afford interested parties an opportunity to object to the appointment of any person as a marriage officer. The Commission considers that notice given by the religious body concerned to its members regarding a nomination will

in all probability more effectively reach the parties to be potentially affected by the appointment than a publication in, say, the Government *Gazette*. The Commission therefore considers that this should constitute an additional requirement which the religious body has to comply with and that the body should allege in its nomination that adequate notice of the nomination has been given to its members in order to afford them an opportunity to raise objections. (See par 2.3.57.)

7. The Department of Home Affairs proposed in their Bill that any decision made by the Minister to designate someone as a marriage officer or to revoke the designation should be reviewable by any provincial or local division of the High Court of South Africa. The Commission finds the proposal to be persuasive. The Commission is of the view that legal certainty will be one of the benefits should such a review procedure be set out in the Marriage Act. (See par 2.3.58)
8. It was noted in discussion paper 88 that customary marriages are not constituted by a marriage officer officiating at the marriage ceremony and that the appointment of marriage officers to conduct customary marriages would therefore be a foreign concept to customary traditions and culture and would not constitute a recognised requirement for establishing customary marriages. The Commission stands by the position adopted in the discussion paper and does not recommend the inclusion in the Marriage Act of clause 10 of the draft from the Department of Home Affairs providing for the appointment of marriage officers to solemnise customary marriages. (See par 2.4.5 — 6)
9. The present position requiring that marriage officers be designated by written instrument should be retained and there does not seem to be justification for the deletion of section 4 of the Marriage Act. (See par 2.5.4 — 6.)
10. The present section 5 of the Marriage Act dealing with marriage officers under laws repealed by the Marriage Act of 1961 should be retained. (See par 2.6.3 — 6)
11. The Marriage Act provides for the *solemnisation* of marriages. It is clear that a marriage is not necessarily *solemnised*, but the alternative “celebrate” is not without its problems. The Commission considers that the terms “conduct a marriage” or “join parties in marriage” are better substitutes and that words to that effect should be used in place of the terms “solemnize” or “solemnization” where appropriate in sections 3(1) and (2), 5,

6(3) and (5), 9, 10(1) and (2), 11(1) and (2), 12, 22, 23, 24(1), 26(2), 27, 29(1), (2) and (3), 29, 29A(1), 30(1), (2) and (3), 31 and 35. (See par 2.7.3 — 7.)

12. The Commission considers that section 6 dealing with the issue of certain persons who may in certain circumstances be deemed to have been marriage officers, should not be amended. The Commission however considers that the references to the Minister delegating powers to any officer in the civil service should be reconsidered. It is recommended that provision be made in a separate clause 2A that the Minister may, subject to the conditions that he or she may deem necessary, delegate any power conferred on him or her by this Act to a person in the service of the Department, but shall not be divested of any power so delegated and may set aside or amend any decision of the delegate made in the exercise of such a power. (See par 2.8.3 — 8.)
13. A proposal was made that the joining of parties in marriage should be privatised, ie persons other than those presently appointed should also be able to conduct marriages. The Commission noted that the New Zealand Marriage Act makes provision for the appointment of, *inter alia*, persons of good character as marriage celebrants. The discussion paper indicated that in view of the limited requests calling for such a step, the Commission is not convinced that the appointment of marriage officers should be extended to include persons other than the present categories of marriage officers. However, the Commission invited the view of respondents on this matter in particular. As the comment on discussion paper 88 indicated, there is very little demand for the “privatisation” of marriage. The Commission therefore recommends that the Marriage Act not make provision for the designation of marriage officers other than those presently provided for. (See par 2.9.3 — 8.)
14. The Commission’s preliminary recommendation was that the Marriage Act should include more grounds for notifying the Minister of changes in the circumstances of religious denominations and religious organisations, such as changes in their objects and, furthermore, that it should provide for the Minister’s power to revoke by notice in the *Gazette* the designation of a person as a marriage officer or the recognition of a religious body. The Commission considers it necessary that the State should be kept informed of changes affecting religious bodies and their representatives. The Commission therefore considers that not only should the existing section 8 of the Marriage Act be retained but that the position of religious bodies should be regulated to a greater extent

than is presently the case. It is therefore recommended firstly, that the Minister of Home Affairs continue to be advised of a change of the name by which a religious body is known, secondly, that provision now be made to inform the Minister when such body changes its objects as well, thirdly, that the Minister may revoke the body's recognition for any of these reasons, and fourthly, that the Minister must inform the body concerned in writing of the revocation. (See par 2.10.3 — 8.)

15. The Commission considers that the grounds for revoking the appointment of a person as a marriage officer should be set out in more detail in the Marriage Act than is presently the case under section 9. The Commission is however of the view that the duty of the Minister to inform the parties concerned in writing remains of cardinal importance. The Commission therefore considers that the Act should require the Minister to inform the person concerned in writing that his or her designation as a marriage officer has been revoked and the grounds founding the revocation. Where the marriage officer had been designated by a religious body, such body should be informed as well. The Commission is further of the view that the since term “designated as a marriage officer” was not consistently used in 9, but the term “registered as a marriage officer” as well, the clause should refer throughout to “designated as a marriage officer” or to “designation” in stead of “registration”. (See par 2.11.4 — 12.)

16. Section 10(1) should be amended to provide that any person who is authorised to conduct any marriage in any country outside the Republic of South Africa, may conduct a marriage between parties of whom at least one is a South African citizen and domiciled in the Republic, and a marriage so conducted must for all purposes be deemed to have been conducted in the Republic. The Commission notes the valuable comment made on the *lex loci celebrationis* principle and it is clear that the present provision of the Marriage Act needs to be qualified. It is therefore proposed that a marriage shall not be conducted in a foreign country unless the marriage officer is satisfied-
 - < that at least one of the parties to the intended marriage is a South African citizen;
 - < where one party to the intended marriage is not a South African citizen, that that party is not a subject or citizen of the foreign country or sufficient facilities do not exist for conducting the marriage in the foreign country in accordance with the law of that country;
 - < where one party to the intended marriage is a subject or citizen of the foreign country, that objection will not be taken by the authorities of that country to the

- intended marriage being conducted in that country; or
- < that a marriage in the foreign country between the parties in accordance with the law of that country would not be recognised in South Africa. (See par 2.12.3 — 2.12.9)
17. It is recommended with regard to section 11 of the Act that-
- < section 11(1) which provides that a marriage may be conducted by a marriage officer only, should remain intact;
 - < the penalty for not complying with the section (namely where a marriage officer purports to join parties in marriage without authorisation) provided for in section 11(2), should be increased to a term of imprisonment not exceeding two years; and
 - < section 11(3) which makes provision that it shall not constitute an offence if a marriage is conducted in accordance with the rites or formularies of any religion, if such ceremony does not purport to effect a valid marriage, should remain intact.

The Commission noted the concerns expressed in relation to the removal of the option of imposing a fine under section 11(2) of the Act. The Commission wishes to point out that the original thinking expressed in the discussion paper was not to abolish the possibility of a fine being imposed under section 11(2). The preliminary recommendation was to delete in section 11(2) the reference to “not exceeding four hundred rand”. In hindsight it is apparent that the discussion paper could have made it clearer that the provisions of the Adjustment of Fines Act 101 of 1991, would be applicable and particularly section 1(2) of which deals with the question of maximum fines where a stated maximum period of imprisonment may be imposed in the alternative. In accordance with sections 1(1)(a) and 1(2) of the Adjustment of Fines Act, read with section 92(1) of the Magistrates' Courts Act 32 of 1944, the maximum fine which a court may impose in lieu of a maximum period of imprisonment of three years is presently R60 000 where the court is not the court of a regional division, and R300 000 where the court is the court of a regional division. Since R400-00 is an unrealistically low amount to deter persons from conducting unauthorised marriages, it is clear that there is a need to make adequate provision for possible fines and imprisonment sentences which may act as a deterrent. The Commission therefore supports the deletion of the present penalty provisions of a fine which is set at a maximum of R 400-00 and to increase the maximum

term of imprisonment from twelve months to two years. The Commission considers that this proposal might also possibly act as a more effective deterrent than the existing provision to discourage the practice pointed out to the Commission, where a minister of religion who is not a marriage officer purports to conduct a marriage or marriages with no marriage officer present, and later takes the marriage register and marriage certificate to a marriage officer to sign. (See par 2.13.6 — 12)

18. Section 12 prohibits the joining of parties in marriage without the production of an identity document or the making of the prescribed declaration by the parties. It is clear that there is a need for prescribing that parties should produce proof of their identity to marriage officers. However, it is also clear that there could be circumstances of non-compliance and the question is raised as to what the consequences should be. The Commission considers that the Marriage Act should be amended to state that failure to comply strictly with the provision does not affect the validity of the marriage provided that such marriage was in every other respect conducted in accordance with the provisions of the Marriage Act, that there were no other lawful impediments to the marriage, that such marriage was not dissolved or declared invalid by a competent court, and that neither of the parties to such marriage had after such marriage and during the life of the other, lawfully married another. (See par 2.14.6 — 12.)

6. The Commission has noted the comments supporting the retention of section 22 and those suggesting its deletion. This section sets out what the consequences are if the requirements regarding banns, notices of intention to get married and special licences are not strictly complied with. The Commission considers that there is still a need for this transitional provision which deals with marriages conducted in the past in contravention of the then prevailing requirements. The Commission therefore recommends that the section be retained and that the words “Union” be substituted with “Republic” and “solemnised” with “conducted” as was proposed in the discussion paper. (See par 2.15.3 — 9.)

7. It is recommended that section 23(1) be amended to make provision that the party raising objections to a marriage should also provide a copy of his or her objection in writing to the parties contemplating marriage at least 24 hours prior to the contemplated marriage being conducted. Such a requirement, in addition to the present written objection which has to be lodged with the marriage officer, would in all probability serve as a further

deterrent against the lodging of unfounded objections to a marriage. (See par 2.16.6 — 10.)

8. Section 24 prohibits a marriage officer from conducting the marriage of a minor if the required consent is not furnished to him or her in writing. The Commission's preliminary recommendation was that besides the substitution of the term "conduct" in section 24(1) for the term "solemnize", sections 24(1) and (2) should remain unamended. It was suggested to the Commission to set out fully in the Act what is meant by "legally required consent". This proposal seems persuasive to effect legal certainty. The Commission recommends that apart from the amendments proposed in the discussion paper, section 24 set out as follows what is meant by legally required consent:

(3) "Legally required consent" means for the purposes of this Act that —

- (a) if both the minor's parents are alive, consent shall be obtained from both parents;
- (b) if the minor's parents are divorced and he or she is in the custody of one parent, consent shall be obtained from both parents;
- (c) if the minor's parents are divorced and sole guardianship is awarded to one parent-
 - (i) in terms of section 5(1) of the Matrimonial Affairs Act, Act No 37 of 1953; or
 - (ii) section 6(3) of the Divorce Act, Act No 70 of 1979, the minor shall obtain the consent from that parent;
- (d) the minor shall obtain the consent of his or her mother in any case where his or her parents have never been married;
- (e) if one of the parents of the minor is deceased and the parents had at any time been married to each other, consent shall be obtained from the surviving parent and any other person who is the legal guardian of the minor;
- (f) if both parents of the minor are deceased and they had at any time been married to each other, consent shall be obtained from any person who is the legal guardian of the minor;
- (g) if the minor's parents had never been married to each other and one or both of them are deceased, consent shall be obtained from the mother if she is alive and, if applicable, from any person who is the legal guardian of the minor if she is deceased;

- (h) if the consent of the parent or legal guardian cannot be obtained, section 25 applies;

Provided that a minor who was previously married, or a minor who has been declared a major under the provisions of the age of Majority Act, Act No 57 of 1972, does not require parental consent to marry. (See par 2.17.8 — 13.)

- 22. The Commission stated in its discussion paper that in view of the lack of comment on section 24A which regulates the consequences and dissolution of marriage for want of consent of parents or guardians, it would seem that the present provision is satisfactory. The preliminary recommendation was that the section should not be amended. The Commission recommends that in view of the lack of any further comment it remains of the point of view that this section should remain unamended. (See par 2.18.6)
- 23. Section 25 which governs the position when consent of parents and guardians cannot be obtained, seems satisfactory and it would seem that there is no need for amendment, except for the insertion of gender-sensitive terms. (See par 2.19.3 — 5.)
- 24. The Commission explained in its discussion paper that the minimum age for marriage (set out in section 26) should be 18 years of age for males and females. The Act provides presently that no boy 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 authorised by him or her. The Commission considers that the reasoning why this section should set a consistent age requirement for boys and girls of 18 years is persuasive. The Commission therefore recommends that section 26 be amended as was provisionally proposed in the discussion paper, namely that no boy or girl under the age of 18 shall be capable of contracting a valid marriage. (See par 2.20.3 — 9.)
- 25. The Department of Home Affairs suggested to the Commission that the prohibition of marriages between a man and a woman and the direct descendant of his or her deceased spouse where they are not related to each other by blood is questionable and needs to be reconsidered. The Commission's preliminary recommendation was that section 28 should make provision for the provincial or local division of the High Court to have jurisdiction to consent to a marriage between a man or a woman and the direct descendant of his or her deceased spouse if both parties have reached the age of 18

years and they are not related to each other by blood. (The Commission also considered that this provision should correspond to its recommendation setting out the minimum age for marriage for males and females to be 18 years of age.)

There was no opposition to the preliminary recommendation that consent has to be obtained if a man or a woman and the direct descendant of his or her deceased spouse wish to marry if both parties have reached the age of 18 years and they are not related to each other by blood. The Commission however considers that the issue is much broader than this and that the question is rather whether there should be any limitations to the marriage between persons who are related by affinity. The Commission is of the view that the New Zealand approach should be followed in this instance. The Commission is, however, mindful of the objections raised in the Commission's investigation into customary marriages against requiring permission of the High Court. The Commission is therefore of the view that the permission of the Minister of Home Affairs should be sought when parties related by affinity wish to marry. Such a requirement would mean that these marriages would be adequately regulated and only parties who have given serious thought to the implications of such a marriage will seek the required permission. The Commission has noted the reasoning by the Department of Home Affairs that the Minister of Home Affairs should consider applications for consent in these cases and not the High Courts as the Minister will be more accessible to poorer sections of the community. The Commission is satisfied that this should be an administrative decision taken by the Minister or an official and that this decision can be taken on review by a high court if the Minister's decision is not favourable.

The Commission agrees with the suggestion that the Act should clearly indicate which marriages between parties closely related are prohibited and void. The Commission is further of the view that the Minister's consent must be obtained for a marriage between persons where both parties have reached the age of 18 years and they are related within the degrees of affinity. The Commission does not favour the requirement of the New Zealand legislation that the Court must be satisfied in relaxing the prohibition to the intended marriage that neither party contributed to the cause of the termination of any previous marriage of the other party since the Marriage Act does not presently contain such a requirement in regard to sections 28(c) and (d). (See par 2.21.3 — 30)

26. Section 29(2) presently sets out the following places for the conducting of marriage ceremonies: churches, other buildings used for religious services, public places and private dwelling-houses *with open doors*. The discussion paper contained two options

to be considered by respondents. The first option is that there should not be any limitations at all with regard to places where marriages may be conducted. In terms of the second option the range of places where marriages may be conducted would be less limited than is presently the case although they would still be limited to some extent. This would require the deletion of the statutory requirement that parties be joined in marriage in a private dwelling with *open doors* and the addition of the words “or in any other building or facility used for conducting marriages”.

The Commission duly considered the two suggestions that the places at which marriages may be conducted should be limited such as that marriages may be conducted at any place provided that members of the public have adequate access to the place, and secondly, that the marriage officer shall refuse to conduct a marriage which will detract from the solemnity of the occasion. Whilst these proposals might serve to prevent weddings underwater or in hot-air balloons the Commission is of the view that these limitations might not survive constitutional scrutiny. The requirement of public access might violate the rights of adherents to certain religions where exclusion of the general public is of the very essence to the solemnity of the occasion. Since the Commission considers that the first option be followed, namely that there should not be any limitations at all with regard to places where marriages may be conducted, there is no need to retain section 29(3). (See par 2.22.3 — 54.)

27. Some respondents made proposals on the registration of customary marriages. The Commission recommended in its report on customary marriages that customary marriages should be registered to ensure that marital status is made certain and easier to prove, and to encourage more people to register their marriages, the traditional authorities should be constituted registering officers. Section 4 of the Recognition of Customary Marriages Act, 120 of 1998 gave effect to this recommendation. The Commission does not therefore support the recommendations made in relation to the registration of customary marriages as other legislation already deals adequately with this aspect. (See par 2.23.8)
28. The Commission has also noted Prof June Sinclair’s remark in *The Law of Marriage* that section 42(3) of the Births, Marriages and Deaths Registration Act 81 of 1963 provided that a duly signed certificate of marriage was prima facie evidence of the particulars set forth therein, that this Act was repealed by the Births and Deaths Registration Act 51 of 1992 and that the Marriage Act does not contain a similar provision. Prof Sinclair

suggests that this *lacuna* is an oversight and that the legislature could surely not have intended that a duly signed certificate of marriage should no longer be prima facie evidence of the particulars set forth in it. Hence, the Commission recommends that a provision should be included in the Marriage Act that a duly signed certificate of marriage presents prima facie evidence of the particulars set forth therein. (See par 2.23.9)

29. The Commission recommends that provision be made in section 29A for the administrative procedures to be followed with regard to the registration of marriages as was proposed in the discussion paper. (See par 2.23.11.)

30. It was pointed out to the Commission that as long as the marriage formula is recognised as sufficient for the purpose by the religious denomination or organisation of which the marriage officer is minister, it is adequate to protect the State's interest with respect to the language to be used in a marriage ceremony. It was also argued that the State does not have a constitutional right to impose more specific requirements, such as requiring the use of specific language in a marriage formula or requiring the approval of any alternate marriage formula by the Minister of Home Affairs. The Commission considers that the limitation of the religious right to conduct marriages according to the dictates and precepts of religious bodies would be constitutionally if the following approach was followed: the State should recognise that a marriage officer who is a minister of religion or a person holding a responsible position in a religious body may perform the marriage according to the marriage formula usually observed by the religious body, provided that the marriage formula at least includes the words presently prescribed in the Marriage Act (subject to the proposed minor amendments). The Commission is further of the view that if the Marriage Act were to require as a minimum content the prescribed wording, then the approval religious bodies have to obtain from the Minister for using their marriage formula, can be discarded. It seems to the Commission that the State's interest lies in ensuring that the marriage formula makes it clear to the people present at the marriage that the parties contemplating marriage declare that there are no impediments to their marriage and that they take each other as spouses. The Commission also considers that to effect legal certainty it is vital that the marriage formula makes clear the point at which the parties become husband and wife.

The Commission also agrees with a suggestion that section 30(2) be deleted in view of the amendment made to section 30(1). The Commission further considers that there is no need for the retention of the words "and thereupon the parties shall give each other

the right hand” in section 30(1) or the words “or to the requirement that the parties shall give each other the right hand” in section 30(3). (See par 2.24.3 — 19.)

31. The Commission’s view is that there is no need to amend section 31 which governs the circumstances under which certain marriage officers may refuse to conduct certain marriages. (See par 2.25.3 — 8.)

32. The Marriage Act makes provision that no marriage officer may demand or receive any fee, gift or reward, for or by reason of anything done by him or her as marriage officer in terms of the Act. The Act however provides also that a minister of religion or a person holding a responsible position in a religious denomination or organisation may receive such fees or payments as were ordinarily (prior to the commencement of the Act) paid to any such minister of religion or person in terms of the rules and regulations of his or her religious body. Enquiries made at the Department of Home Affairs established that no fees are presently prescribed by regulation by the Minister of Home Affairs which would entitle a minister of religion or a person holding a responsible position in a religious body to receive such a fee. It is further apparent that the fees prior to the commencement of the Act in 1962 can hardly be substantial after almost four decades. According to an official at the Department of Home Affairs, the Department initiates steps for revoking a designation as a marriage officer whenever they are informed that a minister of religion receives a fee for conducting a marriage.

The Commission considers that if the intention is that no fees should be payable at all to ministers of religion, then the Act should provide thus and not create the impression that there might be some obscure regulation sanctioning the payment of a set fee. The Commission however is worried that the rationale for denying a fee to ministers of religion or a person holding a responsible position in a religious body is weak. One can understand that it should constitute an offence if a marriage officer were to demand excessive fees or rewards for conducting a marriage but it seems questionable that the receipt of a prescribed fee should not be sanctioned.

The Commission considers that there are two options in regard to the payment of fees to marriage officers who are ministers of religion or persons holding responsible positions in a religious body which should be considered. The first option is the deletion of the proviso which makes provision in section 32(1) for the payment of fees to certain marriage officers. The second option is to follow the wording of section 34 which provides that nothing contained in the Act shall prevent the acceptance by any person of

any fee charged by such religious body for the blessing of a marriage, provided the exercise of such authority is not in conflict with the civil rights and duties of any person. The Commission considers that if the intention is to prevent ministers of religion from demanding or receiving excessive fees, it could in all probability be best regulated if these fees were to be determined from time to time by religious bodies. Religious bodies would seem to be ideally placed to determine an appropriate fee payable by the members of their community. If a marriage officer were to demand an amount which exceeded the one determined by the body, then it would constitute an offence for which the officer could be prosecuted. The Commission considers that the intention of the legislature in 1961 was surely that ministers of religion and persons holding responsible positions in religious bodies should be entitled to receive a fee and that a fee should have been prescribed.

The Commission recommends that a minister of religion or a person holding a responsible position in a religious body may receive such fees or payments as the religious body may from time to time determine.

The Commission provisionally recommended that the penalty should be imprisonment without the option of a fine for contravening section 32 when it was not aware that there are no fees prescribed. The Commission considers that this fact presents a totally different scenario than was foreseen when the preliminary recommendation was considered. The Commission therefore reconsidered its preliminary proposal and is of the view that it would be excessive if the only penalty option for contravening this provision were to be imprisonment. The Commission is of the view that the relative seriousness of a contravention of the section warrants the option of the imposition of a fine. The fine option should therefore be retained in section 32 although the reference to the amount of one hundred rand should be deleted in order to keep up with inflation without having to amend the section from time to time. (See par 2.26.3 — 12.)

33. The question arose as to the need for the inclusion of section 33 in the Marriage Act (which governs the blessing of marriages) in view of section 34 of the Marriage Act (which governs the making of rules or regulations in connection with the religious blessing of a marriage). It can be argued that section 33 is superfluous in view of section 34. On the other hand it can be argued that section 34 merely governs the power of making rules and regulations whereas section 33 sets out the details of when a marriage may be blessed and by whom, and that there is therefore a need for the retention of section 33. The Commission considers that there is no need for the retention of section

- 33 and recommends that section 33 be deleted. (See par 2.27.3 — 8.)
34. Section 34 section seems to be necessary to grant the power to religious bodies for the blessing of marriages and acceptance of fees by them for the blessing of marriages. The retention of this section therefore seems justified. (See par 2.28.3 — 8)
35. The question arose whether there is a need for section 35 in view of section 11 of the Marriage Act. Section 35 makes provision for penalties for conducting marriages contrary to the provisions of the Act. Section 11 makes it an offence for a marriage officer to purport to conduct a marriage which he or she is not authorised to conduct or which to his or her knowledge is legally prohibited. Marriages conducted by persons who are not marriage officers are similarly prohibited. It is therefore clear that section 11 is more restricted in its scope than section 35 since section 35 penalises the joining of parties in marriage in contravention of the provisions of the Marriage Act as a whole while the former enumerates only a few grounds of criminality. It would therefore seem that there is a need for retaining section 35 and no amendments are consequently recommended in regard to section 35 apart from the deletion of the words “not exceeding one hundred rand”. The Commission considers it beneficial if the provisions of the Adjustment of Fines Act of 1991 also apply in this respect and hence the need for constant amendments to the Act in order to keep abreast with inflation will be obviated. (See par 2.29.3 — 8.)
36. The Commission is of the view that section 36 which makes provision for penalties for false representations or statements should not be amended. (See par 2.30.3 — 5.)
37. Section 37 makes provision for South African courts having jurisdiction to try persons who contravene the provisions of the Marriage Act in any country outside the Republic of South Africa. The Commission noted that there may be a number of offences parties may commit outside the geographical borders of South Africa in contravention of the provisions of the Marriage Act. One example is where a person who is already a party to a marriage contracts a second marriage in another country without obtaining a prior divorce, thereby committing the offence of bigamy. It should be possible under these circumstances to try the offender in South Africa. In the absence of dissenting views from respondents, the Commission recommends that there is no need to amend section 37 besides the substitution of the term “Republic” for the term “Union”. (See par 2.31.3

— 8)

38. The Department of Home Affairs notes in its comment on discussion paper 88 that the proposed Amendment Bill does not provide for repeal and savings and suggests that the repeal of the TBVC marriage laws be provided for. The Home Affairs Laws Rationalisation Act 41 of 1995 provided, inter alia, that section 29 of the Marriage Act, 1961 shall apply uniformly throughout the Republic. There were, however, separate Marriage Acts in existence in the former homelands. The Commission recommends the repeal of the Transkei Marriage Act of 1978, the Bophuthatswana Marriage Act of 1980 and the Ciskei Marriage Act of 1988. (Enquiries at the regional offices of the Department of Home Affairs in Sibasa established that the South African Marriage Act of 1961 was applied in the former Venda and there is therefore no separate legislation in force in Venda which needs to be repealed.) (See par 2.32.1 — 3.)

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CHAPTER 1

1.1 THE BACKGROUND TO THIS INVESTIGATION

1.1.1 The Department of Home Affairs approached the Commission during 1996 on the issue of the review of the Marriage Act 25 of 1961 (the Marriage Act) with a request to investigate and recommend legislation relating to a new marriage dispensation for South Africa. The request was preceded by the Department of Home Affairs, who is responsible for administering the Marriage Act, reviewing and redrafting the provisions of the Marriage Act with the aim of ensuring its compliance with the Constitution of 1996. Together with its request, the Department of Home Affairs submitted a draft Marriage Bill to the Commission during September 1996. The Department of Home Affairs was of the view that due to the sensitivity of the whole issue of the recognition of different types of marriages, especially with regard to the matrimonial property dispensation, the Commission is regarded the appropriate body to research and give advice on the issue of a new marriage dispensation for South Africa.

1.1.2 In the memorandum attached to its suggested Marriage Bill the Department stated that the Bill contains proposals with a view to, inter alia,

- C giving full legal recognition to customary unions and marriages solemnised under the tenets of a religion;
- C introducing a Marriage Act that will apply throughout the Republic;
- C regulating the appointment of marriage officers and the cancellation of such appointments on a proper basis;
- C ensuring that all legal marriages and customary unions are recorded in the Population Register; and
- C re-regulating prohibitions, age restrictions and consequences of unlawful marriages and customary unions.

1.1.3 The Department of Home Affairs furthermore draws attention to the following problems relating to marriages in the Republic:

- C Muslim and Hindu marriages, contracted in the Republic, are not recognised as legal marriages in the Republic, firstly, because they are potentially polygamous, and, secondly, because they were not solemnised by authorised marriage officers in compliance with the provisions of the Marriage Act. Polygamous civil marriages are, however, being recognised by the Marriage Act of 1978 of Transkei.
- C The Marriage Act provides for the appointment of marriage officers for solemnising marriages according to Christian, Jewish and Mohammedan rites and the rites of any Indian religion.

- C The Department is increasingly being pressured to rationalise the Marriage Act in order to accommodate customary unions and the hitherto unrecognised religious marriages;
- C In terms item 2(1) of Schedule 6 of the Constitution of 1996, all law which was in force when the new Constitution took effect, continues in force, subject to any amendment and consistency with the new Constitution. As a result of this provision the various divergent marriage laws in various parts of the country are still in operation, causing dissatisfaction, confusion and conflict. The guardianship dispensation in the Transkei Marriage Act of 1979, in particular, is causing many couples to go to the nearest office outside the borders of Transkei for the solemnisation of marriages under the Marriage Act of 1961;
- C The minority status of women in a customary union is being questioned and perceived as being offensive to women;
- C The demands from the gay community for the recognition of gay marriages as valid marriages are ever increasing;
- C The prohibition of marriage by a man or a woman and the direct descendant of his or her deceased spouse where they are not related to each other by blood is also being questioned;
- C Control over marriage officers solemnising religious marriages and customary unions needs to be regulated for purposes of uniformity throughout the Republic;
- C The definition and interpretation of a religious law marriage, especially with regard to Satanism, Rastafarianism and other observances needs to be investigated;
- C There is ever increasing pressure on the Department to provide for less formal requirements regarding places where a marriage might take place.

1.1.4 The Commission considered the request at its meeting on 29 and 30 November 1996. The Commission approved the inclusion of the investigation in its programme, noting that the Commission was at the time engaged in an investigation into *Customary Marriages* which entailed the reform of substantive law and that it might also have a direct impact on the proposals for reform contained in the Department of Home Affairs' draft Marriage Bill.

1.2 THE COMMISSION'S MEDIA STATEMENT

1.2.1 The Commission issued a media statement on 7 January 1998 the aim of which was to inform the community at large that the Commission had recently included the investigation in its programme and to comment on whether the provisions contained in the Marriage Act are adequate or whether they should be amended and, in that event, the way in which such amendments should be effected.¹ The media statement pointed out that the Marriage Act presently governs the following aspects of contracting marriages in South Africa. The Act —

¹ See "Law Commission to review Marriage Act" *The Citizen* 9 January 1998 on p 10; "Marriage Act Probe" *Pretoria News* 9 January 1998 on p 2; "Public invited to comment on Act's status" *Business Day* 9 January 1998 on p 3 and "Untying the legal love knots" *Mail and Guardian* at <http://www.mg.co.za/mg/news/98apr2/29apr-marriage.html>.

- C designates certain persons in the service of the State and in religious denominations as marriage officers; it also regulates matters such as the revocation or limitation of the authority of marriage officers;
- C provides for the solemnisation of marriages outside the Republic and deals with various types of unauthorised solemnisations;
- C regulates the documentary requirements of marriage, such as the furnishing of identity books or other prescribed declarations;
- C deals with the lodging of objections to any proposed marriage, as well as the issue of minors, proof of age and the granting of consent for minors' marriages by parents or guardians, commissioners of child welfare, judges of the High Court or the Minister of Home Affairs, respectively;
- C sets out the requirements for the contracting of a valid marriage, including the prohibition of marriage between people closely related by blood or by affinity; it also mirrors the common law definition of marriage as being a union between one man and one woman;
- C sets out the formalities that must be gone through in order to contract a valid marriage and these include the requirements that the parties appear in person with witnesses, that the marriage be solemnised by a marriage officer according to a certain formula in a public building within certain times of the day and that the parties sign a marriage register.

1.3 DISCUSSION PAPER 88

1.3.1 In September 1999 Discussion Paper 88 was published for general information and comment. The closing date for comment was 30 November 1999 but on request it was extended to 15 December 1999. The discussion paper was distributed to side-bar societies, bar societies, senior magistrates' offices, the various divisions of the High Court, interested parties, government departments and foreign law reform agencies. The discussion paper was made available on the Commission's Website² and a media statement was issued to announce the availability of the paper.³

1.4 THE WAY FORWARD

1.4.1 The comments and suggestions made by respondents on the discussion paper was taken into account when this report was drafted. This report contains final recommendations and a Bill which the Commission considered on 21 April 2001 and it was subsequently submitted to the Minister for Justice and Constitutional Development. It was explained in the discussion

² See <http://www.law.wits.ac.za/salc/discussn/discussn.html>

³ See "Newlyweds to get free hand in marriage" *Independent Online News* 8 September 1999 at <http://www.iol.co.za>

paper that the Commission does not deal with issues regarding customary marriages and the recognition of religious marriages in that paper. In September 1998 the Commission submitted its Report on Customary Marriages to the Minister of Justice⁴, and the Commission published an Issue Paper on Islamic Marriages in May 2000.⁵ It is envisaged that a discussion paper on Islamic Marriages and Related Matters will be published later this year. The Commission will therefore not be making specific recommendations relating to Islamic Marriages in this report as all the issues relating to the investigation will be dealt with comprehensively in that investigation. The Issue Paper on Islamic Marriages invited comments on, *inter alia*, the following preliminary suggestions:

- C Couples contemplating a marriage should have the right to choose a marital system which is compatible with their religious beliefs and with the Constitution. This implies that the marriage could, by way of contract, be governed by Muslim Personal Law, or by secular law.
- C To the extent that legislation is to give effect to the recognition of Islamic marriages, the new statute ought to provide for both new marriages and existing marriages.
- C In the case of new marriages, the legislation should provide at least for the following matters:
 - < the age of consent, which should be 18 years;
 - < actual and informed consent to the conclusion of a marriage in written form;
 - < the designation of marriage officers who are entitled to perform Islamic marriages;
 - < the registration of marriages by the signing of a marriage register;
 - < the formalities pertaining to the time, place and manner of solemnisation of Islamic marriages;
 - < the appropriate marriage formula for the solemnisation of an Islamic marriage;
 - < a prohibition on marriages within certain prohibited degrees of relationship, including the rules relating to fosterage according to Muslim

⁴ Which resulted in the adoption of the Recognition of Customary Marriages Act, No.120 of 1998.

⁵ This investigation is entitled Islamic Marriages and Related Matters: Project 59. See the Commission's Website for Issue Paper 15 at <http://www.law.wits.ac.za/salc/issue/issue.html>

- Personal Law;
- < a standard contractual provision in terms of which a Muslim Personal Law system is established in the event of parties contemplating a Muslim marriage;
- < the prescription of penalties for false representations or statements.

1.4.2 The Commission is of the view that the Marriage Act should ultimately make provision for all marriages, namely civil marriages, religious marriages and customary marriages in order to consolidate the applicable provisions governing the law of marriage in South Africa. However, the Commission is of the view that its recommendation on the appointment of marriage officers may alleviate current problems concerning religious marriages, if the Act were to be amended to provide for the appointment of ministers of religion as marriage officers, and if the religious representatives of the various denominations are indeed appointed. A number of respondents also addressed the recognition of same gender marriage. This issue will be dealt with in a separate investigation entitled Domestic Partnerships (project 118). It is envisaged that an Issue Paper dealing with same gender marriage, registered partnerships and cohabitation by same gender and opposite gender partners will be published for general information and comment during 2001. The comments received on same gender marriages as a result of the Commission's request for comment on the Marriage Act will be taken into account in project 118.

1.4.3 This report reflects the proposals contained in the Department of Home Affairs' Marriage Bill, comments and suggestions received in response to the Commission's media statement and discussion paper 88, the draft Marriage Amendment Bill contained in discussion paper 88 (see Annexure B) and the Commission's final Marriage Amendment Bill (see Annexure A).

CHAPTER 2

ASPECTS OF THE MARRIAGE ACT REQUIRING CONSIDERATION

2.1 INTRODUCTION

2.1.1 A number of submissions were received from respondents stating that they have no comment on the Bill such as from the Judges of the Natal High Court, the Acting Director-general of the National Department of Sport and Recreation, the Department of Housing, and the Acting Commissioner of Correctional Services.

2.1.2 The Department of Home Affairs suggest in their comment that instead of amending the Marriage Act, it be repealed *in toto* and a new Marriage Act be promulgated containing all the requirements for civil marriages in a user-friendly format containing an index and divided into chapters.

2.1.3 iJubilee ConneXion states that in their view, the Marriage Act should be consolidated in one single piece of legislation affecting all legal aspects of Marriage. They remark that the Commission is dealing with four interrelated legal marriage themes in separate investigations⁶ and consider that this is not helpful. They suggest that the whole question of marriage be looked at holistically and not piecemeal. iJubilee ConneXion suggests that the following guiding principles be taken into account in their application to the Marriage Act:

- C Marriage is not to be taken lightly and must be accorded appropriate dignity. Whatever ceremony is legalised by whatever marriage officer is appointed, the need for dignity and seriousness of this step should be catered for.
- C The word “marriage” must be defined in the Act. The discussion paper notes this deficiency in the present legislation⁷ and the complications arising from this omission. “Marriage” should be defined as “the state of legal union between one man and one woman”. “Performing a marriage” refers to a ceremony or event by which two people enter into such legal union.

⁶ The present review of the Marriage Act (project 109), Customary Marriages (project 90), Islamic Marriages and Related Matters (project 59) and Domestic Partnerships (project 118).

⁷ They refer to paragraph 2.1.2.25 of the discussion paper.

- C The definition of “marriage” specifically intends that a legal “marriage” should be monogamous and heterosexual. Other words, eg “relationships” should be used to describe polygamous or homosexual relationships.
- C The distinction must be continually upheld that it is the State that is responsible for the orderly conduct of civil society, including the legal recognition and registration of marriage and family - the most basic social foundation of the nation. Religion and other components of civil society may and should play a role in such an important institution as marriage, and must be free to add their unique ingredients to the ceremony. In a democratic society, religions are even free not to recognise a legal marriage within their religious context, and recognise an illegitimate marriage within their religious context. The Marriage Act deals with legality - not with the institution of marriage, which is perceived in a variety of ways by various cultures and faiths.

2.1.4 The Law Society of the Cape of Good Hope’s Committee on Family Law is of the opinion that research on Muslim and Hindu marriages should first be finalised so that legislation for the regulation of all marriages is incorporated under one Marriage Act. The committee remarks that this would serve to avoid piecemeal legislation and possible contradictions in provisions of different Acts drafted to regulate marriages within different religions or culture groups. The committee suggests that before introducing such legislation, certain principles should be identified, settled and codified. Mr FC Cantatore of the Society of Advocates of Natal remarks that apart from specific comment on the recognition of foreign embassy or consular marriages in South Africa, and on sections 10(1)(a) and 10(2), 11, 22, 29, 30, 33 and 35, he is in agreement with the recommendations of the Commission regarding the remaining sections discussed.⁸

2.1.5 The Gender Research Project⁹ notes in its comment on the media statement that they are aware that the Marriage Act deals primarily with procedural matters associated with marriage. They remark that they believe that such matters are intimately linked to the broader substantive and constitutional issues regarding the reform of marriage law in South Africa and

⁸ Mr Cantatore notes that from a practical point of view, in the advocates’ profession they do not often have occasion to deal with provisions of the Marriage Act, save where the validity of a marriage has been conducted in a manner other than the usual prescribed manner, is concerned. He remarks that however, as is pointed out by the Commission, there are various aspects of the Bill which, of necessity, should be revised due to the fact that certain aspects are no longer applicable or have become obsolete.

⁹ Of the Centre for Applied Legal Studies at the University of the Witwatersrand.

that the scope of the investigation should be extended to deal with these issues. They point out that while there is still social and cultural emphasis on marriage, the institution no longer commands the ideological hegemony it once did, and as a result, significant numbers of people are either forced through circumstances to remain unmarried or actually choose not to enter the institution or leave it. The Gender Research Project comment that if the starting premise is that the aim of family law is to protect vulnerable family members from disadvantage, then the current emphasis in the law which links many protections to the institution of marriage, need seriously be reconsidered. They propose that families be afforded legal protection based on the functions that they serve in society and that this requires moving away from the anachronistic and inappropriate laws that give protection only to those who fit into the nuclear, heterosexual family form.¹⁰ They propose that —

- C a single form of marriage be created, the formalities for which will be covered by the Marriage Act;
- C the definition of marriage include unions between partners of the same sex;
- C all previously disadvantaged forms such as customary and Muslim marriages be recognised (that these marriages should be monogamous but vulnerable women

¹⁰ See for example *Farr v Mutual & Federal Insurance Co Ltd* 2000 3 SA 684 (C) at 689 H *et seq* where the court remarked as follows in referring to the cases of *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 1999 (3) SA 173 (C) (1999 (3) BCLR 280) and *Langemaat v Minister of Safety and Security and Others* 1998 (3) SA 312 (T):

... these decisions, given in terms of the provisions of the Constitution, accord with the views of an enlightened society. ... while society might not necessarily approve of homosexual relationships, it does recognise that where such a relationship has a degree of permanency and the manner in which the partners live together resembles for all intents and purposes (save that their sexual relations are homosexual and not heterosexual) a marriage between a husband and wife, they could be considered members of a family as would be a husband and wife.

... in *Fitzpatrick v Sterling Housing Association Ltd* [1997] 4 All ER 991 (CA) ([1998] 2 WLR 225) ... the plaintiff and the original tenant had lived together for some 18 years in a stable and permanent homosexual relationship until the latter's death. At 1023c - e ... Ward LJ said the following:

'The test has to be whether the relationship of the appellant to the deceased was one where there is at least a broadly recognisable *de facto* familial nexus. I would not define that familial nexus in terms of its structures and components: I would rather focus on familial functions. The question is more what a family does rather than what a family is. A family unit is a social organisation which functions through its linking its members closely together. The functions may be procreative, sexual, social, economic, emotional. The list is not exhaustive. Not all families function the same way. Save for the ability to procreate, these functions were present in the relationship between the deceased and the appellant.'

Adopting this functional approach in this case, I am of the view that applicant and Johnson were living as members of a 'family' within the meaning of that word in clause 2.1.1.

- and children within existing polygamous marriages should be protected);
- C all marriages are afforded the same legal consequences which are to be set out in comprehensive legislation covering aspects such as ownership of property within the marriage, division of property on divorce or death, maintenance of spouses, all matters relating to children including maintenance, custody, guardianship, access, adoption, legitimacy and ancillary matters. (The Maintenance Act, Divorce Act and Matrimonial Property Act should be reviewed to ensure it meets the requirements of the Constitution and the needs of the country);
- C all parties who cohabit be protected by a comprehensive set of laws which extend the equivalent consequences of marriages to such unions.

2.1.6 Mr Richard Garratt remarks in commenting on the media statement that he works with disadvantaged people in rural communities and sees the results daily of broken marriages, marriages never formalised, marriages to multiple partners where one has fallen into disfavour, marriages in church with no legal confirmation, marriages by traditional rites with no legal confirmation, marriages where the man refuses to provide for the children, and marriages which never happened at all. He considers that any legal framework for marriage needs to take into account the highly disorganised and uncontrolled structure of society in rural areas and to protect the rights of people who find themselves in all these arbitrary situations. He states that he has come to the conclusion that the answer lies in doing away with the concept of marriage as a legal entity, and it seems to him that marriage is a social entity, and often a religious entity, entered into with promises between the partners, witnessed by the society in which they live. He is of the view that there may be no need for the law to get involved at all. Mr Garratt considers the purpose of any legal involvement is to protect the children and sometimes the partners from each other, and to formalise a structure of rights and responsibilities in law so that where a dispute arises the law is able to step in. He states that every day he sees people who fall outside the structure of the legal framework and who cannot seek the help of the law because their *marriage* does not fit the defined legal framework. He considers that the law needs to be able to help those people too, that where children of a second marriage or of a religious-but-not-legal marriage or no formal marriage at all need help, the structure of the law needs to be able to accommodate them, in particular when the intention of those *married* in this way was equivalent to marriage as the law sees it, they should also be seen to have assumed equivalent responsibilities. Mr Garratt suggests that the law of marriage might best be dealt with in conjunction with the law of contract and marriage be looked at as a contract which can be

express, implied, written or verbal as in all walks of life.

2.1.7 The Commission is not persuaded by the arguments of the Law Society of the Cape of Good Hope's Committee on Family Law and iJubilee ConneXion that research on Muslim or any other religious marriages should first be finalised so that legislation for the regulation of all marriages can be incorporated in one Marriage Act. The Commission is of the view that the amendments which are identified in this investigation should be implemented and that the Marriage Act be consolidated in future to address civil, religious and customary marriages ultimately in one Marriage Act. The investigation into domestic partnerships is also a separate issue to be dealt with independently. The Commission does not agree that its proposed method will result in contradictions in provisions of different Acts drafted to regulate marriages or partnerships within different religions or culture groups.

2.2 EX OFFICIO MARRIAGE OFFICERS AND DESIGNATION OF PERSONS IN THE PUBLIC SERVICE AS MARRIAGE OFFICERS

(a) The provisions contained in the Marriage Act

2.2.1 Sections 2 of the Marriage Act provides as follows:

(1) Every magistrate, every special justice of the peace and every commissioner shall by virtue of his office and so long as he holds such office, be a marriage officer for the district or other area in respect of which he holds office.

(2) The Minister and any officer in the public service authorized thereto by him may designate any officer or employee in the public service or the diplomatic or consular service of the Republic to be, by virtue of his office and so long as he holds such office, a marriage officer, either generally or for any specified class of persons or country or area.

(b) The Department of Home Affairs' suggested provision contained

2.2.2 The Department of Home Affairs proposed the following provisions in their Bill:

(1) Every magistrate shall by virtue of his or her office and so long as he or she holds such office, be a marriage officer for the district in respect of which he or she holds office.

(2) The Minister may designate any person in the public service or the diplomatic or consular service of the Republic to be, by virtue of his or her office and so long as he holds such office, a marriage officer, either generally or for any specified class of persons or country or area.

(c) Comments on the media statement

2.2.3 Professor JC Bekker notes that he is concerned about the fact that there are no South African marriage officers abroad, although they may be appointed by the Minister of Home Affairs. He remarks that it has been explained to him that the Minister of Home Affairs will make such appointments only if requested to do so by the Minister of Foreign Affairs. He further remarks that Foreign Affairs officials washed their hands of the issue by saying appointments are made by Home Affairs, and hence, no one was, at least two years ago, prepared to accept responsibility or to explain what the policy was. Professor Bekker suggests that, in his view, some officials abroad, say the consuls should be *ex officio* marriage officers while posted overseas, and other officers could be appointed where there is a need.

(d) Evaluation contained in Discussion Paper 88

2.2.4 The New Zealand Marriage Act makes provision that marriages may be conducted, *inter alia*, by Registrars of Marriages, justices of the peace or other persons of good character.¹¹ The Act provides that where the Registrar-General is satisfied that for geographical, administrative, or other reasons it would be convenient for the residents of any locality for a Justice of the Peace or other person of good character residing in that locality, who wishes to be a marriage celebrant, to be able to solemnise marriages, the Registrar-General may enter that person's name in the list of marriage celebrants.¹² The New Zealand Act does not make provision for the appointment of New Zealand representatives in foreign countries as marriage officers. It however provides¹³ that any New Zealand representative¹⁴ who has attended the marriage of a New Zealand citizen in a country other than New Zealand and is satisfied that the marriage has been solemnised in

¹¹ See the discussion below on the appointment of ministers of religion as marriage celebrants in New Zealand.

¹² Section 7 of the new Zealand Marriage Act makes provision that the Registrar-General must in each year prepare a list of marriage celebrants, he or she must cause the list to be published in the Gazette, it must contain the name of each person entitled under the act to act as a marriage celebrant, it must be corrected or added to as the occasion may require, and he or she must specify in each list published in the Gazette a date on which the list shall come into force.

¹³ In section 43.

¹⁴ Who is defined as any person who is for the time being a head of mission or head of post (within the meaning of section 2 of the Foreign Affairs Act 1988) or a person assigned or reassigned to service overseas under section 6 of the Act.

accordance with the formalities of the law of that country may give a certificate in the prescribed form and shall forward a duplicate copy of the certificate to the Registrar-General. The Australian Marriage Act makes provision for three different classes of marriage celebrants who may conduct marriages in Australia, namely ministers of religion of recognised denominations who are registered under the Act, persons who, under the law of a State or Territory, have the function of registering marriages, and other officers of a State or Territory or other fit and proper persons authorised by the Attorney-General. New civil marriage celebrants are authorised only in areas and communities without sufficient civil marriage celebrants to meet the estimated community need to perform civil marriage ceremonies, provide couples with reasonable access to a choice of celebrant, or to meet the special needs of particular groups in the community who may need celebrants with specialist skills.¹⁵ The following selection criteria are applied in assessing applicants: community/civic involvement; interpersonal skills; public speaking experience and presentation skills; understanding of the requirements of the *Marriage Act 1961* and Marriage Regulations, and the ability to explain these to others; commitment to uphold the institution of marriage¹⁶; and general suitability. The following factors are taken into account with regard to the last-mentioned criterion: applicants should be able to demonstrate a high level of integrity; not have a criminal record; not have a conflict of interest in connection with their profession and business interests; and provide three references to attest to their character and suitability.¹⁷

2.2.5 The Australian Marriage Act makes also provision¹⁸ for the solemnisation in Australia of a marriage by or in the presence of a diplomatic or consular officer. Such marriages are possible if neither of the parties is an Australian citizen, neither of the parties is lawfully married to some other person, and they are not related to each other within a prohibited relationship. The Australian Act further makes provision that a marriage solemnized in Australia by or in the

¹⁵ For example, ethnic communities or people with disabilities, such as the hearing impaired.

¹⁶ As defined in the Marriage Act 1961.

¹⁷ This discussion on the three categories of marriage celebrants was not contained in the discussion paper but is included here for the sake of practical convenience and to assist readers in the understanding of comparable foreign jurisdictions. See the Webpage of the Marriage Celebrants Unit of the federal Attorney-General's Department for more information at <http://law.gov.au/aghome/commaff/illad/celebrants.html>

¹⁸ Section 55.

presence of a diplomatic or consular officer of a proclaimed overseas country¹⁹, shall be recognized as valid in Australia if the marriage is recognized as a valid marriage by the law or custom of the overseas country and the marriage has been registered. The Australian Marriage Act further provides²⁰ that the Attorney-General may appoint as a marriage officer a person appointed to hold or act in any of the following offices (being an office of the Commonwealth) in an overseas country, namely Ambassador, High Commissioner, Counsellor or Secretary at an Embassy, High Commissioner's Office, Legation or other post, and Consul, and any other person qualified under the regulations to be appointed as a marriage officer.²¹

2.2.6 The South African case of *Santos v Santos*²² seems relevant to the present discussion on parties joined in marriage by diplomatic and consular marriage officers. The Court noted that at a marriage ceremony in the Portuguese Consulate in Johannesburg, the vice-consul of Portugal in Johannesburg purported to solemnise a marriage between the parties who were both domiciled in the Republic of South Africa at the time, and further that the vice-consul who solemnized the marriage was not a marriage officer in terms of the provisions of the Marriage Act 25 of 1961. The Court referred to section 11(1) of the Marriage Act which provides that “a marriage may be solemnized by a marriage officer only” and stated that a marriage which is

¹⁹ "Proclaimed overseas country" means an overseas country in respect of which a Proclamation under section 54 is in force. Section 54 provides that where the Governor-General is satisfied, in relation to an overseas country, that the law or custom of that country authorises the solemnisation by or in the presence of diplomatic officers of that country, or consular officers of that country, or both, of marriages outside that country, and the law or custom of that country permits marriages to be solemnised in that country, the Governor-General may, by Proclamation, declare that country to be a proclaimed overseas country.

²⁰ In section 62.

²¹ Note also that under the Foreign Marriage Act, 1969 of India, a marriage between parties, one of whom at least is a citizen of India, may be solemnized by or before a Marriage Officer in a foreign country. The Indian Government has been empowered to appoint diplomatic or consular officers to be Marriage Officers for any foreign country. The conditions to be fulfilled for a marriage to be solemnised under the Act are as follows: neither party has a spouse living, neither party is an idiot or a lunatic, the bridegroom has completed the age of twenty one years and the bride the age of eighteen years at the time of the marriage, and the parties are not within the degrees of prohibited relationship. The fourth condition will not, however, apply when the personal law or a custom governing at least one of the parties permits of a marriage between them. Section 11 of the Act provides that marriages prohibited by any law in force in the foreign country or marriages appearing to be in contravention of international law or the comity of nations cannot be solemnised under the Act. In such circumstances, the Marriage Officer has to record his reasons for refusing to solemnise the marriage, in writing. The order of the Marriage Officer refusing to solemnise the marriage can be appealed against, before the Central Government. Further, under section 17 of the Act, the Marriage Officer is also empowered to register marriages solemnised in a foreign country but not registered.

²² 1987 4 SA 150(W).

solemnized in South Africa by a person who is not a marriage officer is, generally speaking, not a valid marriage under our law. The Court considered the plaintiff's submission that the provisions of the Act would not apply to a marriage conducted in an embassy or a consulate of a foreign country in South Africa inasmuch as such place ought to be regarded as an extension of that foreign country's area of jurisdiction. The Court noted that section 10 of our Marriage Act 25 of 1961 also allows the solemnization of a marriage in accordance with the provisions of the Act in a country outside the Republic of South Africa between South African citizens who are domiciled in the Republic and that such a marriage may be solemnized by a diplomatic or consular officer in the service of the Republic of South Africa who has been designated as a marriage officer in terms of the Act. The Court remarked that the Marriage Act 1961, however, has no corresponding provision enabling a foreign diplomatic or consular officer to solemnise a marriage between subjects of that foreign State in accordance with the laws of that State in its embassy or consulate in South Africa. The Court pointed out that the defendant referred him to the following conclusion of Kahn in his treatise on '*Jurisdiction and Conflict of Laws*' in Hahlo (op cit 4th ed at 592) with regard to the validity of foreign embassy marriages in South Africa:

“Thus for the first time, though it be in a restricted form, our law has provided for the so-called embassy marriage, which the laws of so many countries permit. Though there is no assurance that such a union will enjoy recognition in the law of the place of celebration, it is not to be expected that the executive will lightly grant extraterritorial capacity to solemnise marriages which will be invalid by the *lex loci celebrationis* and so be denied international validity.

There is no corresponding provision at common law or by statute enabling foreign officials to solemnise marriages in South Africa, whether within the precincts of an embassy or elsewhere. Nor should our Courts recognize the validity of a marriage celebrated in country A in the embassy of country B, even though the marriage would be recognized by the law of country B: it must be recognized by the law of country A.”

2.2.7 The Court further noted in *Santos v Santos* that Pålsson *Marriage and Divorce in Comparative Conflict of Laws* (1974) at 274 points out that South Africa and Switzerland are among the few countries which provide for the authorisation of consular marriages by their own representatives abroad, but are opposed to the exercise of any such authority by foreign consuls in their own territory and that Pålsson relies on Kahn as authority for the legal position which applies in South Africa. The Court remarked that according to Pålsson at 273, countries such as Austria, certain Latin American countries and the United States of America preclude foreign consuls from solemnizing marriages in their territory and deny validity to any marriage celebrated in defiance of the prohibition, that those countries usually do not authorise their own consular officers to perform marriages abroad, and that this appears to be the general approach in the United States of America. The Court also remarked that according to Rabel *The Conflict of*

Laws: A Comparative Study vol 1 2nd ed (1958) at 237, the position is that where a consular or diplomatic agent is endowed by the State represented by him or her - the sending State - with the power of officiating at marriages, a marriage performed before him or her is valid in the receiving State only if the latter State has agreed to his acting in this capacity. The Court noted that Pålsson at 274 concludes, however, that consular marriages are, to a varying extent, allowed and recognised by most receiving States, thereby admitting an exception to the *locus regit actum* rule.

“In most countries recognising consular marriages such recognition is granted by operation of law in the sense that it does not presuppose a previous permission by the receiving State. This system prevails in France. It is also accepted in most other countries in Western Europe and elsewhere whose own consuls are empowered by law to perform marriages abroad. To that extent the recognition involves a ‘bilateralisation’ of the approach adopted by the receiving State qua sending State. The same system is followed, however, by certain countries which only provide for individual authorisations of their own consuls abroad, for example West Germany, the Netherlands and the United Kingdom, or which do not provide for such authorisation at all, for example Colombia. The recognition thus afforded, it may be noted, rests very largely on customary law, as deducible from State practice and/or judicial decisions, rather than on statutory law which is relatively scarce on this matter.”

2.2.8 The Court decided in *Santos v Santos* that if the Legislature had intended to accord recognition to foreign embassy or consular marriages in South Africa it would undoubtedly have made provision for it in the Marriage Act, and that there is, equally, no indication that South African law has followed the practice of the United Kingdom and other countries in Western Europe of according recognition to foreign embassy or consular marriages by custom.

2.2.9 It was stated in the Discussion Paper that the question arises whether there is a need to accord recognition to foreign embassy or consular marriages in South Africa in view of the absence of such statutory recognition. CF Forsyth explains that where a marriage was celebrated by an officer of an embassy or consulate within the area of the forum before which the marriage is sought to be recognised, then generally, for the marriage to be recognised, the officer must be authorised under the *lex fori*.²³ In referring to the *Santos* case, Forsyth notes that since the Portuguese Vice-Consul in Johannesburg was not an authorised marriage officer in terms of the Marriage Act, it was correctly held that the marriage was invalid. It was pointed out in the discussion paper that Forsyth notes that the *Santos* judgment was criticised²⁴ and that it

²³ *Private International Law: the modern Roman-Dutch law including the jurisdiction of the Supreme Court* 3rd edition Kenwyn: Juta & Co 1996 at 244 footnote 34.

²⁴ He refers to the article by S Therion in 1985 *De Rebus* at 353.

was considered that it should make no difference whether a marriage takes place in a foreign consulate or a foreign country.²⁵ He however considers that the rejection of the view that foreign embassies and consulates are part of the foreign country's territory implies the rejection of this view too. He states that this matter is frequently regulated by treaty, but to the best of his knowledge South Africa is not party to any such treaties and where a marriage is celebrated outside the ambit of Article 6 of the *Hague Convention of 1902 to Regulate the Conflict of Laws in Regard to Marriage* (to which South Africa is not a party) there seems to be wide adherence to the *lex loci celebrationis*, at least for formal validity of the marriage. He further notes the case of *Radwan v Radwan*²⁶ where it was assumed that a marriage celebrated in the Egyptian Embassy in Paris was formally valid in French law. Forsyth concludes that Mr Justice Grosskopf overstates the case when he remarks in the *Santos* case that embassy marriages are recognised *by custom* in Europe and the United Kingdom. The question was raised in the Discussion Paper whether there is a need to accord recognition to foreign embassy or consular marriages in South Africa. The Commission requested comment on this aspect in particular.

2.2.10 It was also noted in the Discussion Paper that the term "Commissioner" is defined as follows in the Marriage Act: "'Commissioner' includes an Additional Commissioner, an Assistant Commissioner, a Native Commissioner, an Additional Native Commissioner and an Assistant Native Commissioner". It was pointed out that the Department of Home Affairs did not include the term Commissioner or special justice of the peace in its Bill. It was noted in the Discussion Paper that enquiries made at the Department of Home Affairs established that there are no marriages presently being celebrated by Commissioners as contemplated in the Marriage Act. It was explained that the Department of Home Affairs is therefore of the view that although the Marriage Act makes provision for Commissioners and justices of the peace to be marriage officers this is not the case at present. It was said that it is clear that the Marriage Act does not reflect the present position on Commissioners and special justices of the peace being marriage officers. It was stated in the Discussion Paper that it seemed clear that the Act should be brought into line with the prevailing position and that the terms "Commissioner" and "special justice of the peace" should be deleted from section 2(1) of the Act.

2.2.11 It was further explained that it was not entirely clear to the Commission whether the alleged failure by the Department of Home Affairs to appoint diplomatic and consular marriage

²⁵ *Private International Law* 3rd edition at 244 note 34.

²⁶ [1973] Fam 24.

officers is merely an administrative oversight which can be remedied by the Department of Home Affairs considering the matter afresh rather than the legislature having to amend the Marriage Act. It was, however, thought that the suggestion made by Professor Bekker seemed to simplify the appointment procedure considerably if certain officials representing the Republic of South Africa abroad were to be *ex officio* marriage officers. The Commission therefore provisionally recommended that every Ambassador, High Commissioner and Consul should, by virtue of their office and as long as they hold such office, be *ex officio* marriage officers. However, the Commission considered that the Minister's power in terms of the Marriage Act to designate officers or employees in the diplomatic or consular service should remain intact.

(e) Recommendation contained in the Discussion Paper

2.2.12 The Commission's preliminary recommendation was that section 2 of the Marriage Act should be amended —

- C by deleting in section 2(1) the terms "Commissioner" and "special justice of the peace"; and
- C by providing in section 2(1) that certain persons in the diplomatic and consular service of the Republic, namely Ambassadors, High Commissioners and Consuls should by virtue of their office, and as long as they hold such office, be *ex officio* marriage officers for the area in which they hold office.

(f) Comment on the Discussion Paper

2.2.13 Mr Dudley Franklin Arends²⁷ comments that he was informed by the Department of Home Affairs that only ministers of religious organisations can apply for designation as marriage officers. He states that this is in strong contrast to South Africa's counterparts in the USA and the United Kingdom where justices of the peace can be appointed marriage officers. He suggests that the Commission recommend to the Minister of Justice to revisit the Marriage Act to include justices of the peace for designation as marriage officers. Mr Arends says that the majority of people have no knowledge or understanding of the powers and duties in the office of the justice of the peace. He considers that the appointment of justices of peace is to afford the community to be part of the mainstream of the justice system without the required academic

²⁷ Who is a Justice of the Peace for the district of Johannesburg.

legal qualifications. He suggests that to remove this will disempower South Africa's people which is not in the spirit of the Constitution. Mr Arends proposes that section 2(1) provide that every magistrate, every justice of the peace and every commissioner shall by virtue of his or her office and so long as he or she holds such office, be a marriage officer for the district or other area in respect of which he or she holds office.

2.2.14 Mr FC Cantatore of the Society of Advocates of Natal agrees with the submission of Mr CF Forsyth that where a marriage is conducted outside the ambit of Article 6 of the Hague Convention of 1982 (to which South Africa is not a party) to regulate the conflict of laws in regard to marriage there seems to be wide adherence to the *lex loci celebrationis* least for formal validity of the marriage. He notes the case of *Radwan v Radwan* where a marriage celebrated in the Egyptian Embassy in Paris was formally valid in French law. Mr Cantatore states that from a practical view this approach would be sensible as any litigation which flows from the institution of divorce proceedings would more easily and effectively be brought in South Africa. He points out that the recognition of foreign embassy or consular marriages in South Africa would have the effect that a South African court would have jurisdiction in such matters and would obviate the need for parties to resort to their country of birth (or the foreign country) to litigate in these matters. He considers that it would furthermore be desirable that marriages at such embassies or consulates should be recognised in South Africa as the parties are *de facto* resident in South Africa. He however cautions that such marriages would have to comply with the requirements of the Marriage Act and be conducted by a designated marriage officer recognised in the Act.

2.2.15 The Department of Home Affairs comments that the provisional recommendation is supported but that provision should be made for the recognition of marriages conducted at foreign embassies or missions in South Africa as valid marriages under the marriage laws of the sending state. The Department notes that foreign embassies or missions are seen as part of the foreign country's territory and the Department has recognised such marriages up to now on that basis. The Department also points out that section 10 of the Act allows South Africans to marry abroad in accordance with the Act. The Department states that it is not clear how this section can be reconciled with an interpretation where such marriages at embassies/missions abroad must be interpreted in terms of the *lex loci celebrationis* principle, in other words in terms of the marriage laws of the receiving state.

(g) Evaluation

2.2.16 Although few respondents addressed the issue of the recognition of marriages conducted by foreign consular or diplomatic officers in South Africa, particularly as there does not seem to be opposition against making provision therefor, it seems that this aspect should be governed by the Marriage Act. It was considered noteworthy that the Australian Marriage Act makes provision for marriages conducted by diplomatic or consular officers. The requirements set by the Australian Marriage Act seem relevant also to the South African context.²⁸ It is considered that the Marriage Act should likewise provide for the Minister of Home Affairs to designate countries whose consular or diplomatic officers may conduct marriages in South Africa. The Act should then require that neither of the parties contemplating marriage is a South African citizen, further, that the marriage would not be void because either of the parties is lawfully married to some other person, that the parties are within a prohibited relationship or that either of the parties is under marriageable age.²⁹ The Australian requirements for recognition of such marriages, namely that the marriage is recognised as a valid marriage by the law or custom of the overseas country, and that the marriage should be registered in terms of the Act seem persuasive and worthy of following. Thus it is suggested that the requirement be set that the Minister of Home Affairs designate countries whose consular or diplomatic officers may conduct marriages in South Africa. It will also be necessary to determine which countries recognise such marriages as valid marriages. It was noted above that these marriages will not be recognised in terms of the Australian Marriage Act where the marriage would be void for the following reasons: that the consent of either of the parties is not real consent because it was obtained by duress or fraud; that a party is mistaken as to the identity of the other party or as to the nature of the ceremony performed; or that a party is mentally incapable of understanding the nature and effect of the marriage ceremony. The question arises whether there is a need to insert a general provision in the Marriage Act setting out the circumstances under which marriages will be void

²⁸ It seems, however, that the power of marriage celebrants to conduct marriages in embassies in foreign countries has been revoked by the Australian Attorney General in 1993. The Commission nevertheless considers that the Australian legislation presents a good example and that the principles contained in it should be followed.

²⁹ It is noteworthy that the distinction between void and voidable marriages in Australia was recognised from colonial times until 1976. An application for a decree of nullity can, however, since 1976 only be made on the ground that a marriage is void. The result of this is to abolish the notion of voidable marriages under Australian law. The following were the grounds on which a marriage was voidable — where, at the time of the marriage,

- (a) either party to the marriage is incapable of consummating the marriage;
- (b) either party to the marriage is of unsound mind or a mental defective;
- (c) either party to the marriage is suffering from a venereal disease in a communicable form;

or

- (d) the wife is pregnant by a person other than the husband.

See Anthony Dickey *Family Law* 3rd edition at 118 — 119.

along the lines of the Australian Marriage Act. It seems that such a provision could enhance legal certainty as they are not presently set out in the Act, the exception being sections 24A³⁰ and 26.³¹ As the South African law still presently distinguishes between void and voidable marriages, contrary to that of Australia, it is considered that this distinction should also be reflected in the Marriage Act.³² It is suggested the Bill should provide in clause 23A that a marriage will be void where either of the parties is lawfully married to some other person; that the parties are within a prohibited relationship; that either of the parties is under marriageable age; or that a party is mentally incapable of understanding the nature and effect of the marriage ceremony. The Bill should further provide that a marriage is voidable —

- (a) on application by the coerced party where at the time of the marriage the consent of either of the parties was not real consent because it was obtained by duress;
- (b) on application by the mistaken party where at the time of the marriage that party was mistaken as to the identity of the other party or as to the nature of the ceremony performed;
- (c) on application by a spouse where at the time of the marriage the other spouse was afflicted with permanent impotence; or
- (d) on application by the husband where at the time of the marriage the wife was pregnant by a person other than the husband.

2.2.17 It was noted above that the Marriage Act does not reflect the present position on Commissioners and special justices of the peace being marriage officers, and that the Discussion Paper stated that it seemed clear that the Act should be brought into line with the

³⁰ In terms of section 24A a marriage between persons of whom one or both are minors is not merely void because the parents or guardian of the minor, or a commissioner of child welfare did not consent to the marriage. The marriage may, however, be dissolved by a court on the ground of want of consent if application is made 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 by the minor before he or she attains majority or within three months thereafter.

³¹ Section 26 provides that if any person who was not capable of contracting a valid marriage without the written permission of the Minister, contracted a marriage without such permission and the Minister considers such marriage to be desirable and in the interests of the parties in question, he or she may, provided such marriage was in every other respect conducted in accordance with the provisions of the Act, and there was no other lawful impediment thereto, direct in writing that it shall for all purposes be a valid marriage.

³² See Sinclair J assisted by J Heaton *The Law of Marriage* Volume 1 Kenwyn: Juta & Co 1996 at 385 — 391 on nullity of marriage.

prevailing position by the deletion of the terms “Commissioner” and “special justice of the peace” in section 2(1) of the Act. Only Mr Arends addressed the question of the position of special justices of the peace as marriage officers. The Commission is not persuaded by his arguments that special justices of the peace should still in future be marriage officers. The Commission therefore considers that the Marriage Act should be amended by the deletion of the words “Commissioner” and “special justice of the peace”.

2.2.18 There was no opposition to the preliminary recommend that certain persons in the diplomatic and consular service of the Republic, namely Ambassadors, High Commissioners and Consuls should by virtue of their office and as long as they hold such office be *ex officio* marriage officers for the area in which they hold office. The Commission therefore considers that the Marriage Act should be amended as was proposed in the Discussion Paper.

(h) Recommendation

2.2.19 It is recommended that the Marriage Act provide as follows for the recognition of marriages conducted by consular and diplomatic officers of foreign countries in South Africa:

A marriage conducted in the Republic by a diplomatic or consular officer of a foreign country designated by the Minister shall be recognised as valid in the Republic if —

- (a) neither of the parties to the marriage is a South African citizen;
- (b) the marriage would not be void for the reason that —
 - (i) either of the parties is, at the time of the marriage, lawfully married to some other person;
 - (ii) the parties are within a prohibited relationship; or
 - (iii) either of the parties is under marriageable age;
- (c) the marriage is recognised as a valid marriage by the law or custom of the designated foreign country; and
- (d) the marriage is registered in terms of the Act.

2.2.20 The Commission also recommends that section 2 of the Marriage Act should be amended by deleting in section 2(1) the terms “Commissioner” and “special justice of the peace”. It is further recommended that a general provision in the Marriage Act be inserted setting out the circumstances under which marriages will be void such as that either of the parties is lawfully married to some other person; that the parties are within a prohibited relationship; that either of the parties is under marriageable age; or that a party is mentally incapable of understanding the nature and effect of the marriage ceremony. The Bill should further provide that a marriage is voidable — on application by the coerced party where at the time of the

marriage the consent of either of the parties is not a real consent because it was obtained by duress; on application by the mistaken party where at the time of the marriage that party is mistaken as to the identity of the other party or as to the nature of the ceremony performed; on application by a spouse where at the time of the marriage the other spouse is afflicted with permanent impotence; or on application by the husband where at the time of the marriage the wife is pregnant by a person other than the husband.

2.3 THE DESIGNATION OF MINISTERS OF RELIGION AND OTHER PERSONS HOLDING RESPONSIBLE POSITIONS IN RELIGIOUS ORGANISATIONS OR DENOMINATIONS AS MARRIAGE OFFICERS

(a) The provisions contained in the Marriage Act

2.3.1 The Marriage Act presently defines the term marriage officer as follows: "'marriage officer' means any person who is a marriage officer by virtue of the provisions of this Act". Section 3(1) of the Act sets out as follows which ministers or other persons attached to churches may be designated as marriage officers:

(1) The Minister and any officer in the public service authorized thereto by him 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 is such a minister or occupies such position, a marriage officer for the purpose of solemnizing marriages according to Christian, Jewish or Mohammedan rites or the rites of any Indian religion.

(2) A designation under sub-section (1) may further limit the authority of any such minister of religion or person to the solemnization of marriages-

- (a) within a specified area;
- (b) for a specified period.

(b) The Department of Home Affairs' suggested provision

2.3.2 The Department proposed the following provisions:

(1) The Minister may appoint a Minister of religion or any person holding a responsible position in any religious denomination or organization designated by such denomination or organization in the prescribed form, as a marriage officer.

(2) A designation referred to in subsection (1) must be accepted by the Minister unless it is proven to the satisfaction of him or her that the denomination or organization who made the designation is not a bona fide religious denomination or organization.

(3) Any decision made by the Minister under this section to appoint a marriage officer or to reject a designation shall be reviewable by any provincial or local division of the High Court of South Africa, and the Court —

- (a) may call upon the Minister to furnish reasons and to submit such information as the Court deems fit; and
- (b) shall have jurisdiction to —
 - (i) consider the merits of the matter under review; and
 - (ii) confirm, vary or set aside the decision of the Minister.

(c) Comments on the media statement

(i) The Church of Scientology

2.3.3 The Church of Scientology favoured the Commission with a very comprehensive submission addressing the issue under consideration. The Church succinctly remarks that while the Marriage Act permits the designation as a marriage officer of any minister of or person holding a responsible position in "any religious denomination or organization," it is restrictive in that marriage officers can be designated only for the purpose of solemnising marriages according to "Christian, Jewish or Mohammedan rites or rites of any Indian religion." Hence, the Church states that, contrary to the Bill of Rights, section 3 discriminates against every religion other than those enumerated by preventing the solemnisation of marriages according to the rites of other religions. The Church therefore suggests that the Constitution and international law require that section 3(1) of the Marriage Act should be amended to remove its discriminatory language and that this can be effected by simply replacing the phrase "according to Christian, Jewish or Mohammedan rites or the rites of any Indian religion" with "according to the rites of the religious denomination or organisation concerned".

2.3.4 The Church of Scientology remarks that it is particularly interested in this investigation because relevant provisions of the Marriage Act refer to religions that are theistic and that practise widely-recognised forms of worship, supplication and veneration with respect to their god or gods. The Church remarks that although Scientology is a theistic religion and places the Supreme Being at the apex of its cosmology, Scientology religious practices do not include the same forms of worship, supplication and veneration as practised in religions such as Judaism, Islam and Christianity. The Church notes that Scientology religious practices rather seek to better one's understanding of and relationship with the Supreme Being as well as the entire cosmos, much like many Eastern religions such as Buddhism, Judaism and certain schools of

Hinduism, which seek to better one's understanding of and relation to some supernatural principle or power.

2.3.5 The Church of Scientology notes that independent and objective religious and legal organisations and experts, including the Human Rights Committee,³³ the UN Special

³³ The Church notes the United Nations' Universal Declaration of Human Rights (UDHR), the International Covenant on Economic Social and Cultural Rights (ICESCR), and the International Covenant on Civil and Political Rights (ICCPR) and refers particularly to article 26 of the ICCPR: "All persons are equal before the law and are entitled without discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, religion, language, political or other opinion, national or social origin, property, birth or other status." The Church notes that the Human Rights Committee in its comment on Article 26 defines discrimination as "any exclusion, restriction or preference" whether based on race, sex or religion "which has the purpose or effect of nullifying or impairing" equal treatment. It says that UN officials, experts, and UN-treaty-based bodies have consistently found that the expression "religion or belief," as well as the individual terms, "religion" and "belief," must be construed broadly to cover non-traditional religions and all forms of belief. The Church considers that the following comment is the most important finding by the United Nations on the definition of religion: "Article 18 protects theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief. The terms belief and religion are to be broadly construed. Article 18 is not limited in its application to traditional religions or to religions and beliefs with institutional characteristics or practices analogous to those of traditional religions. The Committee therefore views with concern any tendency to discriminate against any religion or belief for any reason, including the fact that they are newly established, or represent religious minorities that may be the subject of hostility by a predominant religious community."

Rapporteur,³⁴ the authors of the study *Freedom of Religion and Belief: A World Report*,³⁵ the

³⁴ A Special Rapporteur appointed in 1989 linked this mandate against discrimination into rites such as the marriage ceremony. In the study, *Elimination of all forms of intolerance and discrimination based on religion and belief*, the Special Rapporteur found that manifestations of intolerance and discrimination can occur when a corollary freedom to freedom of religion or belief is violated, including the freedom to celebrate holidays and ceremonies in accordance with the precepts of one's religion or belief. The Church notes that in 1996 the Special Rapporteur reports:

* All in all, the distinction between a religion and a sect is too contrived to be acceptable. A sect that goes beyond simple belief and appeals to a divinity, or at the very least, to the supernatural, the transcendent, the absolute, or the sacred, enters into the religious sphere and should enjoy the protection afforded to religions.

* The term sect seems to have a pejorative connotation. A sect is to be considered different from a religion, and thus not entitled to the same protection. This kind of approach is indicative of a propensity to lump things together, to discriminate and to exclude, which is hard to justify and harder still to excuse, so injurious is it to religious freedom.

* Religions cannot be distinguished from sects on the basis of quantitative considerations, saying that a sect, unlike a religion, has a small number of followers. This is in fact not always the case. It runs absolutely counter to the principle of respect and protection of minorities, which is upheld by domestic and international law and morality. Besides, following this line of argument, what are the major religions if not successful sects?

* Again, one cannot say that sects should not benefit from the protection given to religion just because they have no chance to demonstrate their durability. History contains many examples of dissident movements, schisms, heresies and reforms that have suddenly given birth to religions or religious movements.

³⁵ The Church remarks that the study finds that new religions must be treated in the same manner as traditional religions and that new religions are a target of discrimination:

* Freedom of religion therefore is not to be interpreted narrowly by states, for example, to mean traditional world religions only. New religions or religious minorities are entitled to equal protection. This principle is of particular importance in light of the evidence reflected in the Country entries, including those of the European section, revealing that new religious movements are a recurring target for discrimination or repression.

* Today new religious ideas, expressed through new religious movements, face a perception that their beliefs expressed are wrong or do not qualify as religious. Although the objection to new religious movements is often expressed in criticism of their methods, it is at bottom a rejection of their freedom of thought which stimulates hostility and restrictions on their organizations and activities. The challenge remains considerable to establish an ethic of tolerance towards those who differ on religious grounds.

Council of Human Rights Centre,³⁶ the European Court of Human Rights,³⁷ the Organisation of Security and Cooperation in Europe,³⁸ the World Congress on Religious Liberty,³⁹ the Zimbabwe

³⁶ In its study on religion under Article 9 of the European Convention on Human Rights, the Centre noted that the concept of religion is “not confined to widespread and globally recognized religions but also applies to rare and virtually unknown faiths. Religion is thus understood in a broad sense”.

³⁷ The Church remarks that the Court noted in *Manoussakis and Others v Greece* on 26 September 1996 that a fundamental human rights policy of the European Community is to secure true religious pluralism, and that the Court made it clear, in support of this policy, that the European Convention excludes any discretion on the part of the State to determine whether religious beliefs or the means used to express such beliefs are legitimate. The Court stressed that seemingly innocuous administrative action restricting the rights of minority religions operated as a lethal weapon against the right to freedom of religion. The Church also refers to Article 14 of the European Convention of Human Rights which provides that the enjoyment of the rights and freedoms set forth in the Convention shall be secured without discrimination on any ground such as sex, race or religion. The Church notes that the European Court of Human Rights decided in *Hoffman v Austria* 17 EHRR 293 (1994) that any disparate treatment based essentially on a difference in religion alone is not acceptable.

³⁸ The Church remarks that the meeting in April 1997 convened by the OSCE in Warsaw gave rise to a report which came to the following conclusion: “As a practical matter, the approach suggested by the General Comment of the Human Rights Committee is sound and should be followed. In essence, that approach recognizes that the term religion should be broadly construed, and that it extends to nontraditional and unpopular belief systems.”

³⁹ The Church notes the 4th World Congress on Religious Liberty held in June 1997 in Rio De Janeiro, Brazil by the International Religious Liberty Association, where the participants issued a concluding statement saying that they “accept and affirm the provisions of the United Nations Human Rights Committee's General Comment to Article 18 of the International Covenant on Civil and Political Rights (ICCPR) ... In particular, the Congress participants concur with the General Comment's recognition of the broad scope of religious freedom in its determination that 'Article 18 is not limited in its application to traditional religions or to religions and beliefs with institutional characteristics or practices analogous to those of traditional religions. The Committee therefore views with concern any tendency to discriminate against any religion or belief for any reasons, including the fact that they are newly established, or represent religious minorities that may be the subject of hostility by a predominant religious community'.” The Church remarks that the Congress noted that it affirms that the principle of religious liberty applies equally to new religions as to established ones, Government and public officials should exercise caution and sensitivity when characterising religious groups or religious beliefs, so as to avoid stigmatising specific groups or contributing to patterns of intolerance.

Supreme Court⁴⁰, the High Court of Australia⁴¹, the High Court of New Zealand⁴² and the United

⁴⁰ In *In Re Chickweche* 1995 4 SA 284 (ZSC) a devout follower of the Rastafari movement lodged an application in the High Court for registration as a legal practitioner. The Court reviewed the evidence of an expert who provided his opinion that the Rastafari movement is a religion and remarked: "The Court is not concerned with the validity or attraction of the Rastafarian movement, only with their sincerity." The court relied also on the findings of Dr JN Pandey in *Constitutional Law of India* at 197 where he stated: "Religion is a matter of faith with individuals or communities and it is not necessarily theistic. A religion has its basis in 'a system of beliefs and doctrines which are regarded by those who profess that religion as conclusive to their spiritual well-being'; but it will not be correct to say that religion is nothing else but a doctrine of belief. A religion may only lay down a code of ethical rules for its followers to accept, it may prescribe rituals and observances, ceremonies and modes of worship which are regarded as integral parts of religion, and those forms and observances might extend even to matters of food and dress. Religion is thus essentially a matter of personal faith and belief. Every person has the right not only to entertain such religious beliefs and ideas as may be approved by his judgment or conscience but also to exhibit his belief and ideas by such overt acts which are sanctioned by his religion." The court decided to adopt a broad approach to defining religion and held that the applicant's dreadlocks were a protected form of religious expression: "Accepting the status of Rastafarianism as a religion in the wide and non-technical sense referred to, I am satisfied that the applicant's manifestation of his religion by the wearing of dreadlocks falls within the protection afforded by ... [the religious freedom clause of the Zimbabwe] Constitution."

⁴¹ The Church remarks that, like the USA, Australia does not require either a theistic belief system or worship services, and that this approach was outlined in three supporting decisions by the High Court of Australia in *Church of the New Faith v Commissioner of Pay-roll Tax (Vict)* (1983) 154 CLR 120, involving a church of Scientology located in Australia. The Church states that despite the differences between the three opinions, each emphatically rejected a definition based on exclusively theistic notions. The Church remarks that the first opinion approached the definition as warranting some criteria that would result in a guarantee of religious freedom, and, according to them, there are two criteria for a religion, namely firstly, a belief in a supernatural being, thing or principle, and secondly, a system of canons of conduct that would give effect to that belief. The Church notes that the second opinion set forth a series of indicia they derived by empirically observing accepted religions, each of varying importance with respect to specific cases, and that, according to them, there are four primary indicia: firstly, a belief in something supernatural, some reality beyond that which can be conceived by the senses, secondly, the belief in question relates to man's nature and place in the universe and his relationship to things supernatural, thirdly, as a result of this belief adherents are required or encouraged to observe particular codes of conduct or engage in particular practices that have supernatural significance, and, fourthly, the adherents comprise an one or more identifiable groups. The Church also notes the third opinion which declined to set forth an exhaustive list of criteria in light of the sheer diversity of religious beliefs and practices throughout the world, stating that there was no single acceptable criterion. The Church notes that specific criteria were rejected that had been relied on by the court *a quo* to negate a finding of religiosity, including the absence of a belief in a personal God or a Supreme Being: "Most religions have a god or gods as the object of worship or reverence. However, many of the great religions have no belief in god or a supreme being in the sense of a personal deity rather than an abstract principle. The Ravadan Buddhism, the Samkhya school of Hinduism and Taoism, are notable examples. Though these religions assert an ultimate principle, reality or power informing the world of matter and energy, this is an abstract conception described as unknown or incomprehensible."

⁴² The Church notes further that the objective and broad approach taken in the Australian case of *Church of the New Faith v Commissioner of Pay-roll Tax (Vict)* was followed by the High Court of Auckland in *Centrepoin Community Growth Trust v Commissioner* [1985] 1 NZLR 673.

States Supreme Court⁴³ as well as scholars and other experts in the field of religion, such as

⁴³ The Church says that the theistic notion of religion was dominant until the 1940's when the Supreme Court changed direction in regard to the theistic definition of religion, noting that L. Tribe *Constitutional Law* states at 826: "(A)t least through the nineteenth century, religion was given the same fairly narrow reading in the two clauses: 'religion' referred to theistic notions respecting divinity, morality and worship, and was recognized as legitimate and protected only insofar as it was generally accepted as 'civilized' by Western standards. Courts, moreover, were considered competent forums for making such determination." The Church further notes that, in 1961, the Court discarded the theistic test in *Torcaso v Watkins* 367 US 488 (1961) by announcing its groundbreaking rule that the First Amendment precluded government from aiding "those religions based on a belief in the existence of God as against those religions founded on different beliefs". The Church points out that the Court remarked that "[a]mong religions in this country which do not teach what would generally be considered a belief in the existence of God are Buddhism, Taoism, Ethical Culture, Secular Humanism and others". The Church also notes the decisions of the USA Supreme Court which require that the States act even-handedly in relation to different religions such as *Larson v Valente* 456 US 228, 245 (1982): "This constitutional prohibition of denominational preferences is inextricably connected with the continuing vitality of the Free Exercise Clause... Madison's vision - freedom for all religion being guaranteed by free competition between religions - naturally assumed that every denomination would be equally at liberty to exercise and propagate its beliefs. But such equality would be impossible in an atmosphere of official denominational preference. Free exercise thus can be guaranteed only when legislators - and voters - are required to accord to their own religions the very same treatment given to small, new, or unpopular denominations."

Professors Bryan Wilson⁴⁴, David Chidester⁴⁵ and M Darrol Bryant⁴⁶ have come to the same conclusion, namely that principles of equality and non-discrimination mandate a broad definition of religion which includes new religions and forbids discrimination against them.

⁴⁴ Reader Emeritus in Sociology at Oxford University. The Church notes that he places this issue squarely in the context of the influence of the State on the individual and that only through an objective analysis can a society achieve equality under the law in a manner which embraces the diversity of religious expression known in the modern world:

* Just as scholars have come to recognize the contemporary diversity among religions in today's society, so, if basic human rights of freedom of belief and practice are to be maintained, it becomes essential that old stereotypes of just what constitutes religion should be relinquished. In a culturally pluralistic world, religion, like other social phenomena, may take many forms. Just what is a religion cannot be determined by the application of concepts drawn from any particular tradition.

* If religions are accorded parity by the state, it becomes necessary to adopt abstract definitive terms to encompass the diversity of religious phenomenon.

* As modern scholarship has widened our acquaintance with other cultures, so it has been recognized that what is appropriately designated as 'religion' often departs in many particulars ... from those which characterize Christianity.

The Church states that scholars have had to broaden their view to achieve what Dr Wilson characterises as "ethically neutral definitions" of religion, which consist of "elements [which] came to be recognised as constituting religion, regardless of the substance of the beliefs, the nature of the actual practices, or the formal status of the functionaries in their service".

⁴⁵ Of the University of Cape Town. The Church states that Professor Chidester notes a historical differentiation between "religion" and "superstition" which often "collapses into a basic opposition between 'us' and 'them'". The Church remarks that he also notes that it is not only the indigenous African religions that have fallen victim to the "us versus them" demarcations between religions, but that new religions have suffered the same discrimination:

* In Southern Africa, this conceptual opposition between religion and superstition has had a long history in European reports about indigenous African beliefs and practices. Throughout the nineteenth century, European observers refused to recognize that these forms of African religious life should count as 'religion'.

* Recalling the Christian missionary's nineteenth-century denial of African religion, [the] denial [in question] ... was based upon a specific Christian assumption about the proper form of worship that is supposedly necessary for beliefs and practices to count as authentic religion.

* Since a religious way of life can be regarded as a way of being human, this denial of the religiosity of others has also been a denial of the full humanity of other human beings. The question of the definition of religion, therefore, is not merely an academic issue. It is as basic as the question: What counts as a human being?

* If religions are to be accorded parity by the state, it becomes necessary to adopt abstract definitive terms to encompass the diversity of religious phenomenon.

* As modern scholarship has widened our acquaintance with other cultures, so it has been recognised that what is appropriately designated as 'religion' often departs in many particulars ... from those which characterize Christianity.

The Church notes that he defines religion more loosely as "a distinctive human experiment in the production of sacred time and sacred space" although he also analyses religion in terms of religious beliefs, ritual, ethics, experience and organisation.

⁴⁶ Of the University of Waterloo, Ontario, Canada who defines, as the Church states, religion as "a community of men and women bound together by a complex of beliefs, practices, behaviours and rituals that seek, through this Way, to relate human to sacred/divine life.

2.3.6 The Church of Scientology further remarks that although there is no decision concerning the status of non-theistic religions under the Canadian legal concept of religion, the provincial governments have routinely granted authorisation to solemnise marriages as well as exemption from property taxation to their ministers and organisations. The Church considers that Canada's definition of religion would presumably fall between the United States' definition on the one hand and England's on the other, but says that at least one case interpreting the guarantee of freedom of religion in the Canadian Charter of Rights indicates that the Supreme Court of Canada would take the broader approach. The Church also notes that in *Regina v Big M Drug Mart* 18 CCC 3d 385 (1985) the Supreme Court addressed the constitutionality of a law that prohibited certain retail sales on Sundays. The Church remarks that in invalidating the law, the majority of the Court made it clear that it would not tolerate sanctioning the religious rites of one religion over another.⁴⁷ The Church of Scientology further considers the concurring opinion of Wilson J in the last-mentioned Canadian case in which he harshly criticised the statute for being specific to one religion and thereby inherently discriminatory.⁴⁸

2.3.7 The Church of Scientology also considers that despite the fact that religion has been an integral part of English law since the adoption of the Statute of Uses two centuries ago, there is no definitive judicial decision by an English court defining religion. The Church notes that the closest such decision is *In Re South Place Ethical Society* [1980] 1 WLR 1565 in which Dillon J held that the objects of the Society which professed a belief in "ethical principles" but no belief in God or "anything supernatural", were not for the advancement of religion because there are two "essential attributes" of religion that it did not have, namely "faith and worship; faith in a god and worship of that god". The Church of Scientology is of the view that the reason why this decision is not definitive is two-fold: first, the beliefs of the Ethical Society specifically excluded anything supernatural, such as a transcendent or spiritual unifying force within the universe, irrespective of the Society's non-belief in a god or other deity. (The Church therefore argues that the Court never reached the question of the significance of a belief in a supernatural principle or

⁴⁷ [A] definition of freedom of conscience and religion incorporating freedom from compulsory religious observance is not only in accord with the purpose and traditions underlying the Charter, it is also in line with the definition of that concept as found in the Canadian jurisprudence. ... It [was] urged that the choice of the day of rest adhered to by the Christian majority is the most practical. This submission is really no more than an argument of convenience and expediency and is fundamentally repugnant. ...

⁴⁸ [O]ne can agree with the Chief Justice that in enacting the Lord's Day Act '[t]he arm of the state requires all to remember the Lord's day of the Christians and to keep it holy' and that '[t]he protection of one religion and the concomitant nonprotection of others imports disparate impact destructive of the religious freedom of the collectivity'. Accordingly, the Act infringes upon the freedom of conscience and religion guaranteed in s. 2(a) of the Charter.

thing, as did the high Court of Australia three years earlier.) Secondly, the Church notes that the decision is patently illogical, since under the Court's rule, Buddhism and other non-theistic religions clearly would not qualify. The Church remarks that when confronting the status of Buddhism, Dillon J simply stated that he did "not know enough" about Buddhism and that it may be an "exception" to the rule.⁴⁹ The Church notes that Dillon J never explained why Buddhism should be singled out from among all the non-theistic religions and considers that neither the rule nor the "exception" makes sense. The Church draws attention to the decision of the Supreme Court of Italy which rejected a similar definition of religion requiring obedience and reverence of a Supreme Being as illegitimate finding that it was based on philosophical and socio-historical assumptions that are incorrect and that there was manifest illogicality in the reasoning supporting it.

2.3.8 The Church of Scientology notes that whatever the breadth of the theistic requirement of the case of the *South Place Ethical Society*, the leading authority on the English law of charity believes that the decision will have diminishing validity.⁵⁰ The Church considers that the effect of the UK Human Rights Act of 1998 will be that England's definition of religion will be as sweeping as that of the European Convention and will cover both theistic and non-theistic religions.⁵¹

2.3.9 The Church of Scientology states that experts in the field of religion have developed a number of approaches to defining religion in an "ethically neutral" way, and that interestingly enough, these approaches have resulted in somewhat functionally equivalent definitions of religion. The Church notes that these definitions include three principal elements that closely

⁴⁹ The Church notes *R v Registrar General Ex Parte Segerdal* [1970] 2 QB 697 which characterises Buddhism as an "exceptional case" in imposing a theistic and worship requirement in deciding whether a facility could qualify as a "place of worship".

⁵⁰ The Church quotes Picarda *Law and Practice Relating to Charities* 2nd 1995 at 71: "Whether this test will prevail after the *Church of the New Faith* case remains to be seen. The fact that the latter case has been followed in New Zealand suggests that it may not."

⁵¹ The Church considered that the UK Human Rights Act (the purpose of which was to enact the broad-ranging and fundamental rights contained in the European Convention on Human Rights into domestic law) would mean a more imminent and dramatic demise of the rule. Article 9 of the Human Rights Act of 1998 provides as follows: "1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance. 2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others."

parallel the definition of religion enunciated by the High Court of Australia in *Church of the New Faith v Commissioner of Pay-roll Tax* as well as other courts in other countries that have addressed the issue of how the definition of religion should be addressed, namely —

- C belief in an Ultimate Reality transcending the here-and-now of the secular world, whether called God, Supreme Being, or simply some supernatural principle such as a belief in the transmigration of one's spirit;
- C religious practices directed towards understanding, attaining or communing with, this Ultimate Reality; and
- C a community of believers who join together in pursuing this Ultimate Reality.

2.3.10 The Church of Scientology considers that there is probably little doubt that a change in the law is long overdue since the law is also inconsistent with the new order which gains its the impetus from the South African Bill of Rights. The Church notes that the statutory language of section 3 of the Marriage Act is a relic of the apartheid past and that the observation was made that although there has been no religious intolerance of Christianity in South Africa, the same cannot be said of other religions.⁵² The Church refers to Justice Sach's remark in *S v Lawrence*⁵³ that religious marginalisation in the past coincided strongly in South Africa with racial discrimination, social exclusion and political disempowerment. The Church suggests that the principles which Justice Sachs in *S v Lawrence* found flowing from the religious freedom clause of the Constitution should be used as the guiding light in amending the Marriage Act.

South Africa is an open and democratic society with a non-sectarian state that guarantees freedom of worship; it is respectful of and accommodatory towards, rather than hostile to or walled-off from, religion: acknowledges the multi-faith and multi-belief nature of the country; does not favour one religious creed or doctrinal truth above another; accepts the intensely personal nature of individual conscience and affirms the intrinsically voluntary and non-coerced character of belief; respects the rights of non-believers; and does not impose orthodoxies of thought or require conformity of conduct in terms of any particular world-view. The Constitution, then, is very much about the acknowledgement by the state of different belief systems and their accommodation within a non-hierarchical framework of equality and non-discrimination. It follows that the state does not take sides on questions of religion. It does not impose belief, grant privileges to or impose advantages on adherents of any particular belief, require conformity in matters simply of belief, involve itself in purely religious controversies, or marginalise people who have different beliefs.

2.3.11 The Church of Scientology considers that the Constitution implicitly recognises that the

⁵² Van Wyk *et al Rights and Constitutionalism, The New South African Legal Order* Kenwyn: Juta 1994 at 597.

⁵³ 1997 4 SA 1176 (CC) at 1229D-E and 1997 (10) BCLR 1348 (CC) at 139C.

most important feature of a definition of religion is that it not be discriminatory and that it treat all religions equally. The Church notes that the Constitutional Court held in *Fraser v Children's Court Pretoria North*⁵⁴ that there can be no doubt that equality lies at the very heart of the Constitution, that it permeates and defines the very ethos upon which the Constitution is premised. The Church further considers that the government's constitutional obligation to eradicate discrimination between religions clearly applies to governmental regulation of the solemnisation of marriages. The Church states that as the Court noted in *Ryland v Edros*,⁵⁵ the values of equality and tolerance of diversity and the recognition of the plural nature of our society are key values that underlie our Constitution. The Church suggests that in order to remove the anomalies created by many years of discrimination, the Marriage Act must be amended to allow ministers of any religion to solemnise marriages, the new legislative language must be broad and flexible enough to encompass all religions and it must also establish objective criteria for the definition of religion so that the personal opinions, prejudices and predilections of those who apply it are not permitted to undermine the principles of equality and non-discrimination as set forth in the Bill of Rights.

2.3.12 Hence, the Church of Scientology suggests that in order to abolish the anomalies created by many years of discrimination, the Marriage Act must now be amended and that reform in the area of marriage rites is necessary to harmonise the law with social changes in South African society and to give effect to the principles of religious freedom and equal treatment contained in the South African Constitution. The Church considers that sections 9 and 15 of the Constitution require that section 3(1) of the Marriage Act be amended by removing its discriminatory language limiting marriage officers to specified religions, namely by replacing the phrase "*according to Christian, Jewish or Mohammedan rites or the rites of any Indian religion*" with the ethically neutral phrase "*according to the rites of the religious denomination or organisation concerned*". The Church suggests that such a change would be fully consistent with the provision of section 15(3)(a) of the Constitution providing that "this section does not prevent legislation recognising ... marriages concluded under any tradition, or a system of religious, personal or family law", since nowhere in that section, or anywhere else in the Constitution for that matter, is there any indication that legal marriage rites should be limited to the four enumerated religions.

2.3.13 The Church recommends that in order to meet the constitutional requirement, the

⁵⁴ 1997 2 SA 261 (CC) at 272A and 1997 2 BCLR 153 (CC) at 161F — G.

⁵⁵ 1997 1 BCLR 77(C) at 91 I — F.

amended legislation should provide that the term "religion" be construed broadly, as is provided in the UN Human Rights Committee's General Comment to Article 18 of the International Covenant on Civil and Political Rights. The Church states that historical tests for religiosity derived from Judaeo-Christian concepts no longer have utility since they exclude non-theistic religions, and religions that do not involve practices of worship. The Church considers that the amended legislation should also establish objective criteria such as the elements mentioned above, for application by the Department of Home Affairs. The Church suggests that the adoption of such criteria will ensure the application of "ethically neutral definitions" of religion consistent with sections 9 and 15 of the Constitution. The Church is of the view that only through such a neutral approach which minimises personal prejudices and predilections can the constitutional values of equality under the law, tolerance of diversity and recognition of the plural nature of the South African society be observed.

2.3.14 The Church suggests, finally, that the addition of the following subsections to section 3 would accomplish the aim advocated by them:

3(a) For the purposes of subsection (1), the term "religious denomination or organization" shall be construed as broadly as possible to include any identifiable group of individuals holding a common belief in some supernatural being, thing or principle concerning man's place in the universe and relationship to the supernatural and who have established practices or codes of conduct giving effect to such common belief.

3(b) Without derogating from the generality of paragraph (a), the term "religious denomination or organization" shall not be construed to exclude religions that are nontheistic, nontraditional, newly established or lacking institutional characteristics.

(ii) The Pagan Federation of South Africa

2.3.15 Bower and Cardona, the legal representatives of the Pagan Federation of South Africa (the Federation) note that during the past years after overseeing a suitable constitution and other legal requirements were met, they were requested by the Federation to attend to the designation of the Federation's high priestess as a marriage officer. Bower and Cardona state that considerable hurdles were placed before them and on 4 July 1997 they received a letter from the Department of Home Affairs outlining their reasons why their clients could not be afforded the privileges of a marriage officer. Bower and Cardona remark that before such decision was made, they forwarded considerable literature outlining Paganism as well as the objects and the responsible attitude of their clients, who despite being distrusted and relatively unknown have a considerable following. They state that the reply they received outlines most specifically the

restrictions placed in the Marriage Act in that it states that only the ministers of certain religious organisations as designated may be appointed as marriage officers. Bower and Cardona consider this situation to be discriminatory and indicative of an unequal situation in that it excludes their clients who are an established religion nationally and internationally and who they believe qualify in all material respects as marriage officers. They recommend that the Marriage Act should be amended so as to provide that the designation of who may be appointed as marriage officers includes all religions with qualifications as to who in such religion may act as a marriage officer.

2.3.16 The beliefs of Paganism are explained as follows:⁵⁶

Neopagans believe that divinity is both immanent (internal) and transcendent (external), with immanence being far more important for us to pay attention to right now. This principle of immanence is frequently phrased as, 'Thou art God' or 'Thou art Goddess.' Deities can manifest at any point in space or time which They might choose, whether externally (through apparent 'visitations') or internally (through the processes known as 'inspiration,' 'conversation,' 'channelling,' and 'possession'). This belief often develops among neopagans into pantheism ('the physical world is divine'), panentheism ('the Gods are everywhere'), animism ('everything is alive'), or monism ('everything that exist is one being') all of which are concepts accepted by some Neopagans.

...

The term 'Pagan' comes from the Latin 'paganus,' which appears to have originally had such meanings as 'country dweller,' 'villager,' or 'hick.' The early Roman Christians used 'pagan,' to refer to everyone who preferred to worship pre-Christian divinities, whom the Christians had decided were all 'really' demons in disguise. Over the centuries, 'pagan' became an insult, applied to the monotheistic followers of Islam by the Christians (and vice versa), and by the Protestants and Catholics towards each other, as it gradually gained the connotation of '(a follower of and/or) a false religion.' By the beginning of the twentieth century, the word's primary meanings became a blend of 'atheist,' 'agnostic,' 'hedonist,' 'religionless,' etc., (when referring to an educated, white, non-Celtic European) and 'ignorant savage' when referring to everyone else on the planet).

Today there are many people who proudly call ourselves 'Pagan,' and we use the word differently from the ways that most mainstream Westerners do. To most of us, 'Pagan' is a general term for polytheistic religions old and new, as well as their members. ...

'Neopaganism' or 'Neo-paganism' refers to those religions created since 1960 or so (though they had literary roots going back to the mid-1800's), that have attempted to blend with what their founders perceived as the best aspects of different types of Paleopaganism with modern 'Aquarian Age' ideals, while consciously striving to eliminate as much as possible of the traditional Western monotheism and dualism.

(iii) The Campus Law Clinic of the University of Natal

⁵⁶ Isaac Bonewits "What Neopagans Believe" as contained in the publication *Pagan Africa* Vol 1 Issue 2 December 1997 at 11 and 13 — 14 published by the Pagan Federation of South Africa.

2.3.17 The Campus Law Clinic of the University of Natal also suggests that the category of marriage officers should be widened to include all religious organisations and all other community leaders who have recognised standing in the community such as Chiefs and Headmen.

(iv) The Union of Orthodox Synagogues of South Africa

2.3.18 Chief Rabbi CK Harris states that the Jewish Community would support the recognition of all marriages performed under religious auspices and all marriages conducted by ethnic communities.

(v) The Federal Council of African Indigenous Churches

2.3.19 The Federal Council of African Indigenous Churches also proposes that a marriage officer provided by that particular church should officiate at the marriage, the marriage officer should issue the Church's marriage certificate and that the marriage certificates issued by African indigenous churches should be recognised. The Council suggests that queries about marriage certificates issued by African Indigenous Churches should be directed to the church organisation or council concerned.

(vi) The Church of Jesus Christ of the Latter-Day Saints

2.3.20 Mr De Wet (of the firm of attorneys D De Wet) representing the Church of Jesus Christ of the Latter-Day Saints ("the Church") remarks that the present position regarding the Church is that certain members of the Church in a position of responsibility have been appointed by the Minister of Home Affairs to perform civil marriages, and that other members of the Church in a position of responsibility are appointed by the Church to solemnise Church marriages within the Temple after the civil marriage has taken place.⁵⁷ He also states that certain persons appointed by the Church to solemnise Church marriages within the Temple are not South African citizens. Mr De Wet recommends that the Minister of Home Affairs appoint persons, including non-citizens, holding a responsible position in the Church, as designated by the Church, as marriage officers. It should be noted that the Church considers the Temple marriage as the "real"

⁵⁷ The Church of Jesus Christ of the Latter-Day Saints was established in the USA on 6 April 1830. As at 31 December 1997 the Church was established in 143 nations worldwide with 24 670 congregations consisting of 10 070 524 members. The Church was established in South Africa in 1853. To date the Church in South Africa has 95 congregations consisting of 25 360 members.

marriage and not the civil one.

(vii) Mrs P Samjhawan on Hindu marriage officers

2.3.21 Mrs P Samjhawan states that she was married by a Hindu marriage officer and that she and her husband had all intentions of *legalising* their marriage in the Magistrates' Court. She explains that her husband died recently and she now suffers the consequences of her marriage not being recognised. She notes that she is totally helpless, she cannot attend to legal matters pertaining to her husband's estate, her husband's mother is the executor of the estate, she is not receiving any support from her inlaws, they feel they are in no way responsible for her and they are bound by her late husband's will. She considers that this is so due to the constraint that she and her husband were not *legally* married. Mrs P Samjhawan raises the question why should her marriage not be recognised as legal, noting that they were married by a Hindu marriage officer and in the presence of witnesses. She explains that she has based her marriage on affection and understanding rather than on a legal footing. She further notes that if she took her vows under these pretexts and God's guidance, why should people like her suffer these misgivings.

(viii) The Muslim Assembly

2.3.22 The Executive Director of the Muslim Assembly, Mr Moosa Valli Ismail (the "Muslim Assembly"), notes that the Muslim Assembly wishes to stress that every day spouses to Muslim marriages and their children suffer in various forms undue hardship because of the non-recognition of Muslim marriages, despite the fact that the Cape High Court ruled in *Edros v Ryland* that the decision in *Ismail v Ismail*⁵⁸ that Muslim marriages are against public policy, no longer reflects the spirit of the new Constitution which demands tolerance and respect for religious systems and cultural institutions. The Muslim Assembly remarks if parties by voluntary association choose to marry according to the laws of the Islamic faith that the Constitutional Court is likely to come to the conclusion that where provisions of the Islamic personal and family law are in conflict with certain provisions of the Bill of Rights, that the limitation clause of the Constitution will be invoked on the basis that respect for a person's religious systems of law is a matter of choice by adherents of the Islamic faith, the recognition of such laws being both necessary and reasonable in an open and democratic society. The Muslim Assembly considers

that Roman Dutch Law and the general law of the law has been foisted onto the lives of the Muslims in regard to their private domain, thereby causing a great deal of hardship to Muslim spouses and their children in regard to matters which are of a private and/or personal nature, including property consequences that flow from Muslim marriages. The Muslim Assembly suggests that, like customary marriages, Muslim marriages (although potentially polygamous) should be recognised, subject to specified procedures laid down by Islamic Law. The Muslim Assembly remarks that in any event Muslim marriages are *de facto* monogamous whilst polygamous marriages are an exception.⁵⁹

(ix) Mr Faizel Jacobs on Muslim marriages

2.3.23 Mr Faizel Jacobs⁶⁰ remarks that Muslim marriages should not only be recognised, but legalised, but subject to the condition that such a marriage be legal and valid according to the law of Islam.

(d) Evaluation contained in discussion paper 88

2.3.24 Discussion paper 88 contained a detailed analysis of the in the case of *Ismail v Ismail*⁶¹ which was handed down in 1983 by the then Appellate Division of the High Court of South African (now the Supreme Court of Appeal) on the issue of Muslim marriages in order to reflect the operation of the Marriage Act on the one hand and, on the other, how the question of the recognition of these marriages was dealt with in the past.⁶² Recent cases such as *Amod v Multilateral Motor Vehicle Accidents Fund (Commission for Gender Equality intervening)*⁶³ however overtook the *Ismail* case, where the court held as follows:

[20] ... it was common cause that the Islamic marriage between the appellant and the deceased

⁵⁹ Ms Zuleka Adam remarks as follows in her submission on this issue: "Polygamy is not recommended but only permitted in extraordinary circumstances; the swing towards conservatism however, does not bode well for women's choices when a spouse decides to engage in plural marriages. This will further diminish the survival of monogamous marriages and increase the economic strain on family life and women's self-esteem."

⁶⁰ BA LLB currently doing articles at the University of Cape Town Law School.

⁶¹ 1983 1 SA 1006(A).

⁶² As is noted in Chapter 1 above, the question of the legal recognition of Muslim marriages is, inter alia, considered in the Commission's investigation into Islamic Marriages and Related Matters, and a discussion paper will be published later this year.

⁶³ 1999 (4) SA 1319 (SCA) at 1327.

was a de facto monogamous marriage; that it was contracted according to the tenets of a major religion; and that it involved 'a very public ceremony, special formalities and onerous obligations for both parents in terms of the relevant rules of Islamic law applicable'. The insistence that the duty of support which such a serious de facto monogamous marriage imposes on the husband is not worthy of protection can only be justified on the basis that the only duty of support which the law will protect in such circumstances is a duty flowing from a marriage solemnised and recognised by one faith or philosophy to the exclusion of others. This is an untenable basis for the determination of the boni mores of society. It is inconsistent with the new ethos of tolerance, pluralism and religious freedom which had consolidated itself in the community even before the formal adoption of the interim Constitution on 22 December 1993. ...

[21] This new ethos is substantially different from the ethos which informed the determination of the boni mores of the community when the cases which decided that 'potentially polygamous' marriages which did not accord with the assumptions of the culturally and politically dominant establishment of the time did not deserve the protection of the law for the purposes of the dependant's action. ...

[22] The contrast between the ethos which informed the assessment of boni mores in this kind of approach and the ethos which had come to inform the same assessment in more recent times is evident from the judgment of Farlam J in *Ryland v Edros* where the following is stated:

'Can it be said, since the coming into operation of the new Constitution, that a contract concluded by parties which arises from a marriage relationship entered into by them in accordance with the rites of their religion and which as a fact is monogamous is "contrary to the accepted customs and usages which are regarded as morally binding upon all members of our society" or is "fundamentally opposed to our principles and institutions"?

I think not. I agree with Mr Trengove's submission that it is quite inimical to all the values of the new South Africa for one group to impose its values on another and that the Courts should only brand a contract as offensive to public policy if it is offensive to those values which are shared by the community at large, by all right-thinking people in the community and not only by one section of it.

It is clear, in my view, that in the *Ismail* case the views (or presumed views) of only one group in our plural society were taken into account.'

[23] I have no doubt that the boni mores of the community at the time when the cause of action arose in the present proceedings would not support a conclusion which denies to a duty of support arising from a de facto monogamous marriage solemnly entered into in accordance with the Muslim faith any recognition in the common law for the purposes of the dependant's action; but which affords to the same duty of support arising from a similarly solemnised marriage in accordance with the Christian faith full recognition in the same common law for the same purpose; and which even affords to polygamous marriages solemnised in accordance with African customary law exactly the same protection for the same purpose ... The inequality, arbitrariness, intolerance and inequity inherent in such a conclusion would be inconsistent with the new ethos which prevailed on 25 July 1993 when the cause of action in the present matter commenced. The boni mores of the community would at that time support the approach which gave to the duty of support following on a de facto monogamous marriage in terms of the Islamic faith the same protection of the common law for the purposes of the dependant's action, as would be accorded to a monogamous marriage solemnised in terms of the Christian faith.

2.3.25 It is therefore necessary to refer only briefly to the *Ismail* case where the court stated that section 3(1) of the Marriage Act does not accord any recognition whatever to polygamous unions, that section 3(1) clearly relates only to the form of the marriage ceremony, and not to the

essentials of the marriage as such. The court stated that the section enables a Muslim male and a Muslim female to have their marriage solemnised according to Muslim rites by an *Imam* who has been designated a marriage officer; but, if the marriage is intended to be a monogamous marriage, the *Imam*, officiating at such a marriage, will also have to comply with all the prescribed formalities pertaining to the solemnisation of marriages under the Act such as, for example, the provisions of s 29(2) which require, inter alia, that a marriage be solemnised in the presence of the parties themselves.

2.3.26 The Court stated that having considered all the arguments presented on plaintiff's behalf, it has come to the conclusion that it would not be justified in deviating from the long line of decisions in which South African Courts have consistently refused, on grounds of public policy, to recognise, or to give effect to the consequences of, polygamous unions contracted in South Africa, statutory exceptions apart. The Court considered that the concept of marriage as a monogamous union is firmly entrenched in our society and the recognition of polygamy would, undoubtedly, tend to prejudice or undermine the status of marriage as we know it; and from a purely practical point of view it would also be unwise to accord recognition to polygamous unions for the simple reason that all our marriage and family laws - and to some extent also our law of succession - are primarily designed for monogamous relationships. The Court held that in the result, it has come to the conclusion that the polygamous union between the parties in the instant case must be regarded as void on the grounds of public policy.⁶⁴

2.3.27 It was pointed out in discussion paper 88 that the Commission provisionally agreed with the view held by the Church of Scientology that the matrimonial law should be harmonised with social changes in South African society and that effect should be given to the principles of religious freedom and equal treatment which are contained in the South African Constitution. It was stated that the first issue that had to be resolved is whether the Church of Scientology's

⁶⁴ The discussion paper also pointed out that as recent as 1995 the Transvaal Provincial Division of the High Court stated in the case of *Kalla and Another v The Master and Others* 1995 (1) SA 261 (T) that the reliance upon section 14(1) of the Constitution to validate retrospectively a marriage which was legally invalid in April 1992 when it was terminated by the death of the deceased, is misplaced. Mr Justice Van Dijkhorst remarked in passing that the argument that Islamic polygamous marriages are no longer invalid in our law in view of s 14(1) of the Constitution may well flounder on the provisions of s 14(3) as it could be argued that these would not have been necessary had the draftsmen of the Constitution foreseen that s 14(1) would validate such unions and that the draftsmen in fact adopted the approach of *Seedat's Executors v The Master (Natal)* and provided for specified procedures. He further considered that apart from that, the principle of gender equality embodied in ss 8(2) and 119(3) and constitutional principles I, III and V (read with s 232(4)) may well lead to the conclusion that polygamous (and potentially polygamous) marriages are as unacceptable to the mores of the new South Africa as they were to the old.

suggested amendments to section 3(1) of the Marriage Act and specifically the phrase "*according to the rites of the religious denomination or organisation concerned*" will remedy the situation. Section 402.050 of the Kentucky Revised Statutes⁶⁵ which provides as follows was noted as an example of such a provision:

Marriage shall be solemnized only by:

- (1) Ministers of the gospel or priests of any denomination in regular communion with any religious society;
- (2) Justices and judges of the Court of Justice, retired justices and judges of the Court of Justice except those removed for cause or convicted of a felony, county judges/executives, and such justices of the peace and fiscal court commissioners as the Governor or the county judge/executive authorizes; or
- (3) A religious society that has no officiating minister or priest and whose usage is to solemnise marriages at the usual place of worship and by consent given in the presence of the society, if either party belongs to the society.

2.3.28 Another option considered was the route the Department of Home Affairs suggested in its Bill in granting authority to the Minister of Home Affairs to designate a person as a marriage officer once the Minister is satisfied that the denomination or organisation concerned is a bona fide religious denomination or organisation. A third possibility mentioned in the discussion paper would be to designate by proclamation recognised religious groups or religious organisations. It was explained that the question arises whether the last-mentioned possibility would be constitutional. It was further noted that a feature of a number of the Marriage Acts of other countries is the notion of *recognised or approved religions, churches or congregations*. The Marriage Act of the Canadian Province of New Brunswick provides that the Registrar may recognise a church or religious denomination where that church or religious denomination is duly incorporated under the laws of the province, and is, to the satisfaction of the Registrar, permanently established as to the continuity of its existence⁶⁶ in accordance with the criteria

⁶⁵ Section 46b—22(a) of the General Statutes of Connecticut contains a similar provision: "All judges and retired judges, either elected or appointed, family support magistrates, state referees and justices of the peace may join persons in marriage in any town in the state and all ordained or licensed clergymen, belonging to this state or any other state, so long as they continue in the work of the ministry may join persons in marriage. All marriages solemnized according to the forms and usages of any religious denomination in this state, including marriages witnessed by a duly constituted Spiritual Assembly of the Baha'is, are valid. All marriages attempted to be celebrated by any other person are void."

⁶⁶ Section 2(2). In terms of section 2(3) a decision by the Registrar to recognise, or a refusal to recognise, a church or religious denomination may be reviewed by the Minister of Health and Community Services, and any decision of the Minister to recognise a church or religious denomination shall be deemed to be a recognition under subsection (2).

prescribed by regulation.⁶⁷ The Alaskan Marriage Code provides that marriages may be

⁶⁷ The regulations to the Act provide that for the purposes of paragraph 2(2)(b) of the Act, a church or religious denomination is permanently established as to the continuity of its existence where the church or religious denomination has

- (a) subject to subsection (2), at least five years of continuous existence in New Brunswick as an organized society, association or body of religious believers or worshippers, and
- (b) a membership consisting of not less than twenty-five persons who
 - (i) are nineteen years of age or more,
 - (ii) profess to believe in the same religious doctrines, dogma or creed, and
 - (iii) are organized for religious worship.

The five years of continuous existence in New Brunswick provided for in paragraph (1)(a) does not apply to a church or religious denomination whose founding members were previously members of another church or religious denomination if such other church or religious denomination meets the criteria prescribed in subsection (1).

The Marriage Act of the Province of British Columbia contains similar provisions:

2(1) On application, in the form required by the director, the director may register any religious representative as authorized to solemnise marriage.

(2) The application on behalf of a religious representative must be made by the governing authority with jurisdiction in British Columbia over the religious body to which the religious representative belongs.

(3) The wording of the form required by the director may be varied according to the facts, to set out other qualifications for registration recognized by this Act.

(4) The director may

- 1. issue to the governing authority one or more certificates of registration in respect of each religious representative registered under this Act, and
- (b) include in one certificate the names of any number of registered religious representatives who belong to the same religious body.

(5) The director must keep a register showing

- c the name of every religious representative registered,
- c the name of the religious body to which the religious representative belongs, and
- c the date of the religious representative's registration.

(6) The director must issue a certificate of registration to each religious representative registered under this Act.

(7) The director may register a person as a religious representative if the director is satisfied that

- (a) the doctrines of a religious body do not contemplate a religious representative for the religious body, and
- (b) the appropriate governing body of the religious body has designated a person to act in the place of a religious representative to perform all the duties imposed by this Act on a person solemnizing a marriage, other than solemnizing the marriage, in respect of marriages performed according to the rites and usages of the religious body.

3 (1) A person must not be registered as a religious representative unless the director is satisfied as follows:

- (a) that the person is a religious representative ordained or appointed according to the rites and usages of the religious body to which he or she belongs, or is by the rules of that religious body deemed an ordained or appointed religious representative because of some earlier ordination or appointment;
- (b) that the person
 - (i) is, as a religious representative, in charge of or officiating in connection with a congregation, branch or local unit in British Columbia of the religious body to which he or she belongs, or
 - (ii) is a resident in British Columbia who was formerly in charge of or

solemnised by a minister, priest, or rabbi of any church or congregation in the State, or by a commissioned officer of the Salvation Army, or by the principal officer or elder of recognised churches or congregations that traditionally do not have regular ministers, priests, or rabbis, anywhere in the State.⁶⁸ The Australian Marriage Act provides that the Governor-General may, by Proclamation, declare a religious body or religious organisation to be a recognised denomination for the purposes of that Act.⁶⁹ This provision was considered in the case of *Re: Michael William Nelson and: M Fish and R Morgan*⁷⁰. Mr Justice French noted that the applicant was the High Priest of a religious organisation called "Gods Kingdom Managed by his Priest and Lord" (KMP/L) who applied to the Attorney-General's Department under the provisions of the

officiating in connection with a congregation, branch or local unit in British Columbia, has been superannuated or placed on the supernumerary list, or is a retired religious representative in good standing of the religious body to which he or she belongs;

- (c) that the person is, as a religious representative, recognized by the religious body to which he or she belongs as authorized to solemnise marriage according to its rites and usages;
- (d) that the religious body to which the person belongs is sufficiently well established, both as to continuity of existence and as to recognized rites and usages respecting the solemnization of marriage, to warrant, in the opinion of the director, the registration of its religious representatives as authorized to solemnise marriage.

(2) If a religious representative is in British Columbia temporarily, and, if resident and officiating in British Columbia, might be registered under subsection (1) as authorized to solemnise marriage, the director may register the person as authorized to solemnise marriage during a period to be set by the director.

(3) A certificate of registration issued under subsection (2) must state the period during which the authority to solemnise marriage may be exercised.

⁶⁸ Alaska Statutes section 25.05.261.

⁶⁹ Section 26. The *Marriage Act 1961* provides two methods for authorising ministers of religion as marriage celebrants. Under both methods the authority of the celebrants to solemnise marriages is exactly the same. The first method by which a minister of religion may be authorised as a marriage celebrant is by applying directly to the Family Law Branch of the Attorney-General's Department for authorisation under subsection 39(2) of the Act by the Attorney-General or his delegate. This method is followed by ministers attached to independent churches that have not been recognised under section 26. Under the second method some established religious denominations are declared to be recognised denominations under section 26 of the Act to permit them to nominate ministers of religion directly to the State or Territory registrars for consideration for authorisation as celebrants. The criteria which are applied when assessing applications are—

1. the congregation must have been established for at least 12 months;
2. the religious organisation meets publicly for religious purposes and has an adult congregation of sufficient size to justify the appointment of a marriage celebrant to meet its needs; and
3. the person nominated by the congregation for authorisation as a marriage celebrant must be fit and proper to fulfil the role.

(See <http://law.gov.au/aghome/commaff/fllad/celebrants.html>)

⁷⁰ WA G138 of 1989 Fed No 29 in the Federal Court of Australia.

Marriage Act for registration as a minister of religion authorised to solemnise marriages and that registration was refused. The Court further noted that the applicant was advised by the Attorney-General's Department that organisations applying for proclamation as recognised denominations were required to meet certain guidelines which have been approved by successive Attorneys-General and that these guidelines were—

- C the applicant organisation should be independent of any other religious body;
- C the organisation should have congregations in more than one locality;
- C some form of central administration for the organisation should exist to act as a nominating authority; and
- C there should be some evidence that the organisation is stable and likely to continue as an entity.

2.3.29 The Court stated that the central point of the applicant's argument for damages turns upon the constitutionality of those provisions of the Marriage Act which give a particular status to certain proclaimed religious organisations. The Court noted the following features of the Act: only a person authorised under the Marriage Act may solemnise a marriage and it is an offence for a person not authorised to do so; if two persons are already married to each other they are prohibited from going through another form of ceremony of marriage with each other, nor may an authorised celebrant purport to solemnise such a marriage, although this does not prevent such persons from going through a religious ceremony of marriage provided they produce to the person in whose presence the ceremony is performed a certificate of their existing marriage and a written statement to be witnessed by that person that they have previously gone through a form of marriage with each other, that they are the parties mentioned in the certificate and have no reason to believe that they are not legally married. The Court also remarked that the Act establishes a Register of Ministers of Religion, that a minister who is so registered may solemnise marriages at any place in Australia and that a person is entitled to be registered if the person is—

- C a minister of religion of a recognised denomination;
- C nominated for registration by that denomination;
- C ordinarily resident in Australia; and
- C of or over the age of 21 years.

2.3.30 The Australian Federal Court further considered whether the legislation is a law for

establishing a religion as contemplated in section 116 of the Australian Constitution.⁷¹ The Court noted that the question whether a law is one for establishing a religion may be one of degree. The Court considered that its judgement cannot be divorced from a consideration of the content of the power under which the impugned legislation is enacted, and that in that regard the scope of the constitutional power of the Commonwealth to make laws with respect to marriage "should receive no narrow or restrictive construction" as the Court noted in *Attorney-General (Vic) v The Commonwealth* (1962) 107 CLR 529 at 543 and as Professor Harrison-Moore observed in a passage quoted by the latter Court "it enables the Commonwealth to determine what marriages shall be recognised in the Commonwealth and the forms for the celebration of marriage." The Court stated that having regard to the constitutional responsibility of the Commonwealth with respect to marriage a provision for the designation of particular religious denominations as bodies whose ministers may be registered to perform marriages could not reasonably be said to constitute the establishment of those bodies as religions within the meaning of section 116. The Court however said that that is not to say that the legislation could validly authorise a monopoly in religious marriages in favour of one particular denomination, although there is nothing in the applicant's complaints to suggest that it is so applied and that the criteria for recognition adverted to in the material submitted by him are evidence to the contrary.

2.3.31 The Court also referred to the question whether the prohibition on the performance of marriages by persons other than those authorised under the Act could arguably constitute "a law prohibiting the free exercise of any religion" within the meaning of section 116. The Court noted in that connection that it is relevant to note the provisions of section 113(5) of the Act which enable performance of a religious ceremony of marriage by a person who is not an authorised celebrant where the persons undergoing the ceremony are already legally married to each other and that the freedom guaranteed by section 116 is not absolute. The Court remarked that it is freedom in a society organised under the Constitution and it is subject to limitations which it is the function and duty of the courts to expound, and those limitations are such as are reasonably necessary for the protection of the community and in the interests of social order. The Court referred to *Adelaide Company of Jehovah's Witnesses Incorporated v The Commonwealth*⁷² where Mr Justice Williams said:

⁷¹ S 116 The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.

⁷² (1943) 67 CLR 116 at 159.

"...the meaning and scope of s.116 must be determined, not as an isolated enactment, but as one of a number of sections intended to provide in their inter-relation a practical instrument of government, within the framework of which laws can be passed for organizing the citizens of the Commonwealth in national affairs into a civilized community, not only enjoying religious tolerance, but also possessing adequate laws relating to those subjects upon which the Constitution recognizes that the Commonwealth Parliament should be empowered to legislate in order to regulate its internal and external affairs."

2.3.32 The Court considered that in the light of those principles the statutory scheme for regulating the class of persons who may solemnise marriages does not disclose any basis upon which it could be argued that it interferes with religious freedom in a way that conflicts with section 116. The Court further considered that the provisions of section 113(5) preserve in a way that is consistent with the free exercise of religious observance the right of persons married in the eyes of the law to undergo a religious form of marriage even where the religion concerned is not a recognised denomination and its minister not a registered minister.

2.3.33 The New Zealand Act provides similarly to the provisions of the Australian Marriage Act for the appointment of ministers of religion of approved religious bodies to solemnise marriages. In terms of section 8(1) the name of any minister of religion which has been sent to the Registrar-General by any of the religious bodies enumerated in the first schedule to the Act shall be entered in the list.⁷³ The name of any minister sent to the Registrar-General must be accompanied by a certificate to the effect that the minister is recognised by the religious body as a minister of religion of that body. The certificate must be signed by the person or persons within New Zealand in whom ecclesiastical authority over the religious body is for the time being vested, or reputed to be vested, or, if there is no such person, by two duly recognised office bearers of the religious body. Any organisation may apply to the Registrar-General for approval as an organisation which may nominate persons to solemnise marriages. Every application must be accompanied by a statement signed by the chief office bearer and 10 members of the organisation, all being of or over the age of 18 years, they must state their age and address, and also set out: the objects and beliefs of the organisation; and the number or, if this cannot accurately be ascertained, the approximate number of members of the organisation of or over the age of 18 years. In the case of any organisation the constitution or tenets of which do not recognise any chief office bearer an application signed by 10 members only is regarded as

⁷³ The following religious bodies are listed in the schedule: Baptists; the Church of the Province of New Zealand, commonly called the Church of England; Congregational Independents; the Greek Orthodox Church; all Hebrew Congregations; the Lutheran Churches; the Methodist Church of New Zealand; the Presbyterian Church of New Zealand; the Roman Catholic Church; the Salvation Army.

sufficient. The signatures of the signatories to every application must be attested by some other person who must, by statutory declaration attached to the statement, verify the signatures as the genuine signatures of the persons whose signatures they purport to be. If the Registrar-General is satisfied that the principal object or one of the principal objects of the organisation is to uphold or promote religious beliefs or philosophical or humanitarian convictions, he or she may by notice in the Gazette declare the organisation to be an approved organisation. If the Registrar-General fails or refuses to declare the organisation an approved organisation, he or she must, if required to do so by the organisation, refer the application to the Minister who, if he or she is satisfied that the principal object or one of the principal objects of the organisation is to uphold or promote beliefs or convictions, may direct the Registrar-General to declare the organisation, by notice in the Gazette, an approved organisation; and in that case the Registrar-General must forthwith do so.⁷⁴ Every religious body not enumerated in the first schedule to the Act of which a member was an officiating minister immediately before the commencement of the Marriage Amendment Act 1976 was declared to be an approved organisation.⁷⁵ The name of every adult member of an approved organisation nominated to be a marriage celebrant must be sent to the Registrar-General together with a certificate from the organisation declaring that it wishes the member to be a marriage celebrant. The certificate must be signed and attested in the manner specified in the Act for applications for approval. If the Registrar-General is satisfied that any person so nominated is of good character and otherwise qualified to act as a marriage celebrant, and that the provisions of this Act in respect of the submission of his name have been complied with, he or she must enter the name of the person on the list. If the Registrar-General fails or refuses to enter in the list the name of any person nominated, he or she must, if required to do so by any signatory to the certificate accompanying the person's nomination, refer the nomination to the Minister, who may direct the Registrar-General to enter the person's name in the list and in that case the Registrar-General must forthwith enter the person's name in the list.

2.3.34 Discussion paper 88 set out that the Commission noted the efforts taken by the Church

⁷⁴ See below the discussion on a change of name of the religious organisation or denomination, amalgamation etc.

⁷⁵ The repealed section 9(4) — (6) provided as follows:
(4) The Registrar-General shall forward every application to the Minister of Justice together with either a favourable or an unfavourable recommendation.
(5) The Registrar-General shall not make a favourable recommendation on any application unless he is satisfied that the principal object or one of the principal objects of the organisation is to uphold or promote religious beliefs or philosophical or humanitarian convictions.
(6) If the Minister is satisfied that the principal object or one of the principal objects of the organisation is to uphold or promote beliefs or convictions as aforesaid, he may by notice in the Gazette declare the organisation an approved organisation.

of Scientology in drafting a definition on religious denominations and organisations. It was stated that the question is whether the route taken by jurisdictions such as Australia, Alaska, the Canadian Provinces and New Zealand should be followed in the South African Marriage Act. It was noted that the Marriage Act permits the designation as a marriage officer of any minister of or person holding a responsible position in "any religious denomination or organization". It was pointed out that it is restrictive in that marriage officers can be designated only for the purpose of conducting marriages according to "Christian, Jewish or Mohammedan rites or the rites of any Indian religion." It was explained that the Commission considered whether the suggested phrase "according to the rites of the religious denomination or organisation concerned" will remedy the situation.

2.3.35 It was explained that the Commission also considered the option suggested by the Department of Home Affairs to grant authority to the Minister of Home Affairs to appoint a person as a marriage officer who has been nominated by a religious denomination or organisation once the Minister is satisfied that the denomination or organisation concerned is a bona fide religious denomination or organisation. It was noted that the problem with this option is that it suggests no other grounds for the Minister to refuse to appoint the person concerned (eg that he or she is unfit to be a marriage officer) except for a defect in the *bona fides* of the organisation.

2.3.36 A third option considered in discussion paper 88 was to empower the Minister of Home Affairs to designate by proclamation recognised religious groups or religious organisations. It was suggested that the Marriage Act could then provide that ministers of religion or persons holding responsible positions in religious denominations or religious organisations recognised by the Minister by notice in the *Gazette*, may be designated by the Minister to be marriage officers. The Commission provisionally decided to leave the question to respondents and invited comment on these options. Comment was also invited as to whether criteria formulated to guide the Minister in the exercise of his or her powers should be included in the Act.

2.3.37 It was also explained in discussion paper 88 that the question also arose whether there is a need to reconsider the limitation placed on the authority of ministers of religion or persons holding responsible positions in religious organisations or denominations to join parties in marriage. As noted above the Act presently makes provision that such authority may be limited by the Minister to specified areas or specified periods. The Commission provisionally considered that there is no apparent reason why the Minister should be prevented from limiting the authority as is presently the case. Comment was, however, invited on this aspect.

2.3.38 The Commission was further of the view that the principle suggested by the Department of Home Affairs setting out the powers of the High Court and the procedure of review seemed provisionally to be persuasive. The Commission also noted particularly the provisions contained in the Marriage Act of British Columbia⁷⁶ and was provisionally of the view that legal certainty will be one of the results should such a review procedure be set out in the Marriage Act. The Commission was further of the view that this section should also make provision for review where the registration of a marriage officer is revoked and that the Department of Home Affairs' suggested clause be amended accordingly.

2.3.39 Discussion paper 88 explained that the Commission did not address the issue of customary marriages and the recognition of marriages contracted in terms of Muslim law or Hindu law in its discussion paper, because the position on customary marriages was considered in the Commission's Report on Customary Marriages⁷⁷, and because religious marriages were due to be dealt with in the Commission's investigation into Islamic Marriages and Related Matters. The Commission was nevertheless of the view that the appointment of religious leaders from the Muslim and Hindu faiths as marriage officers will serve to alleviate some of the hardships experienced by adherents to these religions whilst the Commission's investigation into Muslim marriages is being finalised.

(e) Recommendation contained in discussion paper 88

2.3.40 The Commission's preliminary view was that section 3 of the Marriage Act should be amended to provide as follows in subsections (1) and (3):

(1) The Minister may designate any minister of religion of, or any person holding a

⁷⁶ 5(1) If the director refuses the application made on behalf of a person for registration under this Act as a religious representative authorised to solemnise marriage, or if the director cancels the registration of any religious representative, the person or the religious representative may appeal from the refusal or cancellation on a question of law to the Supreme Court within 3 months after the refusal or cancellation.

(2) On an application by the person or the religious representative, the court may direct the procedure to be followed in the appeal.

(3) The court may

(a) make an order confirming the refusal or cancellation of registration appealed from, or

(b) order the director to grant the application for registration or to reinstate the registration of the religious representative.

(4) An order under subsection (3) is final, and the director must give effect to the order.

⁷⁷ Which resulted in the adoption of the Recognition of Customary Marriages Act, No120 of 1998.

responsible position in, any recognised religious denomination or organization recognised by the Minister by notice in the *Gazette* to be, so long as he or she is such a minister or occupies such position, a marriage officer for the purpose of joining parties in⁷⁸ marriage according to the tenets of the religious denomination or organization.

(3) Any decision made by the Minister under this section to appoint a marriage officer or to revoke the designation of any person as a marriage officer under section 9 shall be reviewable by any provincial or local division of the High Court of South Africa, and the Court—

- (a) may call upon the Minister to furnish reasons and to submit such information as the Court deems fit; and
- (b) may—
 - (i) consider the merits of the matter under review; and
 - (ii) confirm, vary or set aside the decision of the Minister.

(f) Comment on discussion paper 88

2.3.41 The National Spiritual Assembly of the Bahá'ís of South Africa state that they support the option advanced by the Commission that the restrictive wording of the Marriage Act be amended to permit the designation as a marriage officer of any minister of, or person holding a responsible position in, any religious denomination or organisation for the purpose of conducting marriages according to the rites of the religious denomination or organisation concerned.⁷⁹ They further say

⁷⁸ It was recommended that the words *join parties in marriage* or *join in marriage* or *conduct marriage* be substituted for the word *solemnise* where appropriate. See the comments by Prof Bekker under par 2.7 below why marriages are not *solemnized*.

⁷⁹ The faith is explained as follows: (See http://www.vic.bahai.org.au/intro/intro_home.htm)
“The Bahá'í Faith is the youngest of the world's independent religions. Its founder, Bahá'u'lláh (1817— 1892), is regarded by Bahá'ís as the most recent in the line of Messengers of God that stretches back beyond recorded time and that includes Abraham, Moses, Buddha, Zoroaster, Christ and Muhammad.
The central theme of Bahá'u'lláh's message is that humanity is one single race and that the day has come for its unification in one global society. God, Bahá'u'lláh said, has set in motion historical forces that are breaking down traditional barriers of race, class, creed, and nation and that will, in time, give birth to a universal civilization. The principal challenge facing the peoples of the earth is to accept the fact of their oneness and to assist the processes of unification.
One of the purposes of the Bahá'í Faith is to help make this possible. A worldwide community of some five million Bahá'ís, representative of most of the nations, races and cultures on earth, is working to give Bahá'u'lláh's teachings practical effect. Their experience will be a source of encouragement to all who share their vision of humanity as one global family and the earth as one homeland.”
The basic teachings of the Bahá'ís is explained as follows: (See http://www.vic.bahai.org.au/intro/intro_basic_teachings.htm)
“Bahá'u'lláh taught that there is one God whose successive revelations of His will to humanity have been the chief civilizing force in history. The agents of this process have been the Divine Messengers whom people have seen chiefly as the founders of separate religious systems but whose common purpose has been to bring the human race to spiritual and moral maturity.
Humanity is now coming of age. It is this that makes possible the unification of the human family and the building of a peaceful, global society. Among the principles which the Bahá'í Faith promotes as vital to the achievement of this goal are

that they would support the inclusion in the Act of the criteria to be used by the Minister in the exercise of his powers of designation. They remark that they believe that the inclusion of criteria allows for objective reference to identifiable factors, that this not only serves to promote transparency, but also dissuades arbitrary decision-making.

2.3.42 iJubilee ConneXion approves of the Commission's preliminary recommendation empowering the Minister to designate any responsible person in any recognised religious denomination as a marriage officer. They however propose that subsection (1) should read as follows: "... a marriage officer for the purpose of legally conducting a marriage ceremony". They also believe that appropriate training should be provided, and that such officers should only be permitted after successfully passing an examination. They are of the view that this will ensure that such officers know and comply with the law, and will help impart dignity to the status of marriage. They also consider that the Church of Scientology's definition of "religious denomination or organisation" is too broad when it says "any identifiable group of individuals holding a common belief". They consider that there is need for such identifiable group to be organised and to have a substantial existence, legal identity, address, and contact person in the country. They consider that otherwise any group of 20 *weirdos* claiming to have a religious identity would qualify. iJubilee ConneXion suggest that there may be wisdom in saying such a group must have been in the country for at least ten years. They note that the precedent set by the Marriage Acts of New Brunswick and British Columbia⁸⁰ emphasises the need for organisational stability before marriage licenses can be given to a religious group. They suggest further that Islamic marriages ought also to be recognised, though the fact that they are potentially polygamous does create an exception to the otherwise monogamous nature of legal marriage in South Africa. iJubilee ConneXion note that of the two options reflected in the draft Bill proposed in the discussion paper, they prefer the first because, firstly, it upholds more clearly the dignity of marriage and, secondly, it ensures that the Minister (and not the religious denomination) upholds the standards of the office of the Marriage Officer. They state that in a

-
1. The abandonment of all forms of prejudice;
 2. Assurance to women of full equality of opportunity with men;
 3. Recognition of the unity and relativity of religious truth;
 4. The elimination of extremes of poverty and wealth;
 5. The realization of universal education;
 6. The responsibility of each person to independently search for truth;
 7. The establishment of a global commonwealth of nations;
 8. Recognition that true religion is in harmony with reason and the pursuit of scientific knowledge."

⁸⁰ See par 2.3.28 above.

democracy, it is the elected state official, not the sometimes undemocratically-appointed religious official, who must be ultimately accountable. They also suggest that it is the Minister of Home Affairs who must ensure proper training is given, and examination passed. iJubilee ConneXion point out that they also agree with the categories of Marriage Officers listed in section 3(2)(a) and (b), namely the limitation of the authority of ministers of religion to a specific area and for a specified period.

2.3.43 Rev Vivian W Harris of the Brooklyn Methodist Church considers that option two is preferable because it provides for the designation by the denomination or organisation. She remarks that it would be intolerable if no such control were required of the denomination or organisation. She also remarks that there is no objection to the amendment which deletes the words “Christian, Jewish or Mohammedan rites or the rites of any Indian religion”. Rev Harris also cautions that by making provision for the designation of a religious denomination or organisation, it carries with it the possibility of undue influence or interference by the State in the affairs of a religious denomination.

2.3.44 The Evangelical Lutheran Church in Southern Africa (Natal-Transvaal) (ELCSA) state that the Church Council of ELCSA would opt for the second option but suggests the deletion of the words “or organisation” at the end of the subsection. Ms ACJ Prinsloo of the Magistrates’ Office Pretoria North remarks that the present limitations of appointment as marriage officers contained in section 3 of the Act is archaic and does not conform to the Constitution. She suggests that the limitation should be repealed and clear guidelines enacted in regard to suspension or revoking of an appointment. She proposes also that applications for nominations as marriage officers should, however, be published in order to afford interested parties opportunity to object to an appointment.

2.3.45 The Office of the General Synod of the Dutch Reformed Church recommend option one but state that option two would also be acceptable. They do not support option three where the Minister of Home Affairs has to recognise a church as such. The Department of Home Affairs also support option one.

2.3.46 Pastor Sid Hartley of the Hatfield Christian Church point out that they support the second option which was suggested by the Department of Home Affairs, namely “to grant authority to the Minister of Home Affairs to appoint a person as a marriage officer who has been nominated by a bona fide religious denomination or organisation”. They suggest also that the authority of a

minister of religion to join parties in marriage should not be limited in area in the Republic of South Africa, but only for specified periods, where necessary.

2.3.47 Phiroshaw Camay, Director of CORE (Co-operative for Research and Education) suggests that the Commission consider extending the recommended provisions to include marriages already conducted which satisfy these provisions. He states that the marriages of Parsees, for example, whether celebrated in India, South Africa, or elsewhere, are not recognised. He states that these exclusions were figments of the racist and apartheid past. He notes that he hopes that the Commission will recognise these imbalances even if it means venturing into areas of retrospective law. Mr Camay suggests that if the Commission intends to redress these imbalances, then it should provide without hesitation provisions which allow for the following:

- C recognition of marriages, wherever celebrated, which satisfy the basic conditions, inter alia, that the marriage was conducted by a duly authorised person having such authority, between willing partners, voluntarily, with witnesses present, and for which a certificate has been issued;
- C offspring of these marriages in South Africa will be considered the legitimate children of such marriages;
- C dissolution of such marriages, where parties are citizens or resident in South Africa, should comply with South African law.

2.3.48 The Church of Scientology points out that the Church acknowledges the excellent work the Commission has done so far in its investigation and evaluation of the Marriage Act and relevant laws of other jurisdictions. They believe that the approach which the Commission has taken exemplifies the objectivity, fairness and consideration that should be characteristic of all governmental action that pertains to such a constitutionally sensitive subject as religion. They consider that the preliminary recommendations that the Commission has published clearly conform with these constitutional standards as well as those enunciated by various international human rights organisations and agreements.⁸¹ The Church of Scientology believes that any action taken by the Minister of Home Affairs may take with respect to this subject matter also should conform with these same high standards. The Church believes that it is imperative that whatever option is decided upon, there be clear, objective criteria established as to the controlling characteristics of a religious denomination or organisation to guide the Minister in determining whether to appoint a marriage officer⁸² or whether a religious denomination or organisation is

⁸¹ Reflected above under the heading "comment on the media statement".

⁸² Under the proposed option one.

bona fide⁸³ or should be recognised.⁸⁴ The Church suggests that option two is the best of the three options on the ground that it places the burden of disproving the religious status on the Minister, rather than requiring the religious denomination or organisation to bear the burden of proving its religious bona fides. The Church of Scientology points out that it believes that this allocation of proof is proper in this situation because in many instances the religious denomination or organisation may lack the resources to defray what could be a very expensive and time-consuming effort of proof.

2.3.49 The Church of Scientology remarks that these guidelines are important regardless of whether the appointment of a marriage officer under the Act is deemed a fundamental act that could amount to interference or noninterference with the free exercise of one's constitutionally protected religious beliefs, or whether the appointment is deemed something less than this, as indicated by the Australian federal court in *Attorney-general (Vic) v The Commonwealth*,⁸⁵ albeit the delegation of a very important right to those concerned, and that is because of the South African constitutional mandate that all religions be treated equally. The Church says that in other words, once the state decides to delegate some right or privilege to religious organisations *qua* religious organisations, then the State cannot discriminate between religious organisations in bestowing such right or privilege absent some overriding fundamental state concern, such as public health and safety.

2.3.50 The Church of Scientology notes that it has described in great objective and non-discriminatory criteria that it believes produces an ethically-neutral definition that fully conforms with and furthers the principles of religious freedom and equality of sections 9 and 15 of South Africa's Bill of Rights. The Church considers that this definition has obvious advantageous attributes, including clarity, flexibility and fairness, in large part because it is a synthesis of approaches taken by scholars of comparative religion from around the world. The Church of Scientology states that by adopting criteria for defining religion such as they propose, South Africa would join other countries that use academia-driven criteria for determining religion.

2.3.51 The Church points out that in 1999 the Danish Ministry of Ecclesiastical Affairs, the governmental body responsible for granting individuals the authority to perform marriage

⁸³ Under the proposed option two.

⁸⁴ Under the proposed option three.

⁸⁵ Referred to above under the heading "evaluation contained in discussion paper 88".

ceremonies in Denmark, decided to adopt objective guidelines for determining whether organisations qualified as “religious communities” under the Danish counterpart of the Marriage Act. The Church of Scientology remarks that in doing so, the Ministry empanelled an advisory committee of academic experts from the fields of history of religion, sociology of religion, theology and science jurisprudence and charged them with the responsibility of developing uniform, clear-cut and factually based criteria for evaluating applicants, and then advising the Ministry as to which applicants meet this criteria. The Church points out that the Committee saw its responsibility as one of balancing somewhat competing considerations of developing clear-cut delineations, on the one hand, yet making the test sufficiently broad to assure continued religious pluralism. The Church says that in concluding that the policy for maintaining pluralism predominated, the Committee developed a “minimal definition” of religion of “specifically formulated faith in man’s dependence upon a power that transcends man and the laws of nature and a faith which gives guidelines for man’s ethics and morals”. The Committee formulated the following guidelines:⁸⁶

- C The concept ‘worship of God’ is a theistic concept which is too narrow in a modern, pleuralistic community. It is therefore necessary to apply a more abstract ‘concept of God’ which covers ‘the understanding of man as a being dependent on a transcendental force’.
- C The worship of God is performed on the basis of a further-elaborated doctrine, ie;
 - < That a creed or other text must exist which sums up and refers to the central texts or traditions of the religion, and which is the basis for the membership.
 - < That it is a matter of a joint faith giving guidelines for the conduct of man - ie ethics and morality.
 - < That it is a matter of a joint faith expressed through marriage or other rites.
 - < That there exists a prescription for or a description of the essential rites.
 - < That the marriage ceremony must fulfill the requirements of Danish marriage law.
- C The concept ‘community of religion’ shall be understood as follows:
 - < That the community has such an organisational structure as to form an

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A copy of which the Church of Scientology made available to the Commission.

- accessible basis for public control and approval.⁸⁷ Statutes must exist which can be subject to evaluation according to Danish legal tradition.
- < That statutorily appointed representatives exist, and are responsible in relation to the public authorities.
 - < That it is a matter of formal membership with guidelines for both adoption of new members as well as discontinuation of membership.⁸⁸

2.3.52 The Church of Scientology notes that the Ministry decided to appoint this panel rather than to continue using the Bishop of Copenhagen as its advisory because the members of the panel were independent experts, not affiliated with any particular religious community, and obviously sensitive to every possible nuance of the issues involved in evaluating religion. The Church of Scientology remarks that barring the creating of an independent expert panel along the lines of

⁸⁷ The Committee explained that in regard to applicants with an esoteric tradition or practice, a particular hindrance to the requirement of the community as to the right for inspection of files exists. The Committee also set requirements that “nothing in the community is taught or done that violates custom or the public order” and that the members know the doctrine of the religion, inter alia, because a joint faith is taken for granted. The Committee also explained that the requirement concerning morality and public order contains other aspects aside from the issue concerning esoteric materials, and that the primary sphere of interest of the Committee is the religious content. The Committee stated that possible violation of the law is evaluated by the courts, although the Committee may evaluate common judgements, media references etc that concern the conduct of the applicant in relation to morality and the public order, and that in the event that such sources are included in the considerations of the Committee, the applicant will be made aware of these. The Committee further explained that it does not involve itself with the requirement about lawful residence and mastering of the Danish language, although it is expected that the application is written in Danish and that the documentation exists in Danish or one of the main European languages (English, German or French).

⁸⁸ The Danish Advisory Committee stated that approval as a religious community implicates both rights as well as duties. The Committee concluded that the approval as a religious community must be based on confidence with regard to economical and other advantages, responsibility of appointed representatives, openness in relation to doctrine and cultus, and continuity in relation to the size of the religious community and the education of its ministers. The Committee further viewed as a prerequisite that approved religious communities, along with the rest of society respect human rights, namely freedom of religion and of faith including the right to embrace another religion. The committee remarked that for it to be able to competently decide on applications for approval as a religious community the following documentation ought to be presented to it when an application for recognition is made:

1. A creed that refers to the central dogmatic texts or traditions of the religion and which clarifies whether it is a matter of ‘worship of God’ and whether this faith gives guidelines for the ethics and morality of its members;
2. The central religious texts of the community;
3. A description of the marriage ceremony and other important rites;
4. A description of the organisational structure of the religious community;
5. A copy of the statutes of the religious community;
6. A copy of their latest audited accounts, audited by a recognised auditor;
7. Information as to the number of members with residence in Denmark;
8. A description of the education of the ministers or marriage officers;
9. Information whether the religious community is publicly recognised or approved in another Nordic country.

the Danish experience that would be responsible for initial processing of all applications for appointment of marriage officers, the Church believes the most expedient way for South Africa to develop objective criteria would be through the Commission. The Church considers that the Commission already has ready access to all information relevant to drafting the criteria and has a clear interest in assuring equality and nondiscrimination. The Church suggests that by coupling these substantive criteria with the procedural requirements of the Marriage Act, the Minister of Home Affairs - as well as the people of South Africa - would have the benefit of a clear and compelling legislative mandate.

(g) Evaluation

2.3.53 The majority of respondents supported the second option. The Commission is, however, not convinced that the second option should be the one to be included in the Act. According to this option the Minister of Home Affairs may appoint a minister of religion of, or any person holding a responsible position in, any religious denomination or organisation designated by such denomination or organisation in the prescribed form to be, a marriage officer for the purpose of joining parties in marriage according to the tenets of the religious denomination or organisation concerned. This option further entails that such designation must be accepted by the Minister unless it is proven to the satisfaction of the Minister that the denomination or organisation who made the designation is not a bona fide religious denomination or organisation. The Commission stated its reservations already in the discussion paper when it pointed out that this option suggests no other grounds for the Minister to refuse to appoint the person nominated by the denomination or organisation except for a defect in the *bona fides* of the denomination or organisation. The Commission also wishes to point out that it would not necessarily be true to state, as a respondent indicates that option two places the burden of disproving the religious status of the denomination or organisation concerned, rather than requiring the denomination or organisation to bear the burden of proof.

2.3.54 The Commission is of the view that the preferable option to follow is the third option whereby ministers of religion or persons holding responsible positions in religious denominations and organisations recognised by the Minister may be designated as marriage officers. The Commission is deeply indebted to respondents, particularly the Church of Scientology who attempted to make the task of the Commission easier in reaching a decision on the issue of the designation of representatives of religious denominations or organisations. The Commission also appreciates the Church of Scientology's efforts in pointing out to it the developments in

Denmark with regard to an acceptable definition on religion. The Commission however considers that it should follow the Canadian and Australian legislative examples in this regard. Only four respondents supported the setting out in the Bill of criteria to guide the Minister in determining whether to appoint someone as a marriage officer. Although the number of respondents calling for criteria are low, the Commission is persuaded by the argument that such criteria included in the Marriage Act would allow for objective reference to identifiable factors, that it would serve to promote transparency and discourage arbitrary decision-making. The Commission further considers that provision should be made that persons should be nominated by religious organisations or denominations for designation by the Minister. The Commission is therefore of the view that guidelines should be included in the Act to guide the Minister of Home Affairs when determining whether a religious denomination or organisation should be recognised. The Commission takes also the right to freedom of religion, belief and opinion guaranteed by the Constitution into account and considers that the criteria set out below conform with this constitutional right.⁸⁹

2.3.55 The Act should require that any religious denomination or organisation may apply to the Minister of Home Affairs for recognition; that they may nominate persons for designation by the Minister as marriage officers, and that every such application for recognition should contain information setting out whether—

- C the religious organisation or denomination professes a belief in a religious doctrine, dogma or creed and is organised for religious worship;
- C the rites and usages of the marriage ceremony followed by the religious denomination or organisation fulfil the requirements of South African marriage law;
- C the religious denomination or organisation is sufficiently well established, both as to continuity of existence and as to recognised rites and usages respecting the conduct of marriages, to warrant the designation of its religious representatives

⁸⁹ See also par 2.24.13 — 15 below on this right and the *case of Christian Education v Minister of Education* 2000 (10) BCLR 1051 at 1069: “The underlying problem in any open and democratic society based on human dignity, equality and freedom in which conscientious and religious freedom has to be regarded with appropriate seriousness, is how far such democracy can and must go in allowing members of religious communities to define for themselves which laws they will obey and which not. Such a society can cohere only if all its participants accept that certain basic norms and standards are binding. Accordingly, believers cannot claim an automatic right to be exempted by their beliefs from the laws of the land. At the same time, the State should, wherever reasonably possible, seek to avoid putting believers to extremely painful and intensely burdensome choices of either being true to their faith or else respectful of the law.”

as authorised to conduct marriages.

2.3.56 The Commission further considers that the Act should require that any nomination by a recognised religious denomination or organisation of a person for designation by the Minister as a marriage officer, must set out particulars as to whether—

- C the person nominated is a religious representative ordained or appointed according to the rites and usages of the denomination or organisation concerned;
- C that nominated person is, as a religious representative, recognised by the religious denomination or organisation to which he or she belongs as authorised to conduct marriages according to its rites and usages.

2.3.57 The Commission also considered the question whether there is a need to reconsider the limitation placed on the authority of ministers of religion or persons holding responsible positions in religious bodies to join parties in marriage. As noted above the Act presently makes provision that such authority may be limited by the Minister to specified areas or specified periods. The Commission provisionally considered that there is no apparent reason why the Minister should be prevented from limiting the authority as is presently the case. One respondent addressed this issue without motivating the need why a designation should not be limited to a specific area. The Commission is therefore not persuaded that the present position should be changed. The Commission noted the suggestion that applications for nominations as marriage officers should be published in order to afford interested parties an opportunity to object to the appointment of any person as a marriage officer. The Commission considers that notice given by the religious denomination or organisation concerned to their members regarding a nomination will in all probability more effectively reach the parties to be potentially affected by the appointment than a publication in say the *Government Gazette*. The Commission therefore considers that this should constitute an additional requirement which the religious body has to comply with and that the organisation should allege in its nomination that adequate notice of the nomination has been given to its members in order to afford them an opportunity to raise objections.

2.3.58 The Commission is further of the view that the Act should make provision for a review procedure by the High Court in regard to the designation and the revocation of a designation as was proposed in the discussion paper.

(h) Recommendation

2.3.59 The Commission recommends that the option to be followed for the designation of persons as marriage officers is the one whereby religious denominations and organisations recognised by the Minister may nominate persons for designation as marriage officers by the Minister. The Commission further considers that criteria should be included in the Act to guide the Minister in determining which religious denomination or organisation should be recognised. The Commission further considers that the Act should require that the nomination by a recognised religious denomination or organisation of a person for designation by the Minister as a marriage officer, must set out certain particulars about the nominated person. Provision should also be made for a review procedure by the High Court in regard to the designation of a marriage officer and the revocation of a designation. The Minister's power to limit the authority of ministers of religion or persons holding responsible positions in religious organisations or denominations to join parties in marriage in specified areas or for specified periods should also remain as the Act presently provides.

2.4 MARRIAGE OFFICERS FOR CUSTOMARY MARRIAGES

(a) The Department of Home Affairs' suggested provision

2.4.1 The Department of Home Affairs suggested the following clause:

10. The Minister may appoint any person he or she considers to be a fit and proper person to solemnise customary marriages, as a marriage officer for customary unions for a particular district or specified area.

(b) Evaluation contained in discussion paper 88

2.4.2 It was noted in discussion paper 88 that customary marriages are not constituted by a marriage officer officiating at the marriage ceremony. A customary marriage is effected by the families of the bride and groom negotiating a relationship between the two kinship groups. The appointment of marriage officers to conduct customary marriages would therefore be a foreign concept to customary traditions and culture and would not constitute a recognised requirement for establishing customary marriages. Moreover, the matter is now covered by the Recognition of Customary Marriages Act, No 120 of 1998.

(c) Recommendation contained in discussion paper 88

2.4.3 It was provisionally recommended that the Department of Home Affairs' suggested clause 10 providing for the appointment of marriage officers to solemnise customary marriages, should not be included in the amended Marriage Act.

(d) Comment on discussion paper 88

2.4.4 The Department of Home Affairs point out that they support the preliminary recommendation.

(e) Recommendation

2.4.5 It was noted in discussion paper 88 that customary marriages are not constituted by a marriage officer officiating at the marriage ceremony and that the appointment of marriage officers to conduct customary marriages would therefore be a foreign concept to customary traditions and culture and would not constitute a recognised requirement for establishing customary marriages.

2.4.6 The Commission stands by the position adopted in the discussion paper and does not recommend the inclusion in the Marriage Act of clause 10 of the draft from the Department of Home Affairs providing for the appointment of marriage officers to solemnise customary marriages.

2.5 HOW DESIGNATION AS MARRIAGE OFFICER TO BE MADE

(a) The provision contained in the Marriage Act

2.5.1 The Marriage Act contains the following provision:

4. Every designation of a person as a marriage officer shall be by written instrument and the date as from which it shall have effect and any limitation to which it is subject shall be specified in such instrument.

(b) The Department of Home Affairs' suggested Bill

2.5.2 The Department of Home Affairs did not include a similar provision in its proposed Bill.

(c) Evaluation contained in discussion paper 88

2.5.3 No respondent addressed this aspect. Discussion paper 88 noted that the Marriage Act of the Canadian Province of Ontario requires that when a person is registered under the Act as authorised to solemnise marriage, and when any such registration is cancelled, the Minister of Consumer and Commercial Relations shall publish notice thereof in the *Ontario Gazette*.⁹⁰ It provisionally seemed to the Commission that for the sake of legal certainty a provision is needed in the South African Marriage Act setting out the way in which a person is designated a marriage officer. It was noted that the present provision is quite simple if compared to the system existing in New Zealand where the names of marriage celebrants are put on a list of celebrants which has to be published annually in their Gazette. The New Zealand system therefore serves to effect in all probability more legal certainty than the present South African system does. The Commission did not believe that a system similar to the New Zealand system should be implemented in South Africa, particularly in view of the lack of comment in this regard. The Commission was nevertheless provisionally of the view that section 4 of the Marriage Act should be retained.

(d) Recommendation contained in discussion paper 88

2.5.4 The Commission provisionally recommended that the present position requiring that marriage officers be designated by written instrument be retained and that there does not seem to be justification for the deletion of section 4 of the Marriage Act.

(e) Comment on discussion paper 88

2.5.5 iJubilee ConneXion and the Department of Home Affairs point out that they support the preliminary recommendation contained in discussion paper 88.

(f) Evaluation and recommendation

2.5.6 The Commission considers in view of the absence of dissent that section 4 of the Marriage Act should remain unamended.

⁹⁰ Section 23.

2.6 MARRIAGE OFFICERS UNDER LAWS REPEALED BY THE MARRIAGE ACT

(a) The provisions contained in the Marriage Act

2.6.1 The Marriage Act contains the following provisions:

5(1) Any person who, at the commencement of this Act, or of the Marriage Amendment Act, 1970, is under the provisions of any prior law authorized to solemnise any marriages, shall continue to have authority to solemnise such marriages as if such law had not been repealed, but shall exercise such authority in accordance with the provisions of this Act.

(2) Any person shall be deemed to have been designated as a marriage officer under this Act.

(3) ... (Deleted)

(b) The Department of Home Affairs' suggested provision

2.6.2 The Department of Home Affairs suggested the following provision:

4. Any person who is appointed as a marriage officer under a law which is repealed by this Act shall be deemed to be a marriage officer appointed under this Act, for the period and area in which and the conditions subject to which such marriage officer was appointed.

(c) Evaluation contained in discussion paper 88

2.6.3 It was noted in discussion paper 88 that the question arises whether the Department of Home Affairs' suggested clause 11 may have a more limited application than section 5 which states, inter alia, that the appointed marriage officer shall exercise such authority in accordance with the provisions of the Act. It seemed as if the Department's suggested clause deals only with the aspects of appointment for the period, area and subject to the conditions of appointment. It was provisionally considered that the present section 5 should be retained.

(d) Recommendation contained in discussion paper 88

2.6.4 It was provisionally recommended that the present section 5 of the Marriage Act be retained.

(e) Comment on discussion paper 88 and evaluation

2.6.5 Only the Department of Home Affairs addressed this issue in comment and point out that they support the preliminary recommendation. The Commission therefore suggests that section 5 of the Act be retained.

(f) Recommendation

2.6.6 The Commission recommends that section 5 of the Marriage Act be retained and that minor amendments be effected to section 5(1) to read as follows: “Any person who, at the commencement of this Act, or of the Marriage Amendment Act, 1970, is under the provisions of any prior law authorised to join any party in marriage, shall continue to have such authority as if such law had not been repealed, but shall exercise such authority in accordance with the provisions of this Act.

2.7 THE SOLEMNISATION OF MARRIAGES

(a) The provisions contained in the Marriage Act

2.7.1 As noted above, the Marriage Act provides in section 3(1) that certain persons may be designated marriage officers for the purpose of *solemnising* marriages. The term is also used in sections 5, 6(3) and (5), 9, 10(1) and (2), 11(1) and (2), 12, 22, 23, 24(1), 26(2), 27, 29(1), (2) and (3), 29A(1), 30(1), (2) and (3), 31, 33 and 35.

(b) Comments on the media statement

2.7.2 Professor JC Bekker suggested that the term “solemnise” seems to be obsolete because it is derived from a performance in the context of religious rites and ceremonies, and as marriages are no longer necessarily religious, one may simply refer to the occasion as a registration. Professor Bekker noted that Ministers do not, after all, appoint officials to register motor vehicles and therefore he posed the question why Ministers should appoint people who register marriages. He considered that the acceptance of the marriage event as a registration should not unduly disturb religious denominations, since they have in any event their rituals. Professor Bekker therefore questioned the fact that the Marriage Act appears to equate the registration of a marriage with a solemn occasion.

(c) Evaluation contained in discussion paper 88

2.7.3 It was remarked in discussion paper 88 that it is noteworthy that the General Statutes of Connecticut uses the terms “join persons in marriage”⁹¹ and “celebrate marriages”. The Commission provisionally agreed with Professor Bekker's argument that a marriage is not necessarily *solemnised*. However, it seemed that the issue is more complicated than would seem at first glance. The question arose whether the term “registration” would necessarily be a suitable substitute under all circumstances. It was not entirely clear whether the term “registration” might lead to confusion in the sense of a marriage being formally recorded as opposed to a marriage ceremony being conducted or the parties being joined in marriage. The Commission therefore provisionally considered that the substitution of the term “solemnisation” or “solemnise” needs further consideration and that it might be more appropriate to use the terms “join parties in marriage” or “conduct a marriage ceremony”.

(d) Recommendation contained in discussion paper 88

2.7.4 The Commission provisionally recommended that the terms “join parties in marriage” or “conduct a marriage ceremony” be substituted for the terms “solemnize” or “solemnization” where appropriate in sections 3(1) and (2), 5, 6(3) and (5), 9, 10(1) and (2), 11(1) and (2), 12, 22, 23, 24(1), 26(2), 27, 29(1), (2) and (3), 29, 29A(1), 30(1), (2) and (3), 31 and 35.

(e) Comment on discussion paper 88

2.7.5 iJubilee ConneXion comments that marriage should not be reduced to the level of “registering motor vehicles” as Prof Bekker suggests. They point out that their suggested principles require that marriage be granted high dignity and respect and that “solemnisation” conveys this aspect of dignity as well. They note that other words can be used if this is regarded as too staid.

2.7.6 Pastor Sid Hartley of the Hatfield Christian Church states that the Church would prefer the term “join parties in marriage” to the term “solemnise” or solemnisation” and that the whole of the Act be changed accordingly. The Department of Home Affairs point out that they support the preliminary recommendation.

(f) Evaluation and recommendation

⁹¹ Inter alia in sections 46b— 22 and 46b— 23.

2.7.7 The Commission considers in view of the limited comment on this aspect that the preliminary recommendation should be followed and recommends that the terms “join parties in marriage” or “conduct a marriage ceremony” be substituted for the terms “solemnize” or “solemnization” where appropriate in sections 3(1) and (2), 5, 6(3) and (5), 9, 10(1) and (2), 11(1) and (2), 12, 22, 23, 24(1), 26(2), 27, 29(1), (2) and (3), 29, 29A(1), 30(1), (2) and (3), 31 and 35.

2.8 CERTAIN PERSONS MAY IN CERTAIN CIRCUMSTANCES BE DEEMED TO HAVE BEEN MARRIAGE OFFICERS

(a) The provisions contained in the Marriage Act

2.8.1 The Marriage Act contains the following provisions:

6(1) Whenever any person has acted as a marriage officer during any period or within any area in respect of which he was not a marriage officer under this Act or any prior law, and the Minister or any officer in the public service authorized thereto by the Minister is satisfied that such person did so under the bona fide belief that he was a marriage officer during that period or within that area, he may direct in writing that such person shall for all purposes be deemed to have been a marriage officer during such period or within such area, duly designated as such under this Act or such law, as the case may be.

(2) Whenever any person acted as a marriage officer in respect of any marriage while he was not a marriage officer and both parties to that marriage bona fide believed that such person was in fact a marriage officer, the Minister or any officer in the public service authorized thereto by him may, after having conducted such inquiry as he may deem fit, in writing direct that such person shall for all purposes be deemed to have been duly designated as a marriage officer in respect of that marriage.

(3) Any marriage solemnized by any person who is in terms of this section to be deemed to have been duly designated as a marriage officer shall, provided such marriage was in every other respect solemnized in accordance with the provisions of this Act or any prior law, as the case may be, and there was no lawful impediment thereto, be as valid and binding as it would have been if such person had been duly designated as a marriage officer.

(4) Nothing in this section contained shall be construed as relieving any person in respect of whom a direction has been issued thereunder, from the liability to prosecution for any offence committed by him.

(5) Any person who acts as a marriage officer in respect of any marriage, shall complete a certificate on the prescribed form in which he shall state that at the time of the solemnization of the marriage he was in terms of this Act or any prior law entitled to solemnise that marriage.

(b) The Department of Home Affairs' suggested provisions

2.8.2 The Department of Home Affairs' proposed clause 13 corresponds largely with the

present Act, the only differences being the deletion in subsections (1) and (2) respectively of the words “or any officer in the public service authorized thereto by the Minister” and “or any officer in the public service authorized thereto by him”, the inclusion of the words or customary union in subsections (2), (3) and (5) after the words marriage and the references to “he” or “she” instead of “he” throughout the section.

(c) Evaluation contained in discussion paper 88

2.8.3 The Marriage Act of the Province of New Brunswick makes provision that whenever it is made to appear to the Lieutenant-Governor in Council by affidavit that a marriage has been solemnized in the Province in good faith and in ignorance of the requirements of the law by a person who was not at the time duly authorized to solemnise marriage, the Lieutenant-Governor in Council may by order ratify and confirm all marriages performed by that person during a period fixed by such order, or may ratify and confirm any particular marriage or marriages solemnized by that person, and upon such order being made all marriages so ratified and confirmed shall be deemed to be valid from the time of the solemnization thereof, but nothing in the section or in any such order has the effect of confirming or rendering valid a marriage between parties not legally competent to enter into the marriage contract by reason of consanguinity, affinity or otherwise.⁹²

2.8.4 The Commission provisionally considered that there is no need to amend section 6 which makes provision for persons being deemed to have been marriage officers under circumstances where they acted as marriage officers under the *bona fide* belief that they were marriage officers.

⁹² Section 29(1). The Province of British Columbia’s Marriage Act provides likewise in section 11 that the Director of Vital Statistics may sign a written declaration waiving the requirements of the Act as to registration of a religious representative in respect of a marriage if the director is satisfied by an affidavit that the marriage has been solemnised in British Columbia in good faith and intended compliance with the Act by a religious representative who was not registered as authorized to solemnise marriage, and in ignorance of the requirements of this Act, neither of the parties to the marriage was at the time under any legal disqualification to contract the marriage, the parties after that lived together and cohabited as husband and wife, neither of the parties has since contracted valid marriage according to law, and the validity of the marriage has not been questioned by action in any court. Furthermore, when a declaration is signed under section 11(1), the solemnization of the marriage is deemed for all purposes to be and have been lawful and valid from the date of the solemnization. The Ontario Marriage Act provides concisely that if the parties to a marriage solemnized in good faith intended to be in compliance with the Act are not under a legal disqualification to contract such marriage and after such solemnization have lived together and cohabited as man and wife, such marriage shall be deemed a valid marriage, although the person who solemnized the marriage was not authorized to solemnise marriage, and despite the absence of or any irregularity or insufficiency in the publication of banns or the issue of the licence.

Furthermore, it would appear that the Department of Home Affairs proposes the deletion in section 6 of the references to “or any officer in the public service authorized thereto by the Minister” and “or any officer in the public service authorized thereto by him” since the Department proposes in its clause 2 that the Minister may, subject to the conditions that he or she may deem necessary, delegate any power conferred on him or her by this Act to a person in the service of the Department, but shall not be divested of any power so delegated and may set aside or amend any decision of the delegate made in the exercise of such a power. Discussion paper 88 noted that the question arises whether the power of the Minister should be limited to the delegation of power only to persons in the service of the Department of Home Affairs and whether it is possible that there may be circumstances where there would be a need to delegate powers to any officer in the civil service as the Act currently provides. It seemed, however, hardly likely that the Minister of Home Affairs would delegate powers to persons who are not officers in his Department and who are not accountable to him or her. The Department of Home Affairs’ suggested provisions dealing with the delegation of the power of the Minister were therefore provisionally considered persuasive.

2.8.5 It was furthermore said, as was stated above, that the issue of customary marriages is now subject to separate legislation and that all mention of them should be deleted from the proposals of the Department of Home Affairs.

(d) Recommendation contained in discussion paper 88

2.8.6 It was provisionally recommended that section 6 should continue to make provision that persons may be deemed to have been marriage officers in circumstances where they acted as marriage officers under the *bona fide* belief that they were marriage officers. It is further recommended that section 6 of the Marriage Act should be amended to reflect the Department of Home Affairs’ suggested provisions on the delegation of the powers of the Minister of Home Affairs. It was provisionally recommended that a section 2A be inserted in the Act to govern as follows the delegation of the Minister’s powers:

2A. The Minister may, subject to the conditions he or she may deem necessary, delegate any power conferred on him or her by this Act to a person in the service of the Department, but shall not be divested of any power so delegated and may set aside or amend any decision of the delegate made in the exercise of such power.

(e) Comment on discussion paper 88

2.8.7 The Department of Home Affairs point out that they support the preliminary recommendation.

(f) Evaluation and recommendation

2.8.8 Since the preliminary recommendation gave rise to limited comment, the Commission recommends that section 6 should continue to make provision that persons may be deemed to have been marriage officers in circumstances where they acted as marriage officers under the *bona fide* belief that they were marriage officers. It is further recommended that section 6 of the Marriage Act be amended to reflect the Department of Home Affairs' suggested provisions on the delegation of the powers of the Minister of Home Affairs and that a section 2A be inserted in the Act as was preliminarily recommended to govern the delegation of the Minister's powers.

2.9 PRIVATISATION OF AUTHORITY TO CONDUCT MARRIAGES

(a) Comment on the media statement

2.9.1 Mrs Olga Kruger suggests that the joining of parties in marriage should be privatised. She notes that many marriages in foreign countries are also conducted by privately registered marriage officers, as this is to the advantage of many members of the public who would like to be married at a venue of their choice.⁹³ Mrs Kruger suggests that persons appointed in the position of marriage officers should be thoroughly screened and should have passed the written examination. She further suggests that a fee could be charged to prevent persons taking advantage of their positions.

2.9.2 Reverend Dr Louis Bosch's suggestion is similar to that of the previous respondent. He remarks that the proliferation of all kinds of groups, both religious and secular, gives rise to new needs and, in order to satisfy these needs, a new approach to the appointment of marriage officers should be adopted. Reverend Bosch makes the following recommendations with regard to the appointment of marriage officers:

- C A person desiring to be a marriage officer should not necessarily be subject to a religious institution or authority in order to register and act as an appointed

⁹³ Her other suggestions on the present provisions being restrictive in relation to the places of conducting marriages will be considered below.

- official in this capacity;
- C A marriage officer should be appointed upon his or her personal application to the Minister of Home Affairs, subject to his or her satisfying the requirements of the Department, and new criteria should be set to define a bona fide candidate applying for a marriage officer's licence such as that—
- < the persons applying must submit good reasons to be granted a marriage officer's licence according to the discretion implied in the Marriage Act as to who is suitable to be so appointed;
 - < applicants must be trained and qualified;
 - < that they in fact serve those many people who have objections to their marriages taking place in a church or in a court of law.

(b) Evaluation contained in discussion paper 88

2.9.3 The Commission noted that the New Zealand Marriage Act makes provision for the appointment of, *inter alia*, persons of good character as marriage celebrants. It was explained in discussion paper 88 that the question which comes to mind is whether the case for the appointment of persons other than the existing category of marriage officers under the South African Marriage Act is convincingly argued by the two respondents mentioned above. In view of the limited requests calling for such a step, the Commission's preliminary view was that it was not convinced that the appointment of marriage officers should be extended to include persons other than those in the present categories.

(c) Recommendation contained in discussion paper 88

2.9.4 The preliminary view of the Commission was that it seems hardly justified to *privatise* the joining of parties in marriage by the appointment of persons other than magistrates, employees in the public service, or the diplomatic or consular service or ministers of religion or other persons holding responsible positions in any religious denomination or organisation. However, the Commission stated that it would appreciate the view of respondents on this matter.

(d) Comment on discussion paper 88

2.9.5 The National Spiritual Assembly of the Bahá'ís of South Africa remark that they are of the opinion that the institution of marriage is essentially divine in origin and one that gives rise to numerous spiritual and legal obligations. As such they believe that it should be responsibly initiated. They remark that each religious organisation, and the State has requirements that must be met and monitored by office-bearers who are conversant with these requirements. They

state that they share the Commission's preliminary opinion that the appointment of marriage officers not be extended to include persons other than the present categories, extended to embrace all recognised religions.

2.9.6 iJUbilee Connexion note that they strongly support the proposal against privatisation, on the grounds that this would relieve the State of a prime function relating to the very foundation of society, for which it is democratically accountable, and that it would devalue marriage as an institution of dignity in society. They remark that it would also make it difficult to control.

2.9.7 The Department of Home Affairs point out that they support the preliminary recommendation.

(e) Evaluation and recommendation

2.9.8 As the comment on discussion paper 88 indicated, there is very little demand for the "privatisation" of marriage. The Commission therefore recommends that the Marriage Act not make provision for the designation of marriage officers other than those presently provided for.

2.10 CHANGE OF NAME OF RELIGIOUS DENOMINATION OR ORGANISATION AND AMALGAMATION OF RELIGIOUS DENOMINATIONS OR ORGANISATIONS

(a) The provisions contained in the Marriage Act

2.10.1 The Marriage Act contains the following provisions:

8(1) If a religious denomination or organization changes the name whereby it was known or amalgamates with any other religious denomination or organization, such change in name or amalgamation shall have no effect on the designation of any person as a marriage officer by virtue of his occupying any post or holding any position in any such religious denomination or organization.

8(2) If a religious denomination or organization in such circumstances as are contemplated in sub-section (1) changes the name whereby it was known or amalgamates with any other religious denomination or organization, it shall immediately advise the Minister thereof.

(b) The Department of Home Affairs' proposed Bill

2.10.2 The Department of Home Affairs did not include a similar provision in its proposed

Bill.

(c) Evaluation contained in discussion paper 88

2.10.3 The following provisions of the New Zealand Marriage Act were considered noteworthy for the purposes of the present discussion:

(6A) Where an approved organisation changes its name or any of its objects, it shall forthwith give the Registrar notice in writing, signed in the manner required by subsection (2) of this section for an application under subsection (1) of this section, —

- (a) Of its former and new names; and
- (b) Of whether or not its objects remain unchanged since it last stated them to the Registrar-General under this section; and
- (c) If those objects do not so remain unchanged, stating its present objects.

(6B) Where the Registrar-General is satisfied that an approved organisation has changed its name he shall notify the change by notice in the Gazette specifying that organisation's former and new names.

(6C) Where the Registrar-General —

- (a) Has been notified under subsection (6A) of this section that the objects of an approved organisation have changed; or
- (b) Is satisfied that any of the objects of an approved organisation has changed since that organisation last stated its objects to the Registrar — General under this section, — he shall recommend to the Minister either —
- (c) That that organisation should continue to be an approved organisation; or
- (d) That the Minister should cancel the approval of that organisation.

(6D) The Registrar-General shall not recommend under subsection (6C) of this section that an organisation should continue to be an approved organisation unless he is satisfied that the principal object or one of the principal objects of that organisation is to uphold or promote religious beliefs or philosophical or humanitarian convictions.

9(7) If —⁹⁴

- (a) At any time, the Minister —
 - (i) Becomes satisfied that, in the light of information not available to him or the Register-General (as the case may be) when an organisation was approved, or by virtue of a change in the circumstances of an approved organisation that organisation should not continue to be an approved organisation; or
 - (ii) Is not satisfied (whether or not as a result of a recommendation under subsection (6C) of this section) that the principal object or

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The repealed s.9 (7) provided as follows:

"(7) If at any time the Minister becomes satisfied that, in the light of information not available to him at the time he approved an organisation or by virtue of a change in the circumstances of an organisation, the organisation should not continue to be an approved organisation, or if for a continuous period of at least 12 months no person nominated by an approved organisation has his name on the list, the Minister may, by notice in the Gazette, withdraw his approval of the organisation; and from the date of the publication of the notice the organisation shall cease to be an approved organisation."

one of the principal objects of an approved organisation is to uphold or promote religious beliefs or philosophical or humanitarian convictions;

or

- (b) For a continuous period of at least 12 months no person nominated by an approved organisation has his name on the list, —
the Minister may, by notice in the *Gazette*, cancel his approval of that organisation; and on the date of the publication of that notice that organisation shall cease to be an approved organisation.

2.10.4 It was provisionally remarked that it would seem that convincing reasons could be proffered not only for the retention of the existing section 8 of the Marriage Act but for regulating the position of religious organisations and religious denominations to a greater extent than is presently the case and that the provisions of the New Zealand Marriage Act could be considered for this purpose. Firstly it was considered that the Minister of Home Affairs should, as is presently the case, be advised of a change the name by which a religious denomination or organisation is known, and secondly provision should now be made to inform the Minister as well when such denomination or organisation changes its objects. It was further considered that criteria should also be included into the Marriage Act setting out the grounds to be considered by the Minister of Home Affairs for deciding whether or not the designation of a person as a marriage officer or that of a religious organisation or denomination should be revoked.

(d) Recommendation contained in discussion paper 88

2.10.5 It was provisionally recommended that section 8 of the Marriage Act be amended to include more grounds for notifying the Minister of changes in the circumstances of religious denominations and organisations or a change in its objects. It was also provisionally suggested that the section should also be amended to make provision for the Minister's power to revoke by notice in the *Gazette* the designation of a person as a marriage officer or the recognition of a religious denomination or organisation.

(e) Comment on discussion paper 88

2.10.6 Rev Vivian W Harris of the Brooklyn Methodist Church remarks that in clause 2 provision is made for the designation of a religious denomination or organisation. She considers that this carries with it the possibility of undue influence or interference by the State in the affairs of a religious denomination.

2.10.7 The Department of Home Affairs and iJubilee ConneXion point out that they support the preliminary recommendation.

(f) Evaluation and recommendation

2.10.8 The Commission notes Rev Harris concern on the possibility of undue State influence in the affairs of religious denominations or organisations. The Commission considers it necessary that the State should be kept informed of changes affecting religious bodies and their representatives. The Commission therefore considers that not only should the existing section 8 of the Marriage Act be retained but that the position of religious organisations and religious denominations should be regulated to a greater extent than is presently the case. It is therefore recommended firstly, that the Minister of Home Affairs continue to be advised of a change of the name by which a religious denomination or organisation is known, secondly, that provision now be made to inform the Minister when such denomination or organisation changes its objects as well, thirdly, that the Minister may revoke the body's recognition for any of these reasons, and fourthly, that the Minister must inform the body in writing of the revocation.

2.11 REVOCATION OF DESIGNATION AS, MARRIAGE OFFICER AND LIMITATION OF AUTHORITY OF MARRIAGE OFFICER

(d) The provisions contained in the Marriage Act

2.11.1 The Marriage Act contains the following provisions:

9(1) The Minister or any officer in the public service authorized thereto by him may, on the ground of misconduct or for any other good cause, revoke in writing the designation of any person as a marriage officer or the authority of any other person to solemnise marriages under this Act, or in writing limit in such respect as he may deem fit the authority of any marriage officer or class of marriage officers to solemnise marriages under this Act.

9(2) Any steps taken by any officer in the public service under sub-section (1) may be set aside by the Minister.

(b) The Department of Home Affairs' suggested provision

2.11.2 The Department of Home Affairs suggested the following provisions:

12(1) The Minister may cancel any appointment as a marriage officer —

- (a) if such marriage officer is convicted under the provisions of section 15⁹⁵ or 16⁹⁶; or

⁹⁵ The Department's proposed clause 15 deals with the fees payable to marriage officers.

⁹⁶ The Department's proposed clause 16 prohibits the unauthorised solemnisation of marriages and "customary unions".

- C if it is proved to the satisfaction of him or her that a marriage officer is guilty of conduct which defeats the objects or effective administration of this Act.

12(2) The provisions of section 9(3) shall *mutatis mutandis* apply to a decision made in terms of this section.⁹⁷

(c) Evaluation contained in discussion paper 88

2.11.3 The following provisions contained in the Australian and New Zealand Marriage Acts were considered noteworthy:

C The Australian Marriage Act

33.(1) Subject to this section, a Registrar shall remove the name of a person from the register kept by that Registrar if he or she is satisfied that:

- (a) that person has requested that his or her name be so removed;
- (b) that person has died;
- (c) the denomination by which that person was nominated for registration, or in respect of which that person is registered, no longer desires that that person be registered under this Division or has ceased to be a recognized denomination;
- (d) that person:
 - (i) has been guilty of such contraventions of this Act or the regulations as to show him or her not to be a fit and proper person to be registered under this Division;
 - (ii) has been making a business of solemnising marriages for the purpose of profit or gain; or
 - (iii) is not a fit and proper person to solemnise marriages; or
- (b) that person is, for any other reason, not entitled to registration under this Division.

33(2) A Registrar shall not remove the name of a person from a register under this section on a ground specified in paragraph (1) (d) or (e) unless:

- (a) the Registrar has, in accordance with the regulations, served on the person a notice in writing:
 - (i) stating the Registrar's intention to do so on that ground unless, not later than a date specified in the notice and being not less than 21 days from the date of service of the notice, the person satisfies the Registrar that the person's name should not be removed from the register; and
 - (ii) informing the person that any representations made to the Registrar before that date will be considered by the Registrar;
- (b) the Registrar has considered any representations made by the person before the date specified in the notice; and

⁹⁷ The Department's proposed clause 9(3) deals with the review by the High Court of the Minister's decision to appoint a marriage officer or reject a designation as such.

- (c) the removal takes place within 14 days after the date specified in the notice.
- 33(3) Where notice is served on a person under subsection (2), that person shall not solemnise a marriage unless and until:
- (a) the person is notified by the Registrar that the Registrar has decided not to remove the person's name from the register;
 - (b) a period of 14 days has elapsed from the date specified in the notice under subsection (2) and the person's name has not been removed from the register; or
 - (c) the person's name, having been removed from the register, is restored to the register.
- 34.(1) An application may be made to the Administrative Appeals Tribunal for a review of a decision of a Registrar made on or after 1 July 1976:
- (a) refusing to register a person who has applied for registration under this Division; or
 - (b) removing the name of a person from a register in pursuance of section 33.
- 34.(3) The reference in subsection (1) to a decision of a Registrar includes a reference to a decision of a Deputy Registrar of Ministers of Religion given in pursuance of subsection 27 (2).
- 34.(4) Where the Tribunal sets aside a decision refusing to register a person or a decision under section 33 removing the name of a person from a register, the appropriate Registrar shall forthwith register the person, or restore the name of the person to the register, as the case requires.
- 34.(5) For the purposes of the making of an application under subsection (1) and for the purposes of the operation of the Administrative Appeals Tribunal Act 1975 in relation to such an application, where a person has made application under subsection 30(1) for registration under this Division and, at the expiration of a period of 3 months from the day on which the application was made, the person has not been registered and has not been notified by the Registrar that that person's application has been refused, the Registrar shall be deemed to have decided, on the last day of that period, not to register that person.
- 35.(1) Where a person registered under this Division:
- (a) changes his or her name, address or designation; or
 - (b) ceases to exercise, or ceases to be entitled to exercise, the functions of a minister of religion of the denomination by which he or she was nominated for registration or in respect of which he or she is registered;
- the person shall, within 30 days thereafter, notify the Registrar by whom the register in which the person is registered is kept of that fact in accordance with the regulations.
- 35.(2) The Registrar may, upon receiving notification of a change of name, address or designation under subsection (1) or if the Registrar is otherwise satisfied that the particulars shown in the register in respect of a person are not correct, amend the register accordingly.

C The New Zealand Marriage Act

- 13.(1) Where the Registrar-General is satisfied that —
- (a) A marriage celebrant has died; or
 - (b) A marriage celebrant no longer wishes to be a marriage celebrant; or
 - (c) The organisation or religious body which submitted the name of a marriage celebrant no longer wishes him to be a marriage celebrant; or

(d) The organisation which submitted the name of a marriage celebrant is no longer an approved organisation, —
he shall remove the name of the marriage celebrant from the list and shall publish in the Gazette a correction to that effect.

13(2) If the Minister is satisfied —

(a) That a marriage celebrant has wilfully failed or persistently neglected to register the particulars of any marriages or to forward or return to a Registrar or to the Registrar-General any documents required so to be forwarded or returned by this Act; or

(a) That a marriage celebrant whose name has been entered in the list pursuant to section 11 of this Act should not continue to be a marriage celebrant —

he may direct the Registrar-General to remove the name of that marriage celebrant from the list and the Registrar-General shall remove the name from the list and shall publish in the Gazette a correction to that effect.

2.11.4 The Department explained in its memorandum that the Bill contains proposals with a view to regulating, amongst other things, the cancellation of the appointment of marriage officers on a proper basis. It was noted that the question arises whether the Department's suggested provision succeeds in this aim. It was noted above that the Marriage Act provides presently that the designation of a person may be revoked on the ground of misconduct or for any other good cause, whereas the Department's proposed provision envisages cancellation of a marriage officer's appointment if he or she is convicted of receiving or demanding a fee, gift or reward, for purporting to solemnise a marriage which he or she is not authorised to solemnise or which he or she knows is prohibited or if it is proved that the marriage officer is guilty of conduct which defeats the objects or effective administration of the Act. The discussion paper further pointed out that the question arises whether there is a need to set out the grounds for revoking the designation of a person as a marriage officer in more detail than is presently the case. It was stated in the discussion paper that the Department of Home Affairs' suggested provision seems to reflect such an aim. It also seemed that the New Zealand and Australian provisions may serve as good examples for setting out the grounds in more detail. On the issue of the deletion of section 9(2) as the Department of Home Affairs suggested, it was considered above that the Department's suggested clause 3 deals persuasively with this aspect.

(d) Recommendation contained in discussion paper 88

2.11.5 It was provisionally recommended that the grounds for revoking the appointment of a person as a marriage officer be set out in more detail in the Marriage Act than is presently the case under section 9, and that the section be amended to read as follows —

9 The Minister may revoke in writing and by notice in the *Gazette* the designation of any person as a marriage officer or the authority of any other person to join parties in marriage under this Act, or in writing limit in such respect as he or she may deem fit the authority of any marriage officer or class of marriage officers to join parties in marriage under this Act, on the following grounds, namely that —

- (a) a marriage officer has died;
- (b) a marriage officer no longer wishes to be a marriage officer;
- (b) the denomination by which that person was nominated for registration as a marriage officer, or in respect of which that person is registered, no longer desires that that person be registered as a marriage officer;
- (c) the denomination by which a marriage officer was nominated for registration, or in respect of which that person is registered, has ceased to be a recognized denomination;
- (e) the marriage officer has been guilty of such contraventions of the Act or the regulations as to show him or her not to be a fit and proper person to be registered as a marriage officer;
- (f) a marriage officer has been making a business of joining parties in marriage for the purpose of profit or gain;
- (g) a marriage officer is for any other reason, not entitled to registration.

(e) Comment on discussion paper 88

2.11.6 Ms ACJ Prinsloo of the Magistrates' Office of Pretoria North considers that the proposals by the Department of Home Affairs are too limited and should not be accepted without amendment. She however considers the provisions of the Australian Marriage Act to be too cumbersome. She is of the opinion that the grounds to be relied on, should be clearly comprehended by the person in the street. Ms Prinsloo suggests that clear guidelines be enacted in regard to suspension or revoking of an appointment. She considers that the proposals contained in par 2.11.5 are reasonably acceptable and are supported.

2.11.7 Pastor Sid Hartley of the Hatfield Christian Church remarks that the Church would like to see the grounds for revoking the appointment of a person as a marriage officer to include "any person with a criminal record for anything other than minor offences like traffic fines, etc".

2.11.8 The Department of Home Affairs suggests that the proposed duty on the Minister to give notice of the revocation of a marriage officer's designation "by notice in the Government Gazette" be deleted from the section as it would be of no practical value and would place an unnecessary administrative burden on the Department. The Department also considers the propose ground "a marriage officer has died" as superfluous.

2.11.9 iJubilee ConneXion point out that they support the preliminary recommendation.

(f) Evaluation

2.11.10 The Commission considers that the grounds for revoking the appointment of a person as a marriage officer should be set out in more detail in the Marriage Act than is presently the case under section 9. The Commission has noted Pastor Sid Hartley's suggestion. The Commission considers that the question arises whether a conviction in regard to a serious offence should constitute a ground for revoking the designation of a marriage officer since the proposed ground was limited only to contraventions of the Marriage Act and regulations. It could on the other hand be argued that the fact of having been convicted of a serious offence might indicate that a marriage officer is not entitled to continued designation. Maybe the converse argument to be considered is that it need to be set out, otherwise a marriage officer's designation might be in jeopardy once he or she commits a trivial offence. The Commission is, however, not convinced that the Act need to set out that contraventions of legislation, be it in regard to serious or minor offences, should constitute a ground for revoking the designation of a marriage officer.

2.11.11 The Commission noted the Department of Home Affairs' concern regarding the proposal that the Minister should give notice of the revocation of a marriage officer's designation by notice in the Government Gazette. The Commission has considered the Department's suggestion that this requirement be deleted as it would be of no practical value, that it would place an unnecessary administrative burden on the Department, and that the proposed ground that a marriage officer has died is considered superfluous. The Commission considers the concerns of the Department of Home Affairs to be sound and agrees with the deletion of these aspects from the proposed section. The Commission is however of the view that the duty of the Minister to inform the parties concerned in writing remains of cardinal importance. The Commission therefore considers that the Act should require the Minister to inform the person concerned that his or her designation as a marriage officer has been revoked and the grounds founding the revocation. Where the marriage officer had been designated by a religious body for appointment, such body should be informed as well. The Commission is further of the view that the since term "designated as a marriage officer" was not consistently used in clause 9, but the term "registered as a marriage officer" as well, the clause should refer throughout to "designated as a marriage officer" or to "designation" in stead of "registration".

7. Recommendation

2.11.12 The Commission recommends that the grounds for revoking the appointment of a person as a marriage officer should be set out in more detail in the Marriage Act than is presently the case under section 9 and proposes that the clause read as follows:

9(1) The Minister may revoke in writing the designation of any person as a marriage officer or the authority of any other person to join parties in marriage under this Act, or in writing limit in such respect as he or she may deem fit the authority of any marriage officer or class of marriage officers to join parties in marriage under this Act, on the following grounds, namely that —

1. a marriage officer no longer wishes to be a marriage officer;
2. the denomination by which that person was nominated for designation as a marriage officer, or in respect of which that person is designated, no longer desires that that person be designated as a marriage officer;
3. the denomination by which a marriage officer was nominated for designation, or in respect of which that person is designated, has ceased to be a recognized denomination;
- (e) the marriage officer has been guilty of such contraventions of the Act or the regulations as to show him or her not to be a fit and proper person to be designated as a marriage officer;
- (f) a marriage officer has, in contravention of section 32, been making a business of the joining of parties in marriage for the purpose of profit or gain;
- (g) a marriage officer is, for any other reason not entitled to designation.

(2) The Minister must inform —

1. the person whose designation has been revoked; and
2. the religious denomination or organisation —
 1. which nominated that person for designation as a marriage officer; or
 2. which no longer desires that that person be designated as a marriage officer,

in writing about the revocation and the grounds founding it.

2.12 MARRIAGES CONDUCTED IN A FOREIGN COUNTRY

(a) The provisions contained in the Marriage Act

2.12.1 Section 10 of the Marriage Act provides as follows:

(1) Any person who is under the provisions of this Act authorised to solemnise any marriages in any country outside the Union —

- (a) may so solemnise any such marriage only if the parties thereto are both South African citizens domiciled in the Union; and
 - (b) shall solemnise any such marriage in accordance with the provisions of this Act.
- (2) Any marriage so solemnised shall for all purposes be deemed to have been

solemnised in the province of the Union in which the male party thereto is domiciled.

(b) Comment on the media statement

2.12.2 The Campus Law Clinic of the University of Natal suggests that section 10(1) should be amended to read " ...may solemnise any such marriage only if one of the parties thereto is a South African citizen domiciled in the Republic." The Campus Law Clinic considers that if one of the parties is not a South African citizen, the marriage should not give him or her automatic right to citizenship, but that all other requirements for the acquisition of citizenship should be fulfilled. The Campus Law Clinic is further of the view that the fine prescribed for not complying with the provisions of the Marriage Act is not of such a nature that it would act as a deterrent and should therefore be increased.

(c) Evaluation contained in discussion paper 88

2.12.3 The Australian Marriage Act seemed noteworthy in this regard. It provides that a marriage between parties one of whom at least is an Australian citizen may be solemnised in an overseas country by or in the presence of a marriage officer.⁹⁸ The General Statutes of Connecticut also provide that all marriages in which one or both parties are citizens of Connecticut, celebrated in a foreign country, shall be valid, provided that each party would have legal capacity to contract such marriage in Connecticut and the marriage is celebrated in conformity with the law of that country or the marriage is celebrated, in the presence of the ambassador or minister to that country from the United States or in the presence of a consular officer of the United States accredited to such country, at a place within his consular jurisdiction, by any ordained or licensed clergyman engaged in the work of the ministry in any state of the United States or in any foreign

⁹⁸ It was however subsequently noted that the Australian Marriage Act also contains detailed provisions on the restriction of marriages conducted in overseas countries. The Act provides that a marriage shall not be solemnised in an overseas country unless the marriage officer or chaplain is satisfied: (a) that each of the parties to the intended marriage is an Australian citizen or a member of the Defence Force; (b) where one party to the intended marriage is not an Australian citizen or a member of the Defence Force: (i) that that party is not a subject or citizen of the overseas country; or (ii) that sufficient facilities do not exist for the solemnisation of the marriage in the overseas country in accordance with the law of that country; (c) where one party to the intended marriage is a subject or citizen of the overseas country, that objection will not be taken by the authorities of that country to the solemnisation of the intended marriage under this Part; or (d) that a marriage in the overseas country between the parties in accordance with the law of that country would not be recognized throughout Australia.

country.⁹⁹

2.12.4 The question stated in discussion paper 88 was whether, in light of the submission made by the Campus Law Clinic, the Marriage Act should be amended as proposed. The further

⁹⁹ Section 46b — 28. Note that the New Zealand Marriage Act regulates marriages abroad of Commonwealth citizens and citizens of Ireland as follows:

40(1) All marriages (whether solemnised before or after the commencement of this Act) at least one party to which is a citizen of a Commonwealth country or of the Republic of Ireland solemnised in a country other than the country of which the party is a citizen in accordance with a form authorised in that case by the law of the country of which the party is a citizen shall be as valid in New Zealand as if solemnised in New Zealand in accordance with this Act. (2) Nothing in this section shall affect the validity of any marriage solemnised out of New Zealand in accordance with the law of the country where the marriage was solemnised.

41(1) Any New Zealand citizen who intends to be married in a country other than New Zealand according to the law of that country and who desires to obtain the certificate referred to in this section for the purpose of complying with the law of that country may give notice to the Registrar-General in the prescribed form. (2) The Registrar-General upon receiving the notice shall make such searches and inquiries and shall give such notices as may be prescribed by regulations under this Act. (3) The provisions of section 25 of this Act relating to caveats shall apply in respect of intended marriages to which this section relates as they apply to marriages intended to be solemnised in New Zealand under this Act. (4) If no caveat is entered within 14 days of the receipt by the Registrar-General of the notice referred to in subsection (1) of this section, or if any caveat entered is subsequently withdrawn or discharged, the Registrar-General may issue a certificate in the prescribed form that after proper notices have been given no lawful impediment to the marriage has been shown to the Registrar-General to exist.

43(1) Any New Zealand representative who has attended the marriage of a New Zealand citizen in a country other than New Zealand and is satisfied that the marriage has been solemnised in accordance with the formalities of the law of that other country may give a certificate in the prescribed form and shall forward a duplicate copy of the certificate to the Registrar-General. (2) The Registrar-General on receiving, pursuant to subsection (1) of this section, a duplicate copy of the certificate and on being satisfied as to the authenticity thereof, shall bind the duplicate in a special register to be kept by him for the purpose.

44 A service marriage solemnised out of New Zealand by any member of the forces who is a chaplain or who is duly authorised in that behalf shall be deemed to have been and to be as valid as if it had been solemnised in New Zealand in accordance with the provisions of this Act.

46(1) The Registrar-General on receiving, pursuant to section 45 of this Act, a duplicate record of particulars of a service marriage solemnised out of New Zealand and on being satisfied as to the authenticity thereof shall bind the duplicate in a special register to be kept by him for the purpose. (2) In any case where a service marriage has been solemnised out of New Zealand by a member of the forces, whether before or after the passing of this Act, and a duplicate record of the particulars of the marriage has not been received by the Registrar-General under this Act, the Registrar-General, on receiving from either of the parties to the marriage or from any person on behalf of either of the parties or of any of their issue a record of the particulars of the marriage, or an original certificate of the solemnisation thereof, purporting to be signed by the person solemnising the marriage, and on being satisfied as to the authenticity of the record or certificate and that the production of a duplicate record in accordance with section 45 of this Act is impracticable, may accept the record or certificate and bind it in the special register aforesaid as if the record or certificate were the duplicate record as required by the said section 45(3) The Registrar-General, for the purpose of establishing the authenticity of any record or certificate as aforesaid, may examine witnesses on oath and may administer oaths to those witnesses and may require any other proof, by affidavit, declaration, or otherwise, as he thinks fit.

question which arose and which it was noted was not addressed by the Campus Law Clinic is whether the reference to the deemed domicile of the male party should be retained in the Act should the Act be amended as proposed by the Campus Law Clinic. It seemed apparent that if the Act were to require that marriages may be conducted as long as one party is a citizen domiciled in the Republic, such party would not necessarily be a male. Hence, it seemed as if the deeming provision should provide that a marriage so conducted shall for all purposes be deemed to have been a marriage conducted in the Republic.

(d) Recommendation contained in discussion paper 88

2.12.5 The Commission's preliminary recommendation was that section 10(1) be amended to provide that any person who is authorised to join parties in marriage in any country outside the Republic of South Africa, may conduct a marriage between parties of whom at least one is a South African citizen domiciled in the Republic. It was also recommended that the reference in the Act to "in the province of the Republic in which the male party thereto is domiciled" should clearly also be deleted. It was also considered that the Act should provide that a marriage so conducted shall for all purposes be deemed to have been conducted in the Republic.

(e) Comment on discussion paper 88

2.12.6 Mr FC Cantatore of the Society of Advocates of Natal agrees that the section should be amended as recommended by the Commission. The Department of Home Affairs and iJubilee ConneXion also point out that they support the preliminary recommendation. It was noted above under the discussion of section 2, that the Department of Home Affairs state that it is not clear how section 10 can be reconciled with an interpretation where such marriages at embassies or missions abroad must be interpreted in terms of the *lex loci celebrationis* principle, in other words in terms of the marriage laws of the receiving state.

(6) Evaluation and recommendation

2.12.7 The Commission notes the valuable comment made by the Department of Home Affairs on the *lex loci celebrationis* principle. Forsyth also notes that although marriages performed under section 10 of the Marriage Act will be recognised by South African courts, they will not be valid in terms of the *lex loci celebrationis* unless such embassy marriages are specifically recognised under the *lex loci* or the consular or diplomatic official is an authorised marriage

officer in terms of the *lex loci* as well as South African law.¹⁰⁰ He explains that recognition of these marriages outside the Republic of South Africa will be determined by the extent of recognition the country from which recognition is sought will give to such marriages. As South African officials will invariably not comply with the *lex loci* requirements as regards matters of form which is a minimum requirement of the local forum, embassy marriages will generally not be recognised outside the Republic. Forsyth suggests for this reason that parties contemplating marriage outside South Africa would be well advised to conduct their marriage in accordance with the local form as well should they wish international recognition of the marriage.

2.12.8 The *lex loci celebrationis* principle was clearly followed in the foreign legislation referred to in the preceding paragraphs. It is clear that the present provision of the Marriage Act needs to be qualified. It is considered that the following criteria which are contained in the Australian Marriage Act should also be included in the South African Marriage Act, namely that a marriage shall not be conducted in a foreign country unless the marriage officer is satisfied —

6. that at least one of the parties to the intended marriage is a South African citizen;
7. where one party to the intended marriage is not a South African citizen that that party is not a subject or citizen of the foreign country or sufficient facilities do not exist for conducting the marriage in the foreign country in accordance with the law of that country;
8. where one party to the intended marriage is a subject or citizen of the foreign country, that objection will not be taken by the authorities of that country to the intended marriage being conducted in that country; or
9. that a marriage in the foreign country between the parties in accordance with the law of that country would not be recognised in South Africa.

2.12.9 It is recommended that the Marriage Act be amended as was proposed in the discussion paper, namely that any person who is authorised to join parties in marriage in any country outside the Republic of South Africa, may conduct a marriage between parties at least one of whom is a South African citizen domiciled in the Republic, that the reference to “in the province of the Republic in which the male party thereto is domiciled” be deleted and that a marriage so conducted shall for all purposes be deemed to have been conducted in the Republic. The Commission also recommends that the following subsection be added to section 10, namely:

¹⁰⁰ *Private International Law* 3rd edition at 246.

(3) A marriage shall not be conducted in any country outside the Republic unless the marriage officer is satisfied —

1. that at least one the parties to the intended marriage is a South African citizen;
2. where one party to the intended marriage is not a South African citizen —
 - c that that party is not a subject or citizen of that country outside the Republic; or
 - c sufficient facilities do not exist for conducting the marriage in that country outside the Republic in accordance with the law of that country;
3. where one party to the intended marriage is a subject or citizen of that country outside the Republic, that objection will not be taken by the authorities of that country to the intended marriage being conducted in that country; or
4. that a marriage in that country outside the Republic between the parties in accordance with the law of that country would not be recognised in South Africa.

2.13 UNAUTHORISED MARRIAGE CEREMONIES

(a) The provisions contained in the Marriage Act

2.13.1 The Marriage Act provides as follows in this regard:

11(1) A marriage may be solemnised by a marriage officer only.

(2) Any marriage officer who purports to solemnise a marriage which he is not authorised under this Act to solemnise or which to his knowledge is legally prohibited, and any person not being a marriage officer who purports to solemnise a marriage, shall be guilty of an offence and liable on conviction to a fine not exceeding four hundred rand or, in default of payment, to imprisonment for a period not exceeding twelve months, or to both such a fine and such imprisonment.

(3) Nothing in sub-section (2) contained shall apply to any marriage ceremony solemnised in accordance with the rites or formularies of any religion, if such ceremony does not purport to effect a valid marriage.

(b) The Department of Home Affairs' suggested provision

2.13.2 The Department of Home Affairs proposed the following provisions:

16(1) A marriage or customary union may only be solemnised by a marriage officer.

(2) Any marriage officer who purports to solemnise a marriage or a customary union which he or she is not authorized under this Act to solemnise or which to his or her knowledge is legally prohibited, and any person not being appointed as a marriage officer who purports to solemnise a marriage or a customary union, shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding two years, or to both a fine and imprisonment.

(c) Evaluation contained in discussion paper 88

2.13.3 Section 59 of the New Zealand Marriage Act provides that every person who falsely pretends to be a marriage celebrant and knowingly and willfully solemnises any marriage, commits an offence and shall be liable on conviction on indictment to imprisonment for a term not exceeding 5 years. It is stated in respect of the English law that a major defect of the law is that it fails to make the consequences of a number of procedural defects clear, and it was suggested that the minimal requirements relating to both preliminaries and the celebration of a marriage for a valid marriage should be clearly specified.¹⁰¹ It has also been said in regard to the English law of marriage that it is unsatisfactory that the validity or invalidity of a marriage should depend on a subjective test of the parties' knowledge and intent. The English Law Commission has argued as follows in this regard:¹⁰²

[the law] may come close to leaving it to the option of the parties whether their marriage is to be treated as void or valid, for if they allege that they had knowledge of an irregularity it will be virtually impossible to disprove it, and if they allege that they had not, it will normally be extremely difficult to prove the contrary. As a result the dishonest may be more favoured than the scrupulous ...

2.13.4 The Alaska Statutes provide that after a licence has been obtained, a marriage solemnised before a person professing to be a minister, priest, or rabbi of a church or congregation in the state or a judicial officer or marriage commissioner is valid regardless of a lack of power or authority in the person, if the marriage is consummated with a belief on the part of the persons so married, or either of them, that they have been lawfully joined in marriage.¹⁰³ Although the Kentucky Revised Statutes provide that marriage is prohibited and void when, inter alia, it is not solemnised or contracted in the presence of an authorised person or society,¹⁰⁴ the Statute provides that no marriage solemnised before any person professing to have authority therefor shall be invalid for the want of such authority, if it is consummated with the belief of the parties, or either of them, that he had authority and that they have been lawfully married.

2.13.5 It was pointed out in discussion paper 88 that since in customary law a marriage is not

¹⁰¹ SM Cretney & JM Masson *Principles of Family Law* at 25.

¹⁰² *Ibid.*

¹⁰³ Section 25.05.281.

¹⁰⁴ Section 402.020.

constituted by a marriage officer officiating at a marriage ceremony, the draft provision contained in the Department of Home Affairs' Bill seemed to need reconsideration. It was noted that there is no reference to marriage officers in the Commission's Bill on customary marriages. Furthermore, as noted above since customary marriages are dealt with in separate legislation this paper will not deal further with them.

2.13.6 The question arose whether section 11(3) of the Marriage Act needs to be reconsidered. It was noted that the effect of section 11(3) is that the person conducting a marriage ceremony in accordance with the rites or formularies of any religion, does not commit an offence in terms of subsection (2) if such ceremony does not purport to effect a valid marriage. It provisionally seemed to the Commission that there might very well be circumstances where the provision is warranted. An example which came to mind is a ceremony where parties renew their marriage vows. They might have been married to each other for a number of years and do not intend to bring a new marriage into being by participating in the marriage ceremony. Another example considered is where the religious marriage ceremony constitutes a mere blessing of a marriage contracted by civil rites.¹⁰⁵ It was thought that it should not constitute an offence to conduct such a religious marriage ceremony. Hence, the Commission provisionally recommended that section 11(3) should remain intact.

2.13.7 The preliminary view was that it seemed that sections 11(1), (2) and (3) should be retained. However, it was pointed out in discussion paper 88 that the Department of Home Affairs' suggested increased penal provision contained in subsection (2) seemed persuasive. It seemed likely that the possibility of a prison sentence of a term of two years would serve as a strong deterrent than the present term of twelve months.

(d) Recommendation contained in discussion paper 88

2.13.8 It was provisionally recommended that —

- * section 11(1) and (3) should remain unamended; and
- * the maximum term of imprisonment provided for in section 11(2) should be

¹⁰⁵ See section 33 of the Marriage Act: "After a marriage has been solemnised by a marriage officer, a minister of religion or a person holding a responsible position in a religious denomination or organization may bless such marriage according to the rites of his religious denomination or organization."

increased to a term of imprisonment not exceeding two years.

(e) Comment on discussion paper 88

2.13.9 Pastor Sid Hartley of the Christian Hatfield Church remarks that they would like the option of the fine retained but to increase the fine as they feel this would be a sufficient deterrent. Rev Vivian W Harris of the Brooklyn Methodist Church points out that she has encountered a widespread practice where a minister of religion who is not a marriage officer purports to conduct a marriage or marriages with no marriage officer present, and later takes the marriage register and marriage certificate to a marriage officer to sign. She poses the question whether there is any way of preventing this practice. She notes that legislation on its own will not prevent the practice because such legislation exists now.

2.13.10 iJubilee ConneXion point out that they support the preliminary recommendation and add that an increased prison penalty for contravening the provisions of the Act upholds the dignity of marriage. The Department of Home Affairs point out that they support the preliminary recommendation.

(f) Evaluation and recommendation

2.13.11 The Commission noted the concerns expressed in relation to the removal of the option of imposing a fine under section 11(2) of the Act. The Commission wishes to point out that the original thinking expressed in the discussion paper was not to abolish the possibility of a fine being imposed under section 11(2). The preliminary recommendation was to delete in section 11(2) the reference to “not exceeding four hundred rand”. In hindsight it is apparent that the discussion paper could have made it clearer that the provisions of the Adjustment of Fines Act 101 of 1991, would be applicable and particularly section 1(2) of which deals with the question of maximum fines where a stated maximum period of imprisonment may be imposed in the alternative.¹⁰⁶ In accordance with sections 1(1)(a) and 1(2) of the Adjustment of Fines Act,

¹⁰⁶ (1) (a) If any law provides that any person on conviction of an offence may be sentenced to pay a fine the maximum amount of which is not prescribed or, in the alternative, to undergo a prescribed maximum period of imprisonment, and there is no indication to the contrary, the amount of the maximum fine which may be imposed shall, subject to section 4, be an amount which in relation to the said period of imprisonment is in the same ratio as the ratio between the amount of the fine which the Minister of Justice may from time to time determine in terms of section 92(1)(b) of the Magistrates' Courts Act, 1944 (Act 32 of 1944), and the period of imprisonment as determined in

read with section 92(1) of the Magistrates' Courts Act 32 of 1944, the maximum fine which a court may impose in lieu of a maximum period of imprisonment of three years is presently R60 000 where the court is not the court of a regional division, and R300 000 where the court is the court of a regional division.¹⁰⁷ Since R400-00 is an unrealistically low amount to deter persons from conducting unauthorised marriages, it is clear that there is a need to make adequate provision for possible fines and imprisonment sentences which may act as a deterrent. The Commission therefore supports the deletion of the present penalty provisions of a fine which is set at a maximum of R 400-00 and to increase the maximum term of imprisonment from twelve months to two years. The Commission considers that this proposal might also possibly act as a more effective deterrent than the existing provision to discourage the practice pointed out by Rev Vivian Harris, where a minister of religion who is not a marriage officer purports to conduct a marriage or marriages with no marriage officer present, and later takes the marriage register and marriage certificate to a marriage officer to sign.

2.13.12 The Commission recommends that sections 11(1) (which provides that a marriage may be conducted by a marriage officer only), and 11(3) (which makes provision that it shall not constitute an offence if a marriage is conducted in accordance with the rites or formularies of any religion, if such ceremony does not purport to effect a valid marriage) remain unamended and that section 11(2) be amended to —

- C delete the maximum amount of the fine provided for in the section; and
- C increase the maximum period of imprisonment from twelve months to two years.

2.14 FAILURE TO PRODUCE IDENTITY DOCUMENT OR PRESCRIBED DECLARATION

(a) The provision contained in the Marriage Act

2.14.1 The Marriage Act contains the following provision:

12(1) No marriage officer shall solemnise any marriage unless-

- (a) each of the parties in question produces to the marriage officer his or her

section 92 (1) (a) of the said Act, where the court is not a court of a regional division.

¹⁰⁷ See *Government Gazette* No 19435 dated 30 October 1998, R 1411.

identity document issued under the provisions of the Identification Act, 1986 (Act 72 of 1986); or

- (b) each of such parties furnishes to the marriage officer the prescribed affidavit¹⁰⁸; or
- (c) one of such parties produces his or her identity document referred to in paragraph (a) to the marriage officer and the other furnishes to the marriage officer the affidavit referred to in paragraph (b).

¹⁰⁸

The affidavit must contain the following information:

- C that the parties are not related to each other within the prohibited degrees of relationship;
- C that there are no legal impediments to the proposed marriage; and
- C the necessary consent to the marriage has been obtained, if this is required under the circumstances.

(b) The Department of Home Affairs' suggested provision

2.14.2 The Department of Home Affairs' suggested clause 17 corresponds largely with section 12 of the Marriage Act, the only difference being that the words customary unions are inserted into the clause after the words "marriage".

(c) Evaluation contained in discussion paper 88

2.14.3 The New Zealand Marriage Act provides that except as provided in section 15¹⁰⁹ or in section 21¹¹⁰ of the Act, no marriage shall be deemed to be void by reason of any error or defect in the notice, declaration, or licence required before solemnisation, or in the registration of the marriage when solemnised where the identity of the parties is not questioned, or on account of any other infringement of the provisions of the Act. The Alaska Statutes also provide that if a marriage is in other respects lawful and is consummated with the full belief on the part of the persons married, or either of them, that they have been lawfully joined in marriage, then the marriage is not voidable for any of the following reasons:¹¹¹

- C the licensing officer did not have jurisdiction to issue the licence;
- C there was an omission, informality, or irregularity of form in the application for the licence or in the licence itself;
- C either or both witnesses to the marriage were incompetent;
- C the marriage was solemnised after the expiration date of the licence;
- C there were no witnesses to the marriage if the valid licence was issued and if the solemnisation of the marriage can be otherwise proven.

2.14.5 Section 12 of the Marriage Act contains one of the prescribed formalities laid down in the Act, and, as a general rule, failure to comply with the requirements of marriage, renders the marriage void *ab initio*. Commenting on the case of *Ex Parte Dow* the authors Cronje and

¹⁰⁹ Dealing with marriage of persons within prohibited degrees of relationship.

¹¹⁰ Which provides that if any persons knowingly and wilfully marry without a marriage licence where a marriage licence is required by the Act, or in the absence of a marriage celebrant or Registrar where the presence of a marriage celebrant or registrar is required by the Act, the marriage shall be void.

¹¹¹ Section 25.05.041.

Heaton¹¹² argue that only a material defect should render a marriage void *ab initio*. Prof Hahlo notes that the question remains whether a marriage is valid if it was solemnised by the marriage officer on the strength of forged or stolen identity documents or stolen identity documents or of false affidavits.¹¹³ He suggests that no question of nullity can arise if the parties were married under their legal names, and there existed no lawful impediment to their marriage. Prof Hahlo considers that whether the same applies where one or both of the parties were married under false names, is a question which cannot be regarded as settled. He however suggests that where one or both of the parties knowingly misled the marriage officer as to their names, the marriage would still be valid since the marriage officer joins them in matrimony as the persons standing before him, and not as the bearers of certain names. Prof Hahlo further submits that where the marriage officer married the parties although they produced neither identity documents nor affidavits, the marriage would not be invalid. Prof Hahlo states that as long as the parties declare their consent to marry each other in an authorised place, in the presence of no fewer than two competent witnesses and before a competent marriage officer and the marriage officer joins them as husband and wife, there is a valid marriage. Prof Hahlo notes that failure to comply with any of the other formalities prescribed by the Act does not invalidate it, except where the Act, expressly or by necessary intent, so provides.

2.14.6 It was pointed out in discussion paper 88 that it is therefore clear that there is a need for prescribing that parties should produce proof of their identity to marriage officers. However, it was also clear that there could be circumstances of non-compliance and the question arose as to the question what the consequences should be, and whether the Marriage Act should be amended. The Commission provisionally considered that the Marriage Act should be amended to state that failure to comply strictly with this provision does not affect the validity of the marriage provided that such marriage was in every other respect conducted in accordance with the provisions of the Marriage Act, that there were no other lawful impediments to the marriage and that 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, lawfully married another.

¹¹² *Casebook on the Law of Persons and Family* at 224 — 225.

¹¹³ *The South African Law of Husband and Wife* at 81 — 82.

(d) Recommendation contained in discussion paper 88

2.14.7 The Commission provisionally recommended that section 12 of the Marriage Act should be amended as follows to deal with a failure to comply strictly with the requirement to produce identification or the prescribed affidavit regarding the identification of the party concerned:

If parties were joined in marriage and the provisions of subsection (1) were not strictly complied with but such marriage was in every other respect conducted in accordance with the provisions of 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, lawfully married another, be as valid and binding as it would have been if the said provisions had been strictly complied with.

(e) Comment on discussion paper 88

2.14.8 Rev Vivian W Harris remarks that she cannot understand why provision must be made for the recognition as a marriage of a ceremony that does not comply with the Act. She notes that legal requirements in respect of other areas of life do not provide for the condonation of actions which are illegal. She asks whether it is not better to require that the law be observed. She considers that where a *bona fide* error has occurred, the matter can be set right by appeal to a court of law or be performing the ceremony again in proper form. She also notes that the proposed clause 12(2) has the effect of condoning non-compliance with section 12(1). She considers that this seems to be undesirable because there is nothing to compel compliance with section 12(1). She considers that it is surely a simple enough matter for the marriage officer to ensure that form B1 — 31 is completed by a person not possessing an identity document. Rev Harris poses the question what is the liability of a marriage officer who attests an affidavit having reason to believe that the sworn statement is untrue.

2.14.9 The Department of Home Affairs point out that they support the preliminary recommendation.

(f) Evaluation

2.14.10 The Commission notes the concerns expressed by Rev Vivian Harris and agrees that in principle, strict compliance with the provisions of the Act would prevent problems from arising. The Commission is nevertheless of the view that it should provide for circumstances

where there is not strict compliance with the requirements to produce identity documents or to make the prescribed declaration in order to set out what the consequences are. The Commission therefore recommends that the provision preliminarily proposed in the discussion paper be included in the Act.

2.14.11 Rev Harris also poses the question what is the liability of a marriage officer who attests an affidavit having reason to believe that the sworn statement is untrue. It would seem that the marriage officer should refuse to conduct the marriage if he or she has reason to believe that the sworn statement is untrue. Should the marriage officer proceed with the marriage ceremony, he or she would not be able to escape liability created by the general penalty section of 35 and he or she would knowingly be committing an offence.¹¹⁴

(g) Recommendation

2.14.12 The Commission recommends that section 12 the Act deal as follows with a failure to comply strictly with the requirement to produce identification or the prescribed affidavit regarding the identification of the party concerned by the insertion of the following subclause in the Act:

(2) If parties were joined in marriage and the provisions of subsection (1) were not strictly complied with but such marriage was in every other respect conducted in accordance with the provisions of 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, lawfully married another, be as valid and binding as it would have been if the said provisions had been strictly complied with.

¹¹⁴ See the present section 35 which states 35 that any marriage officer who knowingly solemnises a marriage in contravention of the provisions of the Act shall be guilty of an offence and liable on conviction to a fine not exceeding one hundred rand or, in default of payment, to imprisonment for a period not exceeding six months.

2.15 IRREGULARITIES IN PUBLICATION OF BANNES OR NOTICE OF INTENTION TO MARRY OR IN THE ISSUE OF SPECIAL MARRIAGE LICENCES

(a) The provision contained in the Marriage Act

2.15.1 The Marriage Act contains the following provision:

22. If in the case of any marriage solemnised 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 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 solemnised in accordance with the provisions of 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.

(b) The Department of Home Affairs' Bill

2.15.2 The Department of Home Affairs' Bill does not contain this provision. It contains, however, the following general provision providing for the recognition of religious marriages conducted before the commencement of its Bill:

- 30.(1) A marriage solemnised prior to the commencement of this Act shall be deemed to be a marriage solemnised under this Chapter if the Minister is satisfied upon information submitted to him or her in the prescribed form —
- (a) that such a marriage has in fact been solemnised under the tenets of a religion;
 - (b) the person who solemnised the marriage was a duly designated marriage officer by the religious denomination or organization concerned; and
 - (c) the marriage would have been a valid marriage if it was solemnised after the commencement of this Act.
- (2) The Minister may, in addition to any information submitted in terms of subsection (1) or to clarify any information so submitted, call for further information to be submitted to him or her and require or allow such person to give such oral information or produce such other information as in the opinion of the Minister may assist him or her in deciding the matter in question.

(c) Evaluation contained in discussion paper 88

2.15.3 It was noted in discussion paper 88 that the preliminary formalities of the publication of banns or notices of intention to get married and the obtaining of special licences were abolished by the Marriage Amendment Act of 1970. However it seemed necessary to set out specifically what the consequences should be if the requirements regarding banns notices of intention to get married and special licences were not strictly complied with. Furthermore, the Department's proposed provision on the recognition of marriages and the powers of the Minister to obtain information regarding the marriage is restricted to marriages concluded according to the tenets of a religion. This provision suggested by the Department of Home Affairs is a transitional provision which deals with marriages concluded according to the tenets of a religion prior to the commencement of the Bill they proposed. It was noted in discussion paper 88 that since the question of religious marriages will not be addressed in this investigation, the Commission was of the view that the Bill should not contain a specific transitional provision dealing with marriages concluded according to the tenets of a religion.

(d) Recommendation contained in discussion paper 88

2.15.4 It was provisionally recommended that even if section 22 is not retained in the Act in its present form, the Marriage Act should still in future set out specifically what the consequences should be if the requirements regarding banns notices of intention to get married and special licences are not strictly complied with, as the section presently does.

(e) Comment on discussion paper 88

2.15.5 Mr FC Cantatore of the Society of Advocates of Natal comment that if the Commission deems it necessary to set out specifically what the consequences should be of requirements regarding banns, notices of intention to marry and special licences were not strictly complied with, it is suggested that such failure be condoned, especially as these requirements have since fallen away.

2.15.6 Pastor Sid Hartley of the Hatfield Christian Church state that they agree that section 22 not be retained for the reasons the discussion paper gives. Rev Vivian Harris proposes that the words "to further provide for publication of banns" be deleted in the Preamble, because banns are no longer published.

2.15.7 The Department of Home Affairs point out that they support the preliminary recommendation. iJubilee ConneXion also point out their support for the preliminary recommendation and plead that the Commission “not yield to pressure to let contraventions slip through lightly”.

(f) Evaluation and recommendation

2.15.8 The Commission has noted the comments supporting the retention of section 22 and those suggesting its deletion. The Commission considers that there is still a need for this transitional provision which deals with marriages conducted in the past in contravention of the then prevailing requirements.¹¹⁵

2.15.9 The Commission therefore recommends that the section be retained and that the words “Union” be substituted with “Republic” and “solemnised” with “conducted” as was proposed in the discussion paper.

2.16 OBJECTIONS TO MARRIAGE

(a) The provision contained in the Marriage Act

2.16.1 The Marriage Act contains the following provision:

23(1) Any person desiring to raise any objection to any proposed marriage shall lodge such objection in writing with the marriage officer who is to solemnise such marriage.

(2) Upon receipt of any such objection the marriage officer concerned shall inquire into the grounds of the objection and if he is satisfied that there is no lawful impediment to the proposed marriage, he may solemnise the marriage in accordance with the provisions of this Act.

(3) If he is not so satisfied he shall refuse to solemnise the marriage.

(b) The Department of Home Affairs' suggested provision

2.16.2 The Department of Home Affairs suggested the following provision:

¹¹⁵ It is noteworthy that the Irish Family Law Act of 1995 requires notice by the parties contemplating marriage 3 months prior to the date on the marriage is to take place. The court may, on application to it by both of the parties to an intended marriage, by order exempt the marriage from the notice requirement and an application may be made informally, may be heard and determined otherwise than in public, a court fee shall not be charged in respect of it, and shall not be granted unless the applicant shows that its grant is justified by serious reasons and is in the interests of the parties to the intended marriage.

23(1) Any person desiring to raise any objection to any proposed marriage or customary union shall lodge such objection in writing with the marriage officer who is to solemnise such marriage or customary union.

(2) Upon receipt of any such objection the marriage officer concerned shall inquire into the grounds of the objection and if he or she is satisfied that there is no lawful impediment to the proposed marriage, he or she may solemnise the marriage or customary union in accordance with the provisions of this Act.

(3) If he or she is not so satisfied he or she shall refuse to solemnise the marriage or customary union.

(c) Comments on the media statement

2.16.3 The Campus Law Clinic of the University of Natal suggests that section 23(1) should read as follows in order to give the parties a chance to respond, namely:

Any person desiring to raise any objection to any proposed marriage shall lodge such objection in writing with the marriage officer who solemnizing such marriage and also with the parties to the proposed marriage.

(d) Evaluation contained in discussion paper 88

2.16.4 It was noted in discussion paper 88 that the suggestion by the Campus Law Clinic seems persuasive since the aim of its provision seems to be the giving of notice to the parties contemplating marriage that someone has objections to their marriage. In English law before a Superintendent Registrar's certificate is issued, the Registrar will seek to satisfy himself on the basis of the information provided by the parties that they are free to marry.¹¹⁶ The English

¹¹⁶ Cretney & Masson *Principles of Family Law* at 12.

Of interest is also the consultation paper of the Registrar General of Births, Deaths and Marriages in Scotland entitled *Civil Registration in the 21st Century* published on 27 October 2000. (See <http://www.gro-scotland.gov.uk/grosweb/grosweb.nsf/pages/regn21c>) Scottish law requires that notice be given to a registrar of an intended marriage 14 days before the marriage is to take place. The consultation paper explains that while there may be good reasons to retain the period of notice, the case for advertising the marriage is not so clear. It is pointed out that a couple may go to any one of 340 local registration offices in Scotland to give notice of marriage in that district, which may very well be remote from where they or their families live, and where no-one at all may have heard of them. It is said that there is little likelihood in present-day circumstances that putting up a couple's names and the date of the marriage on the public notice-board inside or outside a local registration office will be effective in drawing the attention of someone who might have an interest in the forthcoming wedding but who would not otherwise know about it, and even celebrities have a good chance that the public notice of their impending nuptials will escape attention over the statutory fortnight.

The consultation paper states that the procedure is not only ineffective, but if its purpose is to canvass any legal objections before a wedding takes place, it may also be deemed unnecessary. It is noted that the General Register Office of Scotland (GROS) are aware of no case in the last

Marriage Act provides that members of the public may object to an intended marriage and any person may enter a caveat at the Registrar's office. The New Zealand Marriage Act contains the following provisions governing the lodging of objections or so-called caveats:

25.(1) Any person may lodge with any Registrar a caveat against the marriage of any person named in the caveat on the ground that the marriage is one in respect of which a licence should not be issued under this Act.

25.(2) Every caveat shall be in writing signed by or on behalf of a caveator, and shall state his full name and residential address and the particular grounds of objection on which the caveat is founded.

25.(3) Notice of any caveat may be given to any Registrar other than the Registrar with whom it was lodged. The notice shall be in writing signed by or on behalf of the caveator, and shall state his full name and residential address, the date and place of lodgment of the caveat and the grounds of objection on which the caveat is founded.

25.(4) Until the caveat has been withdrawn by the caveator or has been discharged as provided by section 26 of this Act, no licence in respect of the marriage of the person to whom the caveat relates shall be issued by any Registrar with whom the caveat has been lodged or to whom notice of the caveat has been given in accordance with this section, and no such Registrar shall solemnise the marriage.

26.(1) On receiving notice under section 23 of this Act of an intended marriage against which he is aware that a caveat has been lodged, the Registrar shall submit the caveat to a Family Court Judge or, if a Family Court Judge is not immediately available, to a District Court Judge who shall forthwith inquire into the grounds of objection stated in the caveat, and, if he is of the opinion that those grounds should not prevent the solemnisation of the marriage, he shall discharge the caveat.

26.(2) A caveat shall be deemed to be discharged after the expiration of one year from the date on which it was lodged unless within that time a notice of the intended marriage

decade in which a registrar has received a sustainable legal objection to a marriage in Scotland as a result of a member of the public spotting an entry on a registration-office notice-board. It is pointed out that objections are in fact very rare, and valid objections a tiny proportion even of those few. Almost invariably they come from some family member who has been made aware of the proposed marriage by other means than looking at registration-office notice-boards.

It is said that if it were thought necessary to replicate in modern circumstances the kind of meaningful public awareness of a forthcoming marriage that once would have been achieved by proclamation of banns in a well-attended parish church, or by posting a notice outside the registration office in the village or town where the couple both lived, there is no doubt it could readily be done. It is explained that it could for example be made mandatory to announce all forthcoming marriages in a Scottish national newspaper - or on a GROS website on the Internet for all the world to see, although this seems unnecessary. It is suggested that it might be sufficient to retain a limited duty that the registrar for the district where a couple had given notice to marry should reveal their full names and their marriage date if and only if an enquirer had first stated the nature of a credible possible objection in respect of one or other party. Alternatively, details of forthcoming marriages could fairly readily be collected by GROS (weekly, along with details of events from local registrars), and any potential objections handled centrally. The following questions were put in the consultation paper, namely:

- * Can the requirement for advertising marriages on a local registration-office notice-board be dropped?
- * Need it be replaced by advertisement in the Press and/or on the Internet? or
- * Should GROS hold a list of forthcoming marriages, and be the central point to which potential objectors might be required to address objections?

to which the caveat relates has been given.

26.(3) Where a Family Court Judge (or a District Court Judge) has refused to discharge a caveat, any person may make an application to a Family Court Judge for the discharge of the caveat and the Family Court Judge, if he is of the opinion that there is no longer any reason why the intended marriage should not be solemnised, shall discharge the caveat.

2.16.5 The Australian Marriage Act contains the following provisions on objections:

68. (1) Where notice of an intended marriage has been given to a marriage officer under section 66, a person may, on payment of the prescribed fee, enter with the marriage officer a caveat against the solemnization of the marriage.

68.(2) A caveat under subsection (1) shall:

- (a) be in accordance with the prescribed form;
- (b) be signed by or on behalf of the person entering it; and
- (c) state the ground of objection to the solemnization of the marriage.

68.(3) Where a caveat against the solemnization of an intended marriage is duly entered with a marriage officer, the marriage shall not be solemnised by the marriage officer unless:

- (a) the marriage officer, having inquired into the ground of objection specified in the caveat, is satisfied that the caveat ought not to prevent the solemnization of the marriage; or
- (d) the caveat has been withdrawn by the person who entered it.

68.(4) In case of doubt, the marriage officer may transmit a copy of the caveat, with such statement with respect to the caveat as the marriage officer thinks fit, to the Minister, who shall, after such inquiry, if any, as the Minister thinks fit, give his or her decision in the matter to the marriage officer.

68.(5) The marriage officer shall forthwith inform the person who entered the caveat and the parties to the intended marriage of the decision of the Minister and shall conform to that decision.

2.16.6 It seemed apparent that if the Marriage Act were to require notice to be given to parties intending to get married that they could possibly assist the marriage officer from an earlier stage should the objections be unfounded. It was pointed out that such a requirement would in all probability serve as a further deterrent against the lodging of unfounded objections to a marriage.

(e) Recommendation contained in discussion paper 88

2.16.7 It was provisionally recommended that section 23(1) should be amended to the effect that the party raising objections to a marriage should also provide a copy his or her objection in writing to the parties contemplating marriage.

(f) Comment on discussion paper 88

2.16.8 Rev Vivian W Harris notes that an objection might be made *mala fide* and that the discussion paper seems to recognise this possibility. She points out that if the objection is made during the marriage ceremony itself, or very shortly before the ceremony, there would not be enough time for the marriage officer to investigate the objection and the only course open to the marriage officer would then be to postpone the marriage. She considers that this will be very embarrassing to the parties being married, it could be very expensive if the wedding reception had to be postponed and many guests could be inconvenienced. She notes that there is always recourse to civil law when an objection is made *mala fide* but by then the damage has been done. Rev Harris suggests therefore that any objection be made in writing not later than, say, twenty-four hours before the wedding or such other period of time as would give enough time for the investigation of the objection.

2.16.9 The Department of Home Affairs and iJubilee ConneXion point out that they support the preliminary recommendation.

(g) Evaluation and recommendation

2.16.10 The Commission considers Rev Harris' suggestion that a time limit be set for the lodging of objections to an intended marriage persuasive. Thus the Commission recommends that the Marriage Act require that a party raising objections to a marriage not only inform the marriage officer of objections but also that a copy his or her objection should be provided in writing to the parties contemplating marriage at least 24 hours prior to the contemplated marriage being conducted. The Commission is of the view that such a requirement would in all probability serve as a further deterrent against the lodging of unfounded objections to a marriage.

2.17 MARRIAGE OF MINORS

(a) The provisions contained in the Marriage Act

2.17.1 The Marriage Act contains the following provisions:

24(1) No marriage officer shall solemnise a marriage between parties of whom one or both are minors unless the consent to the party or parties which is legally required for the purpose of contracting the marriage has been granted and furnished to him in writing.

(2) For the purposes of subsection (1) a minor does not include a person who is under the age of twenty-one years and previously contracted a valid marriage which has been dissolved by death or divorce.

(b) The provisions suggested by the Department of Home Affairs

2.17.2 The Department of Home Affairs proposed the following provisions:

23. In this Act, unless the context otherwise indicates —

...

“major” means any person who has attained the age of 21 years or who has under the provisions of section 2 of the Age of Majority Act, 1972 (Act No. 52 of 1972), been declared to be a major, and includes a person under the age of 21 years who has contracted a legal marriage;

18 No marriage officer shall solemnise a marriage or a customary 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 marriage has been granted and furnished to him in writing.

(c) Evaluation contained in discussion paper 88

2.17.3 The New Zealand Marriage Act provides that a marriage licence shall not be issued by any Registrar and no marriage shall be solemnised by any Registrar or marriage celebrant if either of the persons intending marriage is under the age of 16 years on the date of the notice of the intended marriage given under section 23 of the Act. It further provides that no marriage shall be void by reason only of an infringement of the provisions of the section. The New Zealand Marriage Act also provides that if either of the parties to an intended marriage is a minor and has not previously been married, the Registrar shall not issue a licence authorising the marriage or solemnise the marriage unless it has been consented to in accordance with the section. It further provides that subject to the provisions of the section, consent to the marriage of a minor shall be obtained in accordance with the following provisions:

- (a) If both the minor's parents are alive and living together, consents shall be obtained from both parents:
- (b) If the minor's parents are living apart and he is living with one parent, consent shall be obtained from the parent with whom he is living:
- (c) If the parents are living apart and the minor is not living with either, consent shall be obtained:
 - (a) From both parents in any case where they are, or have been, married to each other, unless the consent of one parent is dispensed with by a District Court Judge:
 - (ii) From the mother in any case where the parents have never been married:
- (d) If one of the parents is dead and the parents had at any time been married to each other, consent shall be obtained from the surviving parent and any other person who is the legal guardian of the minor:
- (e) If both parents are dead and they had at any time been married to each other, consent shall be obtained from any person who is the legal guardian of the minor:
- (f) If the minor's parents had never been married to each other and one or both of them are dead, consent shall be obtained from the mother if she is alive and from any person who is the legal guardian of the minor if she is dead.

2.17.4 The New Zealand Marriage Act provides further in section 18 that if any person is the guardian of a minor pursuant to section 5 of the Child Welfare Amendment Act 1948, consent shall be obtained from the guardian and no other consent shall be required. Where a parent whose consent is required or is sufficient is deprived of the guardianship of a minor, the consent of the legal guardian is required or shall be sufficient as the case may be, in place of the consent of that parent. Consent is not required from any person who cannot be found or is, because of mental incapacity, unable to give consent and, unless the minor requests the consent shall not be required from any person who is not resident in New Zealand. Where there is no person whose consent to the marriage of a minor is required under the other provisions of the section, consent to the marriage must be obtained either from a relative who has been acting in the place of a parent or from a Family Court Judge. The section also provides that no marriage shall be void by reason only of the absence of the consent of any person whose consent is required under the section. Under section 19 where any person whose consent is required to a marriage refuses to give his consent, a Family Court Judge may, on application in that behalf, consent to the marriage and that consent shall have the same effect as if it had been given by the person whose consent has been refused. Where an application is made to a Family Court Judge for consent to a marriage, notice of the application must be served on every person whose consent to the marriage is required under section 18 of the Act. The Family Court Judge may however in his or her discretion dispense with the serving of notice on any such person. The New Zealand Marriage Act also contains comprehensive provisions dealing with consent in general. It provides in section 20 that every consent under section 18 of the Act must be in writing,

witnessed by some person who, if resident in New Zealand, shall add his occupation and address, and the consent shall be delivered to the Registrar to whom notice of the intended marriage is given. Any consent given under section 18 of the Act may, by notice in writing signed by the person giving his or her consent, be withdrawn at any time before the Registrar issues the marriage licence or solemnises the marriage, as the case may be.

2.17.5 The Australian Marriage Act provides that a person is of marriageable age if the person has attained the age of 18 years.¹¹⁷ It further provides that a person who has attained the age of 16 years but has not attained the age of 18 years may apply to a Judge or magistrate in a State or Territory for an order authorising him or her to marry a particular person of marriageable age despite the fact that the applicant has not attained the age of 18 years.¹¹⁸ The General Statutes of Connecticut provide likewise that no marriage licence may be issued to any applicant under sixteen years of age, unless the judge of probate for the district in which the minor resides endorses his written consent on the licence.¹¹⁹ The Kentucky Revised Statutes provide that a marriage is prohibited when at the time of marriage the person is under eighteen years of age.

2.17.6 Under English law consent to the marriage of a person who is under the age of 18 is required.¹²⁰ Consent is a requirement to a marriage after civil preliminaries to a marriage and when a marriage is contracted with a common licence. However, although parents or other parties may object to a intended marriage, consent is not required after the publication of bans. Consent is required as follows:

- C From each parent who has parental responsibility for the child and each guardian;
- C If a court has made a residence order which is in force with respect to the child, the consent of the person or persons with whom the child is to live under the terms of the order is required in substitution for that of the parents or guardians;
- C The consent of the designated local authority is required in addition to the consent of the parents and guardians if the child is the subject of a care order designating the local authority;
- C In the case where there is no residence or care order in force, but a residence

¹¹⁷ Section 11 but subject to section 12.

¹¹⁸ Section 12.

¹¹⁹ Section 46b — 30.

¹²⁰ Cretney & Masson *Principles of Family Law* at 8 — 9.

order was in force immediately before the child reached the age of 16, the consent of the person or persons with whom the child was to live under that residence order is required;

- C In the case where the child is a ward of court, the consent of the court is required in addition to that of any person specified above;
- C Where the required consent of a prescribed person cannot be obtained by reason of absence or inaccessibility or by reason of him or her being under any disability the superintendent registrar may dispense with the required consent, or the court may consent;
- C Where a prescribed person refuses to give consent the High Court and county court have jurisdiction to hear an application.¹²¹

2.17.7 No respondents addressed section 24(1) in particular. Rev Dr Louis Bosch however made the following suggestions in regard to minimum ages:

- C The *acceptable* age for marriage should be 19 years for males and females at which consent is sufficient and that no other consent to marry be required;
- C Persons under the age of 19 years must receive consent from the Minister of Home Affairs and not necessarily from their parents;
- C The minimum age for marriage should be set at 14 years of age for both males and females, and the consent of the Minister of Home Affairs as well as the consent of their parents should be required;
- C the age for consent for having sexual relationships should be 15 years for males and females.

2.17.8 It was noted in discussion paper 88 that it seemed in the absence of comments reflecting the opposite point of view, that there is agreement on the question whether written consent should be submitted to a marriage officer in the case of a party or parties intending marriage being a minor or minors. Since, furthermore, the Department of Home Affairs' proposed provision repeats the existing wording of section 24 (with the exception of the addition of the concept of customary unions) it seemed apparent that this section should remain unamended. The question however arose from a drafting perspective whether the existing section 24(2) should be retained or whether this aspect should rather be included in section 1 containing the

¹²¹ Although in practice almost all applications are made to magistrates' courts.

definitions. It was also considered noteworthy that the Department of Home Affairs' definition did not follow the wording of the existing subsection since the words "which has been dissolved by death or divorce" have been omitted. Apart from the apparent change in meaning which the Department of Home Affairs' suggested provision could effect, it was stated that it would seem as if this aspect forms part of the substantive provisions of Marriage Act which should rather be included in the provisions of the Act and as if it would be expedient to retain the existing subsection.

(d) Recommendation contained in discussion paper 88

2.17.9 It was provisionally recommended that besides the substitution of the term "conduct" in section 24(1) for the term "solemnise", sections 24(1) and (2) should remain unamended.

(e) Comment on discussion paper 88

2.17.10 iJubilee ConneXion point out that they support the preliminary recommendation. Pastor Sid Hartley of the Hatfield Christian Church remarks that they consider that 18 years is too young and immature for such a responsible and binding relationship like marriage.

2.17.11 The Department of Home Affairs supports the substitution of the term "conduct" for the term "solemnise" and suggests that for purposes of a user-friendly Marriage Act, that the "legally required consent" be fully described in this section.

(f) Evaluation and recommendation

2.17.12 The Commission has noted the concern about eighteen years of age being too immature to contract marriage but does not regard this argument as persuasive. It seems that the Department of Home Affairs' suggestion on setting out fully what is meant by "legally required consent" is based on the Australian Marriage Act which sets out clearly who may consent to marriage. This proposal seems persuasive to effect legal certainty. Consent to marriage is presently governed in South Africa by a number of Acts although the Marriage Act does not refer to them.¹²² The Guardianship Act¹²³ provides that a woman shall be the guardian of her minor children born out of wedlock¹²⁴ and such guardianship is equal to that which a father has under the common law in respect of his minor children.¹²⁵ This is subject to any

¹²² See generally on consent minors require Sinclair & Heaton *The Law of Marriage* Vol 1 at 366 *et seq* and *Boberg's Law of Persons and the Family* 2nd edition by Belinda van Heerden *et al* Kenwyn: Juta & Co 1999 at 835 — 841.

¹²³ Section 1 of Act 192 of 1993.

¹²⁴ See however *Boberg's Law of Persons and the Family* 2nd edition at 27: "The constitutionality of the common law remains at issue, despite the enactment of the Natural Fathers of Children Born out of Wedlock Act." See also Sinclair & Heaton *The Law of Marriage* Vol 1 at 124 — 126 who argue that our law of parent and child should be reformed to incorporate full sharing of all parental rights and responsibilities, regardless whether the child is born in or out of wedlock.

¹²⁵ Note also the case of *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC) or 1997 (6) BCLR 708 (CC) where the respondent argued that the Presidential Act No 17 which granted special remission of sentences to certain categories of prisoners, *inter alia*, all mothers in prison on 10 May 1994, with minor children under the age of twelve years was discriminatory as he would have qualified for remission, but for the fact that he was the father of his son who was under the age of twelve years. The court noted that the reason given by the President for the special remission of sentence of mothers with small children is that it will serve the interests of children. Although no statistical or survey evidence was produced to establish this fact, the court saw no reason to doubt the assertion that mothers, as a matter of fact, bear more responsibilities for child-rearing in our society than do fathers, and added that this statement was a generalisation. The court remarked that there will be particular instances where fathers bear more responsibilities than mothers for the care of children, and, in addition, there will also be many cases where a natural mother is not the primary care giver, but some other woman fulfils that role, whether she be the grandmother, stepmother, sister, or aunt of the child concerned. The court remarked, however, although it may generally be true that mothers bear an unequal share of the burden of child rearing in our society as compared to the burden borne by fathers, it cannot be said that it will ordinarily be fair to discriminate between women and men on that basis. The court also said that we need to develop a concept of unfair discrimination which recognises that although a society which affords each human being equal treatment on the basis of equal worth and freedom is our goal, we cannot achieve that goal by insisting upon identical treatment in all circumstances before that goal is achieved. The court added that each case will require a careful and thorough understanding of the impact of the discriminatory action upon the particular people concerned to determine whether its overall impact is one which furthers the constitutional goal of equality or not, and that a classification which is unfair in one context may not necessarily be unfair in a different context. (See par 39 — 41.) Note also that in a dissenting judgment Judge Mokgoro held that the

order of a competent court with regard to sole guardianship of a minor child or any right, power or duty which any person has or does not have in respect of such minor. The Matrimonial Affairs Act provides that any provincial or local division of the High Court may, on the application of either parent of a minor whose parents are divorced or are living apart, in regard to the custody or guardianship of, or access to, the minor, make any order which it may deem fit.¹²⁶ If in its opinion it would be in the interests of such minor to do so, it may grant to either parent the sole guardianship (which shall include the power to consent to the marriage of the child) or the sole custody of the minor. The court may also order that, on the predecease of the parent to whom the sole guardianship of the minor is granted, a person other than the surviving parent shall be the guardian of the minor, either jointly with or to the exclusion of the surviving parent. The Divorce Act also makes provision that sole guardianship can be awarded to one parent in respect of a minor child who then has to consent to the marriage of such minor child.¹²⁷ The

Presidential Act constitutes unfair discrimination contrary to section 8(2) of the interim Constitution, but that the unfair discrimination is justified under section 33(1) of the Constitution. (See par 89 *et seq.*) She noted that the President stated that he took particular account of the need to maintain the integrity of the judicial system and the administration of justice, that he also considered the concerns of the public about the release of convicted prisoners, and that the release of mothers of young children was motivated primarily by a concern for children. She pointed out that no fathers were released, despite an acknowledgment by the government that “a minority of fathers . . . are actively involved in nurturing and caring for their children”. In her view, denying men the opportunity to be released from prison in order to resume rearing their children, entirely on the basis of stereotypical assumptions concerning men’s aptitude at child rearing, is an infringement upon their equality and dignity. She considered that the Presidential Act did not recognize the equal worth of fathers who are actively involved in nurturing and caring for their young children, treating them as less capable parents on the mere basis that they are fathers and not mothers. She said that section 8 of the Constitution gives us the opportunity to move away from gender stereotyping; society should no longer be bound by the notions that a woman’s place is in the home, (and conversely, not in the public sphere), and that fathers do not have a significant role to play in the rearing of their young children. She stated that those notions have for too long deprived women of a fair opportunity to participate in public life, and deprived society of the valuable contribution women can make; women have been prevented from gaining economic self-sufficiency, or forging identities for themselves independent of their roles as wives and mothers, and by the same token, society has denied fathers the opportunity to participate in child rearing, which is detrimental both to fathers and their children. She also noted that as recognized by the Constitutional Court in *Fraser v Children’s Court, Pretoria North and Others* 1997 (2) BCLR 153 (CC), fathers have a meaningful contribution to make in child rearing, she was concerned that the Constitutional Court may be perceived as retreating from the valuable principles laid down in that case, and that it is important that those principles be adhered to, so that they may begin to benefit all mothers, fathers and their children.

¹²⁶ Section 5 of Act 37 of 1953.

¹²⁷ Act 70 of 1979, section 6(3): A court granting a decree of divorce may, in regard to the maintenance of a dependent child of the marriage or the custody or guardianship of, or access to, a minor child of the marriage, make any order which it may deem fit, and may in particular, if in its opinion it would be in the interests of such minor child to do so, grant to either parent the sole guardianship (which shall include the power to consent to the marriage of the child) or the sole

Child Act made provision¹²⁸ that a children's court may on the application of the mother or of the father, deprive the father or the mother of the right to exercise in regard to that child any parental powers and confer upon the mother or the father of the child the exclusive right to exercise those powers including the power to grant consent to the marriage or adoption of the child.¹²⁹ A minor however, who was previously married, or a minor who has been declared a major under the provisions of the age of Majority Act, Act No 57 of 1972, does not require parental consent to marry.

2.17.13 The Commission recommends that apart from the amendments proposed in the discussion paper, namely the substitution of the term "conduct" in section 24(1) for the term "solemnise", section 24 should set out in clearer terms what is meant by legally required consent:

- (3) "Legally required consent" means for the purposes of this Act that —
 - (a) if both the minor's parents are alive, consent shall be obtained from both parents;
 - (b) if the minor's parents are divorced and he or she is in the custody of one parent, consent shall be obtained from both parents;
 - (c) if the minor's parents are divorced and sole guardianship is awarded to one parent —
 - (a) in terms of section 5(1) of the Matrimonial Affairs Act, Act No 37 of 1953;
or
 - (b) section 6(3) of the Divorce Act, Act No 70 of 1979,
the minor shall obtain the consent from that parent;
 - (d) the minor shall obtain the consent of his or her mother in any case where his or her parents have never been married;
 - (e) if one of the parents of the minor is deceased and the parents had at any time been married to each other, consent shall be obtained from the surviving parent and, if applicable, any other person who is the legal guardian of the minor;
 - (f) if both parents of the minor are deceased and they had at any time been married to each other, consent shall be obtained from any person who is the legal guardian of the minor;
 - (g) if the minor's parents had never been married to each other and one or both of them are deceased, consent shall be obtained from the mother if she is alive and from any person who is the legal guardian of the minor if she is deceased;
 - (h) if the consent of the parent or legal guardian cannot be obtained, section 25

custody of the minor, and the court may order that, on the predecease of the parent to whom the sole guardianship of the minor is granted, a person other than the surviving parent shall be the guardian of the minor, either jointly with or to the exclusion of the surviving parent.

¹²⁸ In section 60 of Act 33 of 1960. The whole of the Child Act was repealed by the Child Care Act 74 of 1983, except in so far as it related to the appointment of probation officers and the establishment, maintenance and management of schools of industries and reform schools.

¹²⁹ If a children's court is satisfied that a child is living with his mother apart from his father because his father deserted or habitually ill-treated the child or his mother or refused to maintain either of them or that a child is living with his father apart from his mother.

applies.

Provided that a minor who was previously married, or a minor who has been declared a major under the provisions of the age of Majority Act, Act No 57 of 1972, does not require parental consent to marry.

2.18 DISSOLUTION OF MARRIAGE FOR WANT OF CONSENT OF PARENTS OR GUARDIANS AND ITS CONSEQUENCES

(a) The provision contained in the Marriage Act

2.18.1 The Marriage Act contains the following provision:

24A(1) Notwithstanding anything to the contrary contained in any law or the common law a marriage between persons of whom one or both are minors shall not be void merely because the parents or guardian of the minor, or a commissioner of child welfare whose consent is by law required for the entering into of a marriage, did not consent to the marriage, but may be dissolved by a competent court on the ground of want of consent if application for the dissolution of the marriage is made-

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

24A(2) A court shall not grant an application in terms of subsection (1) unless it is satisfied that the dissolution of the marriage is in the interest of the minor or minors.

(b) The Department of Home Affairs' suggested provision

2.18.2 The Department of Home Affairs' suggested provision is drafted identical to the existing section 24A, the only difference being that it was renumbered as clause 19 and that it contains references to customary unions.

(c) Evaluation and recommendation contained in discussion paper 88

2.18.3 Under English law a marriage is void if either party is under 16.¹³⁰ However, if the parties are under 18 and they fail to comply with obtaining the required consent¹³¹ their failure does not affect the validity of the marriage.

¹³⁰ Cretney & Masson *Principles of Family Law* at 44.

¹³¹ See the discussion on section 24 above where the requirements of the English law is noted.

2.18.4 It was pointed out in discussion paper 88 that no respondents addressed this issue. In view of the lack of comment on this section it was stated that it would seem that the present provision is satisfactory. The Commission therefore provisionally recommended that the section not be amended.

(d) Comment on discussion paper 88

2.18.5 Pastor Sid Hartley of the Hatfield Christian Church remarks that they consider that 18 years is too young and immature for such a responsible and binding relationship like marriage.

5. Evaluation and recommendation

2.18.6 The Commission remarked above that it is not persuaded that the age requirement should be amended. The Commission recommends that in view of the lack of any further comment it remains of the point of view that this section should remain unamended.

2.19 WHEN CONSENT OF PARENTS OR GUARDIAN CANNOT BE OBTAINED

(a) The provision contained in the Marriage Act

2.19.1 The Marriage Act contains the following provisions:

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 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.

25(2) A commissioner of child welfare shall, before granting his consent to a marriage under sub-section (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.

25(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.

25(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.

(b) The Department of Home Affairs' suggested provisions

2.19.2 The Department of Home Affairs' suggested provision largely corresponds with the existing section 25, the only differences being that it was renumbered to be clause 20, it is drafted with gender sensitivity kept in mind, subsequent references are to the commissioner instead of to the commissioner of welfare throughout the section and that it contains references to customary unions.

(c) Evaluation and recommendation contained in discussion paper 88

2.19.3 Since no respondents addressed this issue, it seemed that the Act governs this aspect satisfactory. The Commission therefore provisionally recommended that section 25 not be amended except for the references to "he" and "his" should include "she" and "her" as well.

(d) Comment on discussion paper 88

2.19.4 The Department of Home Affairs point out that they support the preliminary recommendation.

C Evaluation and recommendation

2.19.5 The Commission agrees with the provisional suggestion and recommends that section 25 not be amended except for the references to "he" and "his" should include "she" and "her" as well.

2.20 PROHIBITION OF MARRIAGE TO PERSONS UNDER CERTAIN AGES

(a) The provision contained in the Marriage Act

2.20.1 The Marriage Act contains the following provisions:

26(1) No boy 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 by him, which he may grant in any particular case in which he 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.

26(2) If any person referred to in subsection (1) who was not capable of contracting a valid marriage without the written permission of the Minister or any officer in the public service authorized thereto by him, in terms of this Act or a prior law, contracted a marriage without such permission and the Minister or such officer, as the case may be, considers such marriage to be desirable and in the interests of the parties in question, he may, provided such marriage was in every other respect solemnised 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 marriage.

26(3) If the Minister or any officer in the public service authorised thereto by him so directs it shall be deemed that he granted written permission to such marriage prior to the solemnization thereof.

(b) The Department of Home Affairs' suggested provisions

2.20.2 The Department of Home Affairs suggested the following provisions:

21.(1) No person under the age of 18 years shall be capable contracting a valid marriage or customary union except with the written permission of the Minister, which he or she may grant in any particular case in which he or she considers such marriage or customary union desirable: Provided that such permission shall not relieve the parties to the proposed marriage or customary 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.

21(2) If any person referred to in subsection (1) who was not capable of contracting a valid marriage or customary union without such permission and the Minister or such officer, as the case may be, considers such marriage or customary union to be desirable and in the interests of the parties concerned, he or she may, provided such marriage or customary union was in every other respect solemnised 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 marriage or customary union.

21(3) If the Minister so directs it shall be deemed that he or she granted written permission to such marriage or customary union prior to the solemnization thereof.

(c) Comments on the media statement

2.20.3 The Campus Law Clinic of the University of Natal suggested that the minimum age for contracting marriage referred to in section 26 should be 18 in order to bring it in line with the provisions of the Constitution. Rev Dr Louis Bosch however proposes the following minimum

ages:

- C The *acceptable* age for marriage should be 19 years for males and females at which consent is sufficient and that no other consent to marry be required;
- C Persons under the age of 19 years must receive consent from the Minister of Home Affairs and not necessarily from their parents;
- C The minimum age for marriage should be set at 14 years of age for both males and females, and the consent of the Minister of Home Affairs as well as the consent of their parents should be required;
- C the age for consent for having sexual relationships should be 15 years for males and females.

(d) Evaluation contained in discussion paper 88

2.20.4 It was pointed out in discussion paper 88 that the Commission considered the issue of minimum ages for marriage in its discussion paper 74 dealing with Customary Marriages. The Commission argued as follows in its latter Discussion Paper:

5.1.6 To ensure that future spouses can formulate a proper consent to marriage and to obviate potential exploitation of children, a minimum age for marriage is now arguably a necessary step to securing individual human rights. The international Convention on Elimination of All Forms of Discrimination against Women (CEDAW) and the Convention on Consent to Marriage both require states parties to take legislative action to specify a uniform minimum age for marriage. However, these treaties do not stipulate what the age should be.

5.1.7 A straightforward solution would have been to apply the ages laid down in the Marriage Act — 18 for men and 15 for women — to customary marriages. While accepting this general proposal, the Gender Research Project (CALs) and the National Human Rights Trust said that preserving a difference in age discriminated unfairly on the basis of sex and that one age should now apply to both men and women. If companionship is seen as the only goal of marriage, this argument would be relevant. But it could be argued that the Marriage Act does not constitute an unfair discrimination, in view of the alleged differences in the rates at which boys and girls physically mature.

5.1.8 The Gender Research Project (CALs) suggested a minimum age of 18 for both sexes. This proposal would bring South African law into line with international standards, for determining the change from child- to adulthood, since the United Nations Convention on the Rights of the Child, the Constitution and the African Charter on the Rights and Welfare of the Child specify 18. Since South Africa's ratification of the latter Charter is at present under consideration, it is proposed that the minimum age of 18 for marriage should apply to both men and women.

5.1.9 If the individual freedom to marry is to be fully implemented in our law, then a boy or girl who is under age should still, in the appropriate circumstances, be entitled to

contract a marriage. The rules in the Marriage Act, which are designed to govern such a situation, could conveniently be extended to customary marriages. Prospective spouses would need to obtain the written permission of the Minister of Home Affairs, together with their guardians' consent.

2.20.5 The Commission provisionally considered, as the Department of Home Affairs also did, that the minimum age for marriage should be 18 years of age for males and females.

(e) Recommendation contained in discussion paper 88

2.20.6 It was provisionally recommended that section 26 be amended to provide that no boy or girl under the age of 18 shall be capable of contracting a valid marriage except with the written permission of the Minister.

(ii) Comment on discussion paper 88

2.20.7 Ms ACJ Prinsloo of the Pretoria North Magistrates' Office considers that the ages of boys and girls may not be in conflict with the Constitution, as it is merely a physical distinction on the basis of the real physical development of the respective sexes. She however considers that changing the age for the parties concerned to 18 years will cause unnecessary applications made to the Minister of Home Affairs and or his officials. She suggests that this provision be left unamended.

2.20.8 iJubilee ConneXion says that they support the provisional recommendation that "no boy or girl under the age of 18 shall be capable of contracting a valid marriage". They consider that this upholds the dignity of marriage and safeguards the rights of children before they are adults. The Department of Home Affairs also point out that they support the preliminary recommendation.

(ii) Evaluation and recommendation

2.20.9 The Commission considers that the reasoning above why this section should set a consistent age requirement for boys and girls of 18 years is persuasive. The Commission does not consider Ms Prinsloo's argument persuasive for reconsidering the proposed uniform minimum age of 18 years. The Commission therefore recommends that section 26 be amended as was provisionally proposed in the discussion paper, namely that no boy or girl under the age

of 18 shall be capable of contracting a valid marriage, except with the written permission of the Minister or a judge as is the case presently.

2.21 MARRIAGE BETWEEN A PERSON AND A RELATIVE OF HIS OR HER DECEASED OR DIVORCED SPOUSE

(a) The provision contained in the Marriage Act

2.21.1 The Marriage Act contains the following provision:

- 28 Any legal provision to the contrary notwithstanding it shall be lawful for —
- (ii any widower to marry the sister of his deceased wife or any female related to him through his deceased wife in any more remote degree of affinity than the sister of his deceased wife, other than an ancestor or descendant of such deceased wife;
 - (ii any widow to marry the brother of her deceased husband or any male related to her through her deceased husband in any more remote degree of affinity than the brother of her deceased husband, other than an ancestor or descendant of such deceased husband;
 - (ii any man to marry the sister of a person from whom he has been divorced or any female related to him through the said person in any more remote degree of affinity than the sister of such person, other than an ancestor or descendant of such person; and
 - (ii any woman to marry the brother of a person from whom she has been divorced or any male related to her through the said person in any more remote degree of affinity than the brother of such person, other than an ancestor or descendant of such person.

(b) The Department of Home Affairs' suggested provisions

2.21.2 The Department of Home Affairs suggested that clause 23(1) follow the wording of section 28. The Department explained that the prohibition of marriages between a man and a woman and the direct descendant of his or her deceased spouse where they are not related to each other by blood is questionable and needs to be reconsidered. The Department of Home Affairs therefore added the following subclause:

- 23(2) A provincial or local division of the Supreme Court shall have jurisdiction to consent to a marriage or customary union between a man or a woman and the direct descendant of his or her deceased spouse if both parties have reached the age of majority and are not related to each other by descendance.

(c) Comments on the media statement

2.21.3 The Campus Law Clinic of the University of Natal was the only respondent addressing this issue and stated that section 28 should be qualified to include the words “as long as there is informed consent”. The Campus Law Clinic further suggested that where a polygamous marriage is involved, the project committee on customary law would need to ensure that safeguards are included into the legislation.

(d) Evaluation contained in discussion paper 88

2.21.4 The Campus Law Clinic’s suggestion on informed consent addresses a problematic aspect involved in polygamy. The Commission remarked in its Discussion Paper 74 on customary marriages as follows on the question of the consent to marriage:

4.2.8 Today, no one is likely to dispute the requirement that spouses freely consent to their marriage. This principle rests on the freedom to marry, which is fully accepted in international law as well as in South African public policy. An individual's right to decide his or her marital destiny is clearly a universal human right, and it is endorsed by over a century of precedent and legislation in South Africa. It is more important now to consider the implications of requiring of spousal consent, namely, the most appropriate means of ensuring that a properly informed consent is given. Colonial courts and legislatures, for instance, paid no attention to the age at which a prospective spouse could formulate consent. (Ages fixed under the Marriage Act were assumed to apply only to civil or Christian unions.) Nor were women released from the need to obtain their guardians' approval in order to marry.

4.2.9 Determining whether a woman genuinely consents to her marriage is still a problem. The Gender Research Project (CALS), for example, said that the process of negotiating marriage demands no more than that a woman acknowledge that she knows the man who is proposing. Her consent is then inferred. Moreover, even in common law, what constitutes duress sufficient to invalidate consent is still not absolutely settled. These problems are not amenable to solution by statute. Legislation would be more effective in fixing a specific age at which individuals may be presumed mature enough to decide when and whom they want to marry.

2.21.5 Section 46b — 21 of the General Statutes of Connecticut provides that no man may marry his mother, grandmother, daughter, granddaughter, sister, aunt, niece, stepmother or stepdaughter, and no woman may marry her father, grandfather, son, grandson, brother, uncle, nephew, stepfather or stepson. It provides further that any marriage within these degrees is

void.¹³² In terms of section 402.010(1) of the Kentucky Revised Statutes no marriage shall be contracted between persons who are nearer of kin to each other by consanguinity, whether of the whole or half-blood, than second cousins, and marriages prohibited by subsection (1) are incestuous and void.¹³³ Furthermore, in terms of section 25.05.021 of the Alaska Statutes marriage is prohibited and void if performed when either party to the proposed marriage has a husband or wife living, or the parties to the proposed marriage are more closely related to each other than the fourth degree of consanguinity, whether of the whole or half-blood, computed according to rules of the civil law. The Utah Code provides in section 30 — 1 — 1 as follows:

- (6) The following marriages are incestuous and void from the beginning, whether the relationship is legitimate or illegitimate:
 - (a) marriages between parents and children;
 - (b) marriages between ancestors and descendants of every degree;
 - (c) marriages between brothers and sisters of the half as well as the whole blood;
 - (d) marriages between uncles and nieces or aunts and nephews;
 - (e) marriages between first cousins, except as provided in Subsection (2); or
 - (f) marriages between any persons related to each other within and not including the fifth degree of consanguinity computed according to the rules of the civil law, except as provided in Subsection (2).
- (2) First cousins may marry under the following circumstances:
 - (a) both parties are 65 years of age or older; or
 - (b) if both parties are 55 years of age or older, upon a finding by the district court, located in the district in which either party resides, that either party is unable to reproduce.

2.21.6 The Australian Marriage Act provides in section 23B(1) that a marriage is void if the parties are within a prohibited degree of relationship. Marriages of parties within a prohibited degree of relationship are in terms of subsection (2) those between a person and an ancestor or descendant of the person, or between a brother and a sister (whether of the whole blood or the half-blood).¹³⁴ Subsection (3) provides that any relationship specified in subsection (2)

¹³² [Http://www.cslnet.ctstateu.edu/statutes/title46b/t46b — p4.htm](http://www.cslnet.ctstateu.edu/statutes/title46b/t46b—p4.htm) accessed on 12 June 1998.

¹³³ [Http://www.law.state.ky.us/Civil/marriageman.htm](http://www.law.state.ky.us/Civil/marriageman.htm) accessed on 10 June 1998.

¹³⁴ Note that prohibited degrees of relationship are governed as follows in section 4 of the Special Marriage Act of 1954 of India: “The parties to the marriage should not be within the degree of prohibited relationship. However, if the custom or usage governing both parties permit marriages within the degrees of prohibited relationship, this prohibition would not apply to such marriages. Under the provisions of this Act, a custom in relation to a person belonging to any tribe, community, group or family would have to be such rule that is notified by the State Government in the Official Gazette, as applicable to such tribe, community, group or family. The State Government would not issue such a notification unless:

1. the rule has been continuously and uniformly observed for a long time among those

includes any relationship traced through, or to, a person who is or was an adopted child, and for that purpose, the relationship between an adopted child and the adoptive parent, or each of the adoptive parents, of the child shall be deemed to be or to have been the natural relationship of child and parent. The Marriage Act provides further that “adopted”, in relation to a child, means adopted under the law of any place¹³⁵ relating to the adoption of children, and “ancestor”, in relation to a person, means any person from whom the first mentioned person is descended including a parent of the first-mentioned person.

2.21.7 The New Zealand Marriage Act provides that subject to the provisions of section 15 a marriage which is forbidden by the Second Schedule¹³⁶ to the Act shall be void. It further provides that any persons who are not within the degrees of consanguinity (relationships between blood relatives) but are within the degrees of affinity (relationships created by marriage) prohibited by the Second Schedule may apply to the High Court for its consent to their marriage. The Court, if it is satisfied that neither party to the intended marriage has by his or her conduct caused or contributed to the cause of the termination of any previous marriage of the other party,

members;

2. such rule is certain and not unreasonable or opposed to public policy;
3. such rule is applicable only to a family and has not been discontinued by the family.”
(See <http://law.indiainfo.com/personal/hindu-valid-marriage.html>)

Section 5 of the Hindu Marriage Act prescribes certain conditions for the solemnisation of marriage between two Hindus. One of the conditions is that the parties should not be within the prohibited degrees of relationship, unless the custom or usage governing them permits marriage between them. Further, the parties to the marriage should not be *sapindas* of each other, unless the custom or usage governing them permits marriage between them.

Under Section 3(g) of the Hindu Marriage Act, the prohibited degrees of relationship are as follows:

1. If one party to the marriage is a lineal ascendant of the other, for eg if one of the party to the marriage is the father or mother of the other;
2. If one of the parties to the marriage is the wife or husband of a lineal ascendant or descendant, eg marriage of a man to his father's wife or the marriage of a woman to her daughter's husband.
3. Marriage between a man and his brother's wife or uncle's wife or his grandfather's or grandmothers' brother's wife.
4. Marriage between: brother and sister; uncle and niece; aunt and nephew; children of brother and sister; children of sisters; children of brothers.

The “*sapinda*” relationship under the Act extends as far as the third generation, inclusive of the third generation, in the line of ascent through the mother and as far as the fifth generation, inclusive of the fifth generation, in the line of ascent through the father. The line is traced upwards from the person concerned who is counted as the first generation. Under the Act, two persons are said to be *sapindas* of each other if one is a lineal ascendant of the other within the limits of the *sapinda*, or if they have a common lineal ascendant who is within the limits of the *sapinda* relationship with reference to each of them.

¹³⁵ Whether in or out of Australia.

¹³⁶ The Second Schedule is considered in the next paragraph.

may make an order dispensing with the prohibition contained in the Second Schedule to the Act so far as it relates to the parties to the application. If such an order is made, the prohibition ceases to apply to the parties. The Registrar of the Court where any order is made must send a copy in duplicate of the order to the Registrar-General. The Act further provides in section 15 that no marriage not forbidden by the provisions of the Second Schedule to the Act shall be void only on the ground of consanguinity or affinity.

2.21.8 The Second Schedule of the New Zealand Marriage Act provides that a man may not marry his grandmother, grandfather's wife, wife's grandmother, father's sister, mother's sister, mother, stepmother, wife's mother, daughter, wife's daughter, sons' wife, sister, son's daughter, daughter's daughter, sons's son's wife, daughter's son's wife, wife's son's daughter, wife's daughter's daughter, brother's daughter or sister's daughter. The Schedule further provides that a woman may not marry her grandfather, grandmother's husband, husband's grandfather, father's brother, mother's brother, father, stepfather, husband's father, son, husband's son, daughter's husband, brother, son's son, daughter's son, son's daughter's husband, daughter's daughter's husband, husband's son's son, husband's daughter's son, brother's son, sister's son. The Schedule also provides that provisions of the Schedule with respect to any relationship shall apply whether the relationship is by the whole blood or by the half blood. The Schedule defines that, unless the context otherwise requires, the term "wife" means a former wife, whether she is alive or deceased, and whether her marriage was terminated by death or divorce or otherwise, and that the term "husband" has a corresponding meaning.

2.21.9 The English law also distinguishes between relationships of consanguinity (those between blood relations) and relationships of affinity (those created by a marriage).¹³⁷ The English Marriage Act provides on the prohibited degrees of consanguinity that a man may not marry his mother or his daughter, his grandmother or his granddaughter, his sister, his aunt or his niece. It prohibits in regard of affinity, two classes of degrees, namely first class and second class. The first class deals with step-relations and the second class degrees with daughters-in-law and mothers-in-law. Regarding the first class degree of prohibition, a man may only marry his step-daughter, step-mother, step-grandmother or step-granddaughter. Two conditions, however, have to be satisfied, namely that both the parties must be 21 years or older and the younger party must not at any time before attaining the age of 18 have been a child of the family in relation to the other party which means a person not having lived in the same household as

¹³⁷ Cretney & Masson *Principles of Family Law* at 36 *et seq.*

that person and been treated by that person as a child of his family.

2.21.10 The English Marriage Act provides in respect of daughters and mothers-in-law that a man may not marry his son's former wife unless both parties to the intended marriage are 21 or older and both the son and the son's mother are deceased, or conversely if marriage is intended with a mother-in-law, the intending husband's former wife and the former wife's father are both deceased. It is stated that the policy underlying these complex provisions is reasonably clear, namely a man should not be allowed to marry his step-daughter if there has been a parental relationship between them and that he should not be allowed to marry his daughter-in-law in circumstances where it may be thought that his sexual overtures caused the breakdown of her marriage to his son.¹³⁸ However, doubt exists whether these provisions will be wholly effective in all cases and whether there can be any realistic investigation into the parties' declaration that the intended bride has not been a child of the family in relation to the other. It is also suggested that in regard of relationships arising from adoption, natural relationships by consanguinity but not affinity should remain a bar to marriage in the English law, and that the child should be regarded for the purpose of the issue of prohibited degrees as the natural child of his adoptive parents. However, it is considered that a discretion should be given to the court to permit marriages where the prohibited relationship arose only from the adoption, it may prevent hardship and also minimise the risk of role confusion within the family.

2.21.11 In 1992 the Scottish Law Commission also considered the issue of prohibited degrees of relationship in its *Family Law Report*.¹³⁹ They pointed out that the Marriage (Scotland) Act 1977 provides that a marriage is void if the parties are within the prohibited degrees of relationship set out in the Act, and that in the case of blood relationships this means that a person cannot marry his or her parent, grandparent, or great-grandparent; child, grandchild or great-grandchild; brother or sister; uncle, aunt, nephew or niece. They did not suggest any change in these rules. They noted that in the case of relationships by marriage the only restrictions are on marriage with a former spouse's child, grandchild or parent, and even in these cases the law was relaxed in 1986. The Scottish Law Commission explained that in the case of a former spouse's child or grandchild, marriage is permitted provided that both parties are at least 21 years of age at the time of the marriage and "the younger party has not at any time

¹³⁸ Cretney & Masson Principles of Family Law at 41.

¹³⁹ *Report on Family Law* Scottish Law Commission (Scot Law Com No 135). This discussion did not form part of the Commission's discussion paper 88. It is nevertheless included under this heading for sake of convenience. (See <http://www.scotland.gov.uk/library2/doc11/rfl-04.asp>)

before attaining the age of 18 lived in the same household as the other party and been treated by the other party as a child of his family". They remarked that whether this restriction is necessary or desirable is a question on which different views could be held, but considered that it is not manifestly unreasonable. They noted that since the law was reformed as recently as 1986, they did not think that this would be an appropriate time to re-open debate on this issue. They also pointed out that in the case of a former spouse's parent, marriage is now permitted provided that both parties have attained the age of 21 and the marriage is solemnised —

- (a) in the case of a man marrying the mother of a former wife of his, after the death of both the former wife and the former wife's father;
- (a) in the case of a man marrying a former wife of his son, after the death of both his son and his son's mother;
- (b) in the case of a woman marrying the father of a former husband of hers, after the death of both the former husband and the former husband's mother;
- (c) in the case of a woman marrying a former husband of her daughter, after the death of both her daughter and her daughter's father.

2.21.12 The Scottish Law Commission was of the view that these restrictions seem odd and unreasonable. They explained that as they were beginning work on their discussion paper they were referred by a Member of Parliament to a case involving a constituent of his, where the restrictions had caused difficulty and distress. They stated that the case involved a woman who divorced her husband and obtained custody of the children of the marriage, she was greatly supported in looking after the children by her former husband's father and mother, and she in turn provided support when her ex-mother-in-law became ill. Some time after the death of the ex-mother-in-law the woman and her former husband's father decided they would like to marry each other but found that they could not because the woman's former husband was still alive. The Scottish Law Commission noted, however, that section 2(1B) of the Marriage (Scotland) Act 1977 provides that a marriage between a woman and the father of a former husband is permissible only "after the death of both the former husband and the former husband's mother."

2.21.13 The Scottish Law Commission pointed out that other cases where the restrictions in section 2(1B) might seem even more unreasonable can readily be imagined such as the following example:

Suppose that a man aged 40 marries a woman aged 25 who has never known her father. The wife is killed in a road accident and, some time later, the man and his former wife's mother, who is closer to his own age, want to get married. Why should it matter whether the former wife's father, who might not even know that she ever existed, is alive or dead? What is the point of this restriction on a marriage between two people who are both unmarried and unrelated by blood? Or suppose that a man divorced his wife in 1970. She

remarried and went to live in London, taking the son of the marriage with her. In 1977 the son married. He continued to live in London and saw very little of his father. In 1980 the son and his wife were divorced. In 1983 the son's former wife moved to Scotland. She and her former father-in-law began to see more of each other. They would now like to marry each other. Why should they have to wait until both of their former spouses are dead?

2.21.14 The Scottish Law Commission said that it is worth noting that a person can marry his or her former cohabitant's parent, without restriction and that sexual intercourse between a person and the parent of his or her former spouse is not incest, so that in all the examples given the couple could cohabit as husband and wife without committing any offence. They noted that all that the law does is to prevent them from marrying each other and that section 2(1B) is the result of an amendment introduced at the report stage in the House of Lords, at a time when the Bill in question did not yet extend to Scotland. The Scottish Law Commission explained that it was a compromise amendment designed to meet objections which had resulted in the defeat of an earlier proposal to allow people to marry the parent of a former spouse and that the reasons for the rejection of the earlier proposal were that to allow such marriages "would endanger roles within the family and would open up possible erotic overtones." They said that the type of case which concerned the objectors was explained by Lord Meston as follows:

"One can take a typical example. A young couple marry. They may go to live with the parents of, say, the young husband. There may be a weak, immature perhaps teenage daughter-in-law who may be very vulnerable to the influence of her father-in-law. There is a situation of proximity and dependency. If a relationship did develop between the young husband's wife and his father, there are two subsisting marriages which potentially would be ended by divorce. "

2.21.15 The Scottish Law Commission remarked that the question which must be asked is whether the prohibition in section 2(1B) is likely to prevent this type of situation, and are the parties likely to know the law at the time when an attachment is developing, even if they do, is that likely to prevent the attachment developing further? They also stated that it must also be asked why this situation, unfortunate and distressing though it may be, is regarded as so much worse than any other situation in which an attraction between two married people results in the break-up of the two families and why does the parent-in-law relationship itself justify a restriction? They also posed the question whether the situation would be so much less distressful if the younger man were the older man's foster son or brother or nephew or business partner or close friend or if the young woman were the son's cohabitant rather than his wife?

2.21.16 The Scottish Law Commission pointed out that these issues were considered in

the report entitled *No Just Cause* by a group appointed by the Archbishop of Canterbury to look into the law of affinity in England and Wales. They noted that a majority of the group's members referred to the fear that the removal of prohibitions might encourage the formation of attachments between parents-in-law and their sons-in-law or daughters-in-law. They also pointed out that the group did not feel that the law could prevent such cases arising as similar fears had been expressed in relation to the removal of earlier prohibitions, such as the former prohibition of marriage with the brother or, sister of a former spouse, even though there was no evidence to suggest that the removal of these prohibitions had had any ill effects. They said that the group did not accept that the removal of the remaining prohibitions on marriage with former in-laws would tend to undermine the family. The Scottish Law Commission explained that the majority group thought that marriages between former in laws would in practice be rare and that most people, particularly those with religious objections to them, might still prefer to avoid them but that this was not a reasonable argument for prohibiting the lawful marriage of such former in-laws as did wish to marry. They noted that the group's conclusion was that the prohibition was based simply on tradition and could not now be justified on any logical, rational or practical ground, and that the experience of other states where there had never been such a prohibition provided a strong and persuasive argument for abolishing the impediment. The Scottish Law Commission further stated that a minority of the group recommended that the existing legal impediments to marriage between parent-in-law and children-in-law should not be removed and that they said that to allow such marriages would be "to condone sexual rivalry between father and son, or mother and daughter, which, within the close confines of the family, would be destructive of the father and son, or mother and daughter, relationships", it would deprive the child-in-law of his or her safety of place as child in the new family into which he or she marries, when, for instance, a son brings his wife to his father's home, there is an underlying assumption that the daughter-in-law will assume a role in relation to her father-in-law which is exempt from sexual expectations, and to admit the possibility of a future marriage between parent-in-law and child-in-law would be to undermine assumptions which make for the safety and comfort of the adult family.

2.21.17 The Scottish Law Commission said that these arguments are very similar to the arguments which were made many years ago against marriage with a deceased wife's sister, and they seemed to them to be just as unrealistic and just as unsupported by anything in the way of evidence. They remarked that the picture of sexual rivalry painted by the minority seemed to be far removed from the ordinary decencies of family life in Scotland, and, for example, from the actual constituency case referred to earlier. They considered that the idea that women visiting their fathers-in-law are passive creatures who need the protection of a provision in the Marriage

(Scotland) Act 1977 to give them "safety of place" and "a role which is exempt from sexual expectations" struck them as unconvincing. The minority's arguments would seem to them to lead to an outright prohibition of marriage with a former parent-in-law and that is what they actually recommended, although they did concede that there were not such strong objections to a marriage between a parent-in-law and a child-in-law if the intervening spouse were deceased "for then our concern about disruption within the immediate family circle would lose some of its immediate force."

2.21.18 The Scottish Law Commission pointed out that it was a compromise solution which was adopted in the Marriage (Prohibited Degrees of Relationship) Bill for England and Wales and which was later extended to Scotland when the Bill was amended to include Scottish clauses. They were of the view that it is not satisfactory that Scots law should be based on the unconvincing arguments of a minority of a group appointed by the Archbishop of Canterbury to consider the law of affinity in England and Wales. They said that they concluded in the discussion paper that this question deserved to be properly discussed in Scotland. Their preliminary view was that the restrictions presently in section 2(1B) of the Marriage (Scotland) Act 1977 led to anomalies and results which could not be justified by any reasonable argument. They therefore suggested the removal of the few remaining restrictions on marriage between a person and the parent of his or her former spouse. They noted that this suggestion was supported by a majority of those who commented on it and that some respondents thought that it was desirable that the prohibited degrees of relationship should be the same for marriage and for incest and, as it is not incest to have intercourse with a former parent-in-law, favoured removal of the remaining restrictions for this reason. They also explained that the minority who opposed any change did so for various reasons — some appealed to the statement of forbidden degrees in the Old Testament although the biblical degrees were departed from in 1907 when marriage with a deceased wife's sister was permitted. They did not therefore think that there can be any question of going back to them.

2.21.19 The Scottish Law Commission considered that in any event so far as the civil law is concerned, this was a question which has to be decided, for all citizens whatever their religious views, by reference to social considerations and people who have religious objections to particular types of marriage do not need to enter into them. They also indicated that one group of respondents thought that the Scottish law on this subject should remain the same as English law. The Scottish Law Commission did not see why that need be so and considered that there would be no practical difficulties or inconveniences in having different laws on this rather esoteric

point. They explained also that another group expressed concern about pressures on children but remarked that they do not see why children should be prejudiced by the regularisation, through marriage, of an affectionate and supportive relationship which already exists. They remarked that they did not think it likely that a step-parent who already has a close family relationship with his or her step children will necessarily be worse for the children than an unrelated step-parent with no such relationship, nor did they see why children should be prejudiced by the dual roles which result from such marriages as adoption by grandparents is not uncommon and gives rise to similar dual roles. They noted moreover that such dual roles can arise under the existing marriage law in those cases where the very limited restrictions on marriages with the relatives of a former spouse do not apply (eg marriage with former husband's brother, or deceased husband's widowed father) and that no-one, so far as they know, has suggested that they cause any problems. They said that most importantly, they thought that there is a danger of being excessively paternalistic in this area. They pointed out that parents are not generally unmindful of the interests of their own children. They finally considered that the number of marriages which would result from the removal of the remaining restrictions would be likely to be very small indeed and the number of such marriages where there are minor children even smaller. The Scottish Law Commission's conclusion was that the remaining restrictions on marriage with the parent of a former spouse should be abolished. They could see no need for confining this change to persons over the age of 21 remarking that both parties, in the type of case they were considering, will inevitably be old enough to have had at least one former marriage. The Scottish Law Commission therefore recommended that it should continue to be a ground of nullity of marriage that the parties are within the prohibited degrees of relationship specified in the Marriage (Scotland) Act 1977, subject, however, to the removal of the remaining limited restrictions on marriage between a person and the parent of his or her former spouse. They also recommended accordingly that the distinction between marriage with a deceased spouse's widowed parent (which is permitted under the present law) and other marriages with a former spouse's parent (which are not permitted) should no longer be part of Scots law.

2.21.20 It was noted in discussion paper 88 that Prof Hahlo notes in respect of the South African law that ascendants and descendants in the direct line, namely father and daughter, mother and son, grandfather and granddaughter etc, may not marry no matter whether the relationship is based on legitimate or illegitimate descent.¹⁴⁰ He further explains that collaterals

¹⁴⁰ Hahlo *The South African Law of Husband and Wife* at 70 *et seq.*

are prohibited from marrying irrespective whether they are of the whole or half blood, if either of them is related to their common ancestor in the first degree of descent. Marriage is therefore prohibited between brother and sister, half-brother and half-sister, uncle and niece, grand-uncle and grand-niece, but not between cousins, including double first cousins, meaning the children of two brothers and two sisters. The prohibition as regards collaterals by affinity are concerned has been abolished by the Marriage Act, and therefore a man may marry his deceased or divorced wife's sister and any female related to him through his former wife in a more remote degree of affinity than her sister, such as her sister's daughter or aunt. However, marriage by parties in the descending and ascending line are prohibited, and a man may therefore not marry his former daughter-in-law or mother-in-law, his stepmother or his stepdaughter. Adoption is not an obstacle to a marriage which, but for the adoption, would have been permitted. An adoptive daughter and the son of the adoptive parents may therefore marry, provided that they are not related within the prohibited degrees of relationship by blood.¹⁴¹

2.21.21 The Commission's preliminary view was that the Department of Home Affairs' suggestion for adding the additional subsection is persuasive. The Commission provisionally considered that this provision should correspond to its provision setting out the minimum age for marriage for males and females to be 18 years of age. It was thought inadvisable to set any higher standard than the proposed age of 18 years for these cases.

(e) Recommendation contained in discussion paper 88

2.21.22 The Commission provisionally recommended that section 28 be renumbered and a subsection (2) be added to make provision for of the provincial or local division of the High Court to have jurisdiction to consent to a marriage between a man or a woman and the direct descendant of his or her deceased spouse if both parties have reached the age of 18 years and they are not related to each other by blood.

6. Comment on discussion paper 88

2.21.23 Rev Vivian W Harris of the Brooklyn Methodist Church suggests that the

¹⁴¹ See Sinclair *The Law of Marriage* Vol I at 347 and section 20(4) of the Child Care Act, 74 of 1983: "An order of adoption shall not have the effect of permitting or prohibiting any marriage or carnal intercourse (other than a marriage or carnal intercourse between the adoptive parent and the adopted child) which, but for the adoption, would have been prohibited or permitted."

Preamble to the Bill should be changed to read as follows:

... to further regulate a marriage between a person and a relative of his or her deceased or divorced spouse;¹⁴²

2.21.24 Ms ACJ Prinsloo of the Magistrates' Office Pretoria North remarks that she supports the gist of the proposed amendment with the exception of the proposed age limit of 18 years. She is of the view that in order to protect persons who are young and impressionable where these close family ties exist, it would be desirable that the age limit should be 21 years and not 18 years.

2.21.25 iJUbilee ConneXion propose that the wording of the Act list very clearly those incestuous and other relationships which may not be sanctioned by legal marriage, in a list similar to that cited by the Utah Code and the New Zealand Marriage Act.

2.21.26 The Department of Home Affairs supports the preliminary recommendation and suggests for purposes of a more user-friendly Marriage Act that the persons that may legally marry each other be specified in absolute terms in section 28. The Department suggests that it might be more expedient if provision were to be made in the proposed subsection 28(2) for the Minister being empowered to consent to a marriage between a man or a woman and the direct descendant of his or her deceased spouse if both parties have reached the age of 18 years and they are not related to each other by blood, instead of Provincial and Local Divisions of the High Court having such jurisdiction. The Department remarks that such a provision would make it more accessible to the poorer sectors of the community.

(g) Evaluation and recommendation

2.21.27 There was no opposition to the preliminary recommendation that consent has to be obtained if a man or a woman and the direct descendant of his or her deceased spouse wish to marry if both parties have reached the age of 18 years and they are not related to each other by blood.¹⁴³ The Commission however considers that the issue is much broader than this and

¹⁴² The following wording was suggested in the draft Bill: "to further regulate marriages between a person and relatives of his or her deceased or divorced spouses;"

¹⁴³ 28(2) A Provincial or Local Division of the High Court shall have jurisdiction to consent to a marriage between a man or a woman and the direct descendant of his or her deceased spouse if both parties have reached the age of 18 years and they are not related to each other by blood.

that the question is rather whether there should be any limitations to the marriage between persons who are related by affinity.¹⁴⁴ The Commission is of the view that the New Zealand approach should be followed in this instance. The Commission is, however, mindful of the objections raised in the Commission's investigation into customary marriages against requiring permission of the High Court. The Commission is therefore of the view that the permission of the Minister of Home Affairs should be sought when parties related by affinity wish to marry. Such a requirement would mean that these marriages would be adequately regulated and only parties who have given serious thought to the implications of such a marriage will seek the required permission. The Commission has noted the reasoning by the Department of Home Affairs that the Minister of Home Affairs should consider applications for consent in these cases and not the High Courts as the Minister will be more accessible to poorer sections of the community. The Commission is satisfied that this should be an administrative decision taken by the Minister or an official and that this decision can be taken on review by a high court if the Minister's decision is not favourable.

2.21.28 The Commission is further of the view that the objection to the age proposed, namely 18 years, is not persuasive. The Commission considers that this provision should correspond to its recommendation setting out the minimum age for marriage for males and females to be 18 years of age and thinks it inadvisable to set any higher standard than the proposed age of 18 years for these cases.

2.21.29 The Commission also agrees with the suggestion that the Act should clearly set out those marriages between parties closely related which should be prohibited and void. The Commission is of the view that the New Zealand provision should be followed in this regard but,

¹⁴⁴ Prof June Sinclair remarks that it appears absurd that a man should be able to marry his former wife's sister, but not his former wife's stepmother, who is a blood relation neither of himself nor of his former wife. See Sinclair *The Law of Marriage* Vol 1 at 347. See also Jacqueline Heaton "Family Law and the Bill of Rights" in *Butterworths' Bill of Rights Compendium* at 3C9: "Prohibiting marriages between blood relatives because of fears of the genetic risks created by inbreeding is reasonable and justifiable in an open and democratic society and is therefore constitutional. However, the same eugenic concerns do not apply to relatives by affinity. Here the reason for the prohibition on marriage is purely society's views on what is morally acceptable. But do all the prohibited degrees of relationship of affinity still reflect modern society's views? For example, is a marriage between a man and his ex-wife's mother still socially unacceptable? And what about marriage to his ex-wife's daughter from another marriage if he never had a parent-child relationship with that daughter? Could it not be argued that the prohibition on marriage to one's relatives by affinity violates the right to freedom of association? If this argument were to be accepted it is unclear whether the court would find the limitation to be reasonable and justifiable in a society based on human dignity, equality and freedom."

as indicated above, the Minister of Home Affairs should be entitled to consent to a marriage between persons where a relationship based on affinity was created (and not the High Court as is the case in New Zealand). The Commission does also not favour the requirement of the New Zealand legislation that the Court must be satisfied in relaxing the prohibition to the intended marriage that neither party contributed to the cause of the termination of any previous marriage of the other party since the Marriage Act does not presently contain such a requirement in regard to sections 28(c) and (d).

2.21.30 The Commission recommends the following provisions:

28(1) Subject to the provisions of section 28(2) and (3) a marriage between the following parties shall be void —

1. a man and — his grandmother; grandfather's wife; wife's grandmother; father's sister; mother's sister; mother; stepmother; wife's mother; daughter; wife's daughter; sons' wife; sister; son's daughter; daughter's daughter; sons's son's wife; daughter's son's wife; wife's son's daughter; wife's daughter's daughter; brother's daughter; or sister's daughter;
2. a woman and — her grandfather; grandmother's husband; husband's grandfather; father's brother; mother's brother; father; stepfather; husband's father; son; husband's son; daughter's husband; brother; son's son; daughter's son; son's daughter's husband; daughter's daughter's husband; husband's son's son; husband's daughter's son; brother's son; sister's son.

Provided that the provisions of this section with respect to any relationship shall apply whether the relationship is by the whole blood or by the half blood: and provided further that an adoptive child as defined in the Child Care Act, No 74 of 1983, shall be deemed to be the legitimate child of the adoptive parent(s), as if he or she was born of such parents during the existence of a lawful marriage, and an order of adoption shall not have the effect of permitting or prohibiting any marriage which, but for the adoption, would have been prohibited or permitted.

28(2) Where both parties have reached the age of 18 years they may apply to the Minister for his or her consent to their marriage if they are not within the degrees of consanguinity (relationships between blood relatives) but are within the degrees of affinity (relationships created by marriage) prohibited by section 28A(1).

2.22 TIME AND PLACE OF WEDDING CEREMONY; PRESENCE OF PARTIES AND WITNESSES

(a) The provisions contained in the Marriage Act

2.22.1 Section 29 of the Marriage Act provides as follows:

(1) A marriage officer may solemnise a marriage at any time on any day of the week but shall not be obliged to solemnise a marriage at any other time than between the hours of eight in the morning and four in the afternoon.

(2) A marriage officer shall solemnise 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 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 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.

(3) Every marriage-

1. which was solemnised in the Orange Free State or the Transvaal before the commencement of this Act in any place other than a place appointed by a prior law as a place where for the purposes of such law a marriage shall be solemnised; or
2. which by reason of the serious or longstanding illness of, or serious bodily injury to, one or both of the parties was solemnised before the commencement of the Marriage Amendment Act, 1968, in a place other than a place appointed by subsection (2) of this section as a place where for the purposes of this Act a marriage shall be solemnised,

shall, 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 it had been solemnised in a place appointed therefor by the applicable provisions of the prior law or, as the case may be, of this Act.

(4) No person shall under the provisions of this Act be capable of contracting a valid marriage through any other person acting as his representative.

(b) The Department of Home Affairs' suggested provision

2.22.2 The Department of Home Affairs proposed the following provisions:

27(1) A marriage officer may solemnise a marriage at any time on any day of the week but shall not be obliged to solemnise a marriage at any time other than between the hours of eight in the morning and four in the afternoon.

(2) A marriage officer shall solemnise any marriage in a building 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, 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 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.

(3) No person shall under the provisions of this Act be capable of contracting a valid marriage through any other person acting as his or her representative.

(c) Comments on the media statement

2.22.3 A number of respondents were of the view that section 29(2) should be amended. Mr Justice S Selikowitz¹⁴⁵ remarks that in his experience couples regularly marry in various places which do not strictly conform to the currently permitted places, marriage officers do not appear to apply the provisions of the Act strictly and many marriages are therefore conducted outside, wine farms in the Boland and the top of Table Mountain being popular at present. He notes that from time to time these *marriages* become the subject of court evaluation and the ramifications of an order declaring the marriage void are such that the Courts invariably find that they can overlook the defect and treat the marriage as valid, or where necessary declare it to be valid. He therefore considers that the existing situation is undesirable and should be reviewed. Mr DP Kent¹⁴⁶ considers that section 29(2) appears to be archaic and that other than for religious purposes, there appears to be no sound reason why a building or type of building for that matter should play a role in the conclusion of a marriage contract and he therefore proposes that these references be deleted. Rev Andre le Roux¹⁴⁷ proposes that the law regarding the place in which marriages are conducted be broadened to include "a building specifically set aside for the purpose of weddings". He motivates this by saying that many people choose to be married at a guest farm where a *wedding chapel* has been set aside for the service and with reception venues on the property. He notes that under present law the couple need to find a *legal* venue to re-do the legal declarations, sometimes requiring a great deal of time and travelling to do so, all this despite the fact that the service was conducted by a marriage officer in what used to be a church or chapel but which is no longer used for religious services, or a chapel constructed for the purpose of weddings.

2.22.4 The Campus Law Clinic and Mrs Olga Kruger are of the view that the places where a marriage can take place should not be so restrictive. The Campus Law Clinic further remarks in regard of section 29(4) of the Act that this provision has implications for Islamic marriages which are conducted by proxy and that safeguards should be considered with regard to instances where fraud could be committed. The attorneys Bouwer and Cardona¹⁴⁸ suggest that

¹⁴⁵ Judge of the High Court of the Cape of Good Hope Provincial Division.

¹⁴⁶ Of the firm of attorneys Douglas Kent & Co of Margate.

¹⁴⁷ Of the Trinity United Church which is a congregation of the Methodist Church of Southern Africa.

¹⁴⁸ Who act as the legal representatives of the Pagan Association.

marriages solemnised outdoors be recognised in their entirety. Ms Donna Vos, the President and High Priestess of the Pagan Association explains that their marriages take place usually in an outside environment, as they are nature based, although marriages may take place within a more sheltered environment at times.

2.22.5 Mr D de Wet suggests on behalf of the Church of Jesus Christ of Latter-Day Saints that section 29 be amended by the deletion of the words “with open doors” in the section. Mr De Wet points out the following reasons for the proposed amendment:

3. The provision that there should be open doors has its historical origin from the canon law and the practise of the Church of England. It is a relic from the past and no longer serves a purpose.
4. If it be deemed necessary that there be openness in the solemnisation of marriages or if it is deemed necessary that persons who wish to object to an intended marriage be given an opportunity of doing so, then this can be provided for in some other way.
5. The requirement of open doors is unconstitutional as a result of the provisions of section 9 (equality), section 15 (freedom of religion) and section 31(1) (cultural and religious practices) of the Constitution.

2.22.6 Mr De Wet states that the Church has a procedure for the solemnisation of marriages which is in accordance with the provisions of the Marriage Act except section 29(2). He remarks that in terms of Church doctrine a Church marriage is required to take place inside Church buildings set aside and dedicated as Temples¹⁴⁹ which is open only to members of standing¹⁵⁰ of the Church. He further explains that the Church marriage is thus conducted in public and affords objectors an opportunity to object, but the public and objectors are restricted to being Church members. Mr De Wet notes that in order to comply with the open door policy of section 29(2) of the Marriage Act Church members are subjected to undergoing two marriage ceremonies. He considers that it would be fair and just to amend the subsection to accommodate the religious beliefs and practices of the Church and others whose beliefs and

¹⁴⁹ Fifty Temples are currently in operation in 23 countries worldwide and one such temple is presently in operation in South Africa, situated in Parktown, Johannesburg.

¹⁵⁰ He notes these are members of the Church who have been a member of the Church for not less than one year and who obtain a Temple recommend or certificate from a Church officer in a position of responsibility confirming that such persons adhere to the tenets and doctrines of the Church.

practices do not require an open door policy and the present law is unnecessarily onerous in that it requires married couples belonging to the Church to participate in two separate ceremonies. Mr De Wet also states that Church doctrine provides that a Church marriage be witnessed by two witnesses and that only members of the Church who qualify in terms of Church doctrine to enter into a dedicated Temple may attend the marriage ceremony. Mr De Wet remarks that a specific marriage formula is adhered to by the Church officer solemnizing the Church marriage and that the prescribed marriage formula is a material requirement of a Church marriage. Mr De Wet makes the following suggestions in this regard, namely that legislation provides —

- C that dedicated Church Temples in South Africa, as designated by the Church, be an acceptable venue for a civil marriage ceremony to be open to all persons holding a valid Temple recommend or certificate in terms of the tenets and doctrines of the Church:
- C that the marriage formula of the Church, as prescribed by Church doctrine, be an acceptable marriage formula for the purpose of concluding a legally recognised civil marriage in a Church Temple.

2.22.7 Mr De Wet considers that the common legislative requirement that marriages be contracted in buildings that are open to the public or with open doors, is a product of history that has existed within the legislative traditions of various legal systems for centuries. He states that historically, “open doors” was a companion requirement to the publication of banns and served the same purpose. He notes that these formalities were specifically developed to provide adequate opportunities for concerned individuals to object to a marriage on the basis of a known impediment, such as a lack of parental consent (if either of the parties had not yet reached the age of majority), consanguinity, or affinity. Mr De Wet remarks that the historical roots of the “open doors” requirement originated in England at a time when communities were small and closely-knit, when these communities were also somewhat immobile and tended to be centred around the local parish. He notes that the “open doors” formality was also developed at a time when clandestine marriages presented serious social, religious, but mostly economic ramifications. He remarks that the policy behind the legislative language was that any member of the community who knew of a lawful impediment to the marriage should have an adequate opportunity to object before the alliance was created.

2.22.8 Mr De Wet notes that as the English law developed over time, marriage legislation was a process of consolidation rather than reformation of prior law, and, as a result, the modern

application of the open doors requirement to current social-economic conditions is unnecessarily restrictive. He remarks that although sound legal policy at the time of enactment, many subsequent social and legal changes have virtually eliminated the need to perform weddings with “open doors”. Mr De Wet considers moreover, that modern compliance with this historic formality no longer provides a practical or effective opportunity to object. Mr De Wet sets out the historical background of the open doors requirement in his submission. He notes that historically, marriages in many cultures were contracted under close community supervision, and, for example, from the time of Constantine, Roman law did not require any formal ceremony or certificate for a valid marriage. He states that legally all that was required was consent and the absence of any prohibition based on such impediments as kinship or social status. He notes that, in Roman culture, a marriage was also a public event that involved the joining of two families, and the long-term consequences of the alliance were understood to have a profound influence upon the wider community.

2.22.9 Mr De Wet explains that the primary purpose of marriage was the transferring of family name and property to the next generation, which ensured the continuation not only of the individual family lines but of the Roman state itself. Therefore, he says, Roman law, which was naturally reflective of the culture, required not only the consent of the bride and groom, but also that of the *paterfamilias*, or the male head of each family. Mr De Wet points out that a formal betrothal between family patriarchs followed by arranged marriage was customary among Christians and non-Christians in the Roman empire, and that during medieval times the custom of obtaining patriarchal consent grew obsolete in many legal systems and cultures as social mores changed. He notes that in the Anglican society which was influenced to a considerable degree by Roman law, consent of the parties was eventually the only formality required to contract a valid marriage. He remarks that this formless requirement initially allowed and eventually encouraged clandestine marriages despite the existence of impediments such as infancy or prohibited degrees of consanguinity. He notes that the chief concerns with these clandestine marital alliances were, however, the resulting economic consequences, such as property rights and the determination of an heir at law. Mr De Wet points out that of particular concern was the fact that because a woman’s property immediately vested in her husband, a clandestine marriage provided an effective method whereby a man could obtain a rich heiress’ property without the knowledge or consent of her parents.

2.22.10 Mr De Wet notes that during the Middle Ages clandestine marriages grew commonplace and were a source of much trouble and grief to the Church of England, and that

the Church of England consequently promulgated canonical laws that imposed formalities designed to give the public notice of the upcoming ceremony and, most particularly, an adequate opportunity to object. He points out that despite the Church of England's canonical efforts to deter clandestine marriages, it appears that the Church had no power to invalidate them, and finally and as a result to the ineffectiveness of Canon law, Lord Hardwicke's Act was passed in the early part of the 18th century which effectively eliminated the formless common law marriage in England. Mr De Wet remarks that in 1836, the passing of the Marriage Act in England finally made it possible for all religious denominations to marry according to their own rites, and even allowed civil marriage before a superintendent registrar, so long as specified formalities designed to publicise the marriage were met. He states that these formalities were based upon the prior legislation and included requirements such as the publication of banns, posting public notice in the office of the superintendent registrar, and the conducting of a formal ceremony with *open doors*.

2.22.11 Mr De Wet considers that historically-based formalities such as the "open doors" requirement meet current social needs as effectively as a suit of medieval armour during a battle where the combatants employ automatic weapons and long-range missiles. He points out that the underlying purpose from bodily harm still exists, but new weapons create new dangers and thus require measures for self-preservation. He considers similarly that the historic marriage formalities tend to make marriage unnecessarily complex and restrictive and reflective of the needs and social conditions of the early nineteenth century rather than those of the late 20th century. Mr De Wet points out that although marriage was once a public, community-supervised event, it is increasingly viewed as a most private, personal matter that is almost completely free from community intervention. He remarks that there continues, however, to be valid social justification for some level of community involvement and that marriage creates a legal status unlike any other, with inherent rights and responsibilities that affect not only the individuals involved, but the society at large.

2.22.12 Mr De Wet considers that legislative tradition with respect to marriage reflects a genuine effort to balance the equally but sometimes conflicting principles of the natural right to marry and the social need to marital stability. Mr De Wet notes that there are four basic underlying requirements for a valid marriage which have existed for centuries and continue to reflect sound public policy. First, he points out, there must be certainty that a marriage has in fact been created. He says that this requirement goes primarily to the understanding of the parties themselves — there must be no doubt that a marriage has indeed been formed.

Secondly, he remarks, there must be proof of the marriage via public records. He considers that this second requirement is also intended to provide an adequate opportunity to conduct the appropriate pre-marital investigation to assess the soundness of the proposed alliance, ie the capacity of the parties to marry barring lawful impediments. He notes thirdly, that the marriage must be based upon mutual consent and the absence of fraud, and finally, some recognised form of solemnisation is required. He notes that each of these requirements is based upon sound public policy that has existed throughout a rich legislative history and continues to reflect social needs. He however considers that there is no indication that any of these four basic requirements are furthered to any practical degree by the “open doors” language found in the Marriage Act. He is of the view that the original legal basis behind the “open doors” formality and the social conditions which both created its demand and ensured its effectiveness no longer exist.

2.22.13 Advocate BW Burman SC was requested by the Church of Jesus Christ of Latter-Day Saints to consider the constitutionality of section 29(2). He notes that the disadvantaged group are the members of the Church. He points out that it must be considered whether their interests have been unfairly discriminated against, and these interests must be weighed up against the purpose of section 29(2) of the Marriage Act. He remarks that the discrimination is not so much that the Church is treated the same as everybody else — they are as section 29(2) applies to everybody — but that being different to others they are not treated differently. Adv Burman states that the Church is different in that its marriage formalities require a closed door policy — that is that access is not open to the general public but is restricted to Church members. He considers that to require members of the Church to undergo two marriage ceremonies impairs their dignity or affects them in a comparably serious manner. Adv Burman points out that it must be remembered that the guarantee of equality lies at the very heart of the Constitution.¹⁵¹ Adv Burman considers that the *Mthembu*¹⁵² case can be seen as an example of tolerance and of treating different people differently, that is, recognising their difference. He also notes that section 9(5) of the Constitution provides that religious discrimination is unfair unless it is established that it is fair.

¹⁵¹ Adv Burman refers to *Fraser v Children’s Court, Pretoria North, and Others* 1997 (2) SA 261 (CC) and *Mtembu v Letsela and Another* 1998 2 SA 675 SA (T) at 688B. He notes that in the latter case the Court refused to declare a customary union rule of succession invalid because it offended western norms.

¹⁵² See preceding footnote.

2.22.14 Adv Burman considers that regard must be had to the background and purpose of the open door policy and the extent to which the purpose is achieved by requiring an open door. He points out that the policy behind the legislative language was historically that any member of the community who knew of a lawful impediment to the marriage should have an adequate opportunity to object before the marriage was entered into, and although marriage was once a more public community supervised event than it is today and is increasingly viewed as a private personal matter, it is not completely free from community interest. He also considers that there continues however to be a valid social justification for some level of community involvement.

2.22.15 Adv Burman considers that it may be said that the open door policy is a system based on a legal fiction of the past. He points out that given the historic purpose of the open door language and its current application to present day society it is apparent that this formality is no longer entirely useful, and that the original legal basis behind the open door formality and the social conditions which both created its effectiveness are diminished. Adv Burman remarks that if this statement is correct and there is presently little requirement or necessity for the policy then it could be shown that the discrimination is fair or that the policy could be justified in terms of section 36(1) of the Constitution. He considers that if there is a requirement for the policy then its purpose may be achieved in various other ways. He suggests that one example is that it could be a requirement that objections be made to the marriage officer an hour before the ceremony. He points out that the present position of the Marriage Act is that as bans are not necessary, there is no publicity to the intended marriage. Adv Burman remarks that it is his view that there are prospects that section 29(2) will be found unconstitutional as it offends religious equality.

2.22.16 Adv Burman refers to the case of *S v Lawrence*¹⁵³ which dealt with the right to sell liquor on a Sunday and which was prohibited by the Liquor Act. It was argued that the closed days provision was inconsistent with the right to freedom of religion as it induced a submission to a sectarian Christian concept of the proper observance of the Christian Sabbath. The Court held that a law which compelled observance of the Christian Sabbath against the religious freedom of those who held other beliefs would be inconsistent with section 14 of the Constitution. The Court held that the essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to manifest religious beliefs openly and

¹⁵³ 1997 10 BCLR (CC).

without fear of hindrance or reprisal, and the right to manifest religious beliefs by worship and practice or by teaching and dissemination. Adv Burman notes that the Court held that there might be circumstances in which endorsement of a religion or a religious belief by the State would contravene the freedom of religion provision of section 14 of the Constitution, and that this would be the case if such endorsement has the effect of coercing persons to observe the practices of a particular religion, or of placing constraints on them in relation to the observance of their own different religion. The Court pointed out that the coercion may be direct or indirect but it must be established to give rise to an infringement of the freedom of religion and that it is for the person who alleges that section 14 has been infringed to show that there has been such coercion or constraint.

2.22.17 Adv Burman remarks that the open door policy is a policy which is founded on a practice by the Church of England and the canon law, and by making provision for that policy in a statute, the legislature is endorsing that religious belief and is so curtailing the Church's beliefs. Hence, he argues, it has the effect of coercing the Church to observe the practice of a particular religion. Adv Burman notes that enforcing the open door policy is also compelling persons whose religious beliefs are different to observe that policy. He points out that in the minority judgment of O'Regan J, it was held that the requirements of the Constitution require more of the legislature than it to refrain from coercion and that it was required in addition that the legislature refrain from favouring one religion over others. He notes that fairness and even-handedness in relation to diverse religions is a necessary component of freedom of religion and that the value of equality and tolerance of diversity and the recognition of the plural nature of our society are among the values that underlie the Constitution.

2.22.18 Adv Burman considers that it may be said that there is a public requirement that intended marriages be conducted and that this justifies the open door policy. He notes that this view would depend on whether the open door policy is achieving its purpose and whether there is no other way to achieve that purpose. He points out that the historical purpose of the policy does not seem to be effective in present times, and that there are other ways — as he mentioned above- in which the purpose of the policy can be achieved. He considers that another aspect of section 29(2) may also be referred to which prohibits marriages in the open-air or a structure that does not qualify as a building as it requires the marriage to be solemnised in a church or other building with open doors. He considers that if the purpose is openness then there should be no requirement of a marriage being solemnised in a building. Adv Burman notes that this requirement reconfirms the historical origin of the policy. He also states that the

requirement of publishing bans which originated from the same historical origin was abolished some years ago. He notes that the effect of that is that publicity is no longer given of the intended marriage and any potential objector would not obtain knowledge of the intended marriage or where it was going to be performed, and so be able to object at the ceremony. Adv Burman refers also to section 31(1) of the Constitution and points out that it provides that persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community to enjoy their culture, practise their religion and use their language. He considers that this provision reinforces the acceptance of religious communities being allowed to practise their religion as they practise it. Adv Burman therefore considers that there is a reasonable prospect that section 29(2) of the Marriage Act¹⁵⁴ will be held to be unconstitutional as a result of the provisions of section 15 of the Constitution.

C Evaluation contained in the discussion paper

2.22.19 It was stated that the provision contained in the Australian Marriage Act was noteworthy. The Act provides that a marriage may be solemnised on any day, at any time and at any place, and that a marriage shall not be solemnised unless at least two persons who are, or appear to the person solemnising the marriage to be, over the age of 18 years are present as witnesses.

2.22.20 It was explained that the English Marriage Act requires that a marriage be conducted with open doors in the presence of two or more witnesses and a Registrar or authorised person, and the latter is often the celebrant.¹⁵⁵ An English register office marriage usually takes place in the office serving the district in which both parties reside and the requirement that the ceremony be conducted with open doors means that the doors need not actually be open provided they are not so closed as to prevent persons from entering that part of the building.¹⁵⁶ Places may be registered in England for conducting marriage ceremonies and, in order to qualify for registration, it must be a separate building which is a place of meeting for religious worship. An authorised person who is usually a minister of the religious group concerned may be nominated to celebrate marriages without the presence of the Registrar. The English State therefore licenses both the places where marriages can take place and those who

¹⁵⁴ Which requires a marriage to be conducted with open doors.

¹⁵⁵ Cretney & Masson Principles of Family Law at 20.

¹⁵⁶ Cretney & Masson *Principles of Family Law* at 18 *et seq.*

can conduct them. The form of the ceremony is however almost entirely left to the parties and the authorities of the registered building. The prescribed form of a civil marriage requires the statement "I call upon these persons here present to witness that I, A.B., do take thee, C.D., to be my lawful wedded wife (or husband) and that the parties declare that they know of no lawful impediment to the marriage. The Archbishop of Canterbury has the power to licence marriages at any hour of the day or night in any church or chapel or other meet and convenient place whether consecrated or not. However, licences are today usually granted to permit marriages in places such as college chapels at Oxford and Cambridge which fall outside the range of parish church and other authorised Anglican chapels. With the exception of Quaker and Jewish marriages, and marriages by Special or Registrar-General's Licence, it is an offence knowingly and wilfully to celebrate a marriage save between 8 am and 6 pm, although a marriage contracted outside these hours will be valid.

2.22.21 The Commission noted also that there were recent developments in the United Kingdom on the issue of marriage venues.¹⁵⁷ In February 1998 the Registrar General of Births, Deaths and Marriages of Scotland sought the views of the public on a possible change to the law of Scotland which would allow civil marriages (that is, those marriages which are not solemnised by a religious celebrant) to take place elsewhere than in the 250 local offices of authorised district registrars.¹⁵⁸ It was explained that it is widely accepted that the State should continue to take an interest in the legal and social aspects of marriage as an institution, but that in recent years the marriage ceremony has increasingly come to be seen as a matter whose elements, including venue and circumstances, are properly for choice by the couple, rather than part of a uniform package with elements all decided by some religious or municipal authority. The State's specific interests in the arrangements for civil marriage were identified as perhaps threefold, namely recording the relationship, seemliness and dignity of the ceremony and 'reasonableness' of venues for civil marriages.

2.22.22 The Scottish Registrar General remarked in regard to recording the relationship that the essence of the marriage ceremony is that the couple confirm their consent to the relationship, in the presence of each other, and in front of witnesses, after which it is formally and

¹⁵⁷ These developments came to the Commission's notice only when this report was drafted. It is, however, included under this heading for reasons of practicality and convenience in order to form part of the exposition of the legal position in the United Kingdom under one heading.

¹⁵⁸ Registrar General *Civil Marriages Outwith Registration Offices* February 1998 see <http://www.open.gov.uk/gros/cmoro.htm> or contact marriage@gro-scotland.gov.uk

permanently recorded in an official book, and accuracy and reliability of the record are therefore essential. It was considered that the Scottish procedure whereby the paperwork for all marriages, civil and religious, before and after the ceremony, is done by the local registrar, an official specially appointed for the purpose, and by no-one else, works well and that the Registrar General sees no reason to propose change. In regard to seemliness and dignity of the ceremony, it was explained that marriage puts an official stamp of seriousness upon a relationship, and very significant legal and economic consequences flow from the multi-faceted marriage contract, underwritten by the State. It was said that since most people would regard it as important that the ceremony itself, marking the beginning of this contract, should focus the minds of the couple, and of others present, on its significance, marriage ceremonies, civil or religious, should therefore be seemly and dignified rather than tawdry or frivolous. The Registrar General further stated in regard to the 'reasonableness' of venues for civil marriages that a related but not quite identical point relates to civil marriage only. It was pointed out that the law of Scotland authorises a very wide range of religious celebrants to solemnise religious marriages, and the effect is to put very few constraints upon the personal preferences of the couple for a religious marriage ceremony of a particular kind in a particular place. It was explained that whether they choose a cathedral, a mosque, their own home, a hotel, a canal-barge or a mountain-top, some celebrant can usually be found to marry them. It was said that religious celebrants can be presumed to have the moral authority to ensure it is done in a seemly and dignified way, and they are, by and large, free to make their own decisions about whether or not to conduct particular weddings, so if a celebrant is unhappy with anything inappropriate proposed by the couple, he or she can always refuse to conduct the marriage. It was also explained that registrars, by contrast - who are local council employees working to detailed instructions issued by the Registrar General - are acting as officials of the State and, as such, they find it much more difficult to refuse without good reason.

2.22.23 The Registrar General noted that the State therefore has an interest in ensuring a rather greater degree of control over the 'reasonableness' of venues for civil marriages, because it needs to protect individual registrars from discomfiture in the face of couples' unusual choices of venue or circumstances, even where seemliness and dignity may not apparently be at risk. At the very least the State needs to offer some such protection against unreasonable demands in order to ensure it can recruit, retain and motivate people to be local registrars.

2.22.24 The Registrar General explained that in Scotland over the period 1940-1998 the nature of the civil marriage 'product' has changed significantly and that a typical civil wedding

was once a way of recording a relationship quietly in an ordinary office, during office-hours, and was in effect a 'non-ceremony' for people who for one reason or another did not want a church wedding.¹⁵⁹ It was also explained that some civil weddings still are of this nature, but many now are full-scale ceremonies, often at weekends, with traditional wedding attire, music, photography and video, and numerous guests present in addition to the two statutory witnesses. The Registrar General further stated that the Marriage (Scotland) Act 1977 allows civil marriages to be solemnised by any authorised registrar in his or her local registration office, and only in exceptional cases where a party is unable to attend by reason of serious illness and where the marriage cannot be delayed does the Act permit a civil marriage to be solemnised outside a registration office.

2.22.25 Scotland, it was explained, offers a wide choice of some 250 offices with an authorised registrar, and the couple seeking to be married are not restricted to the office(s) in their area(s) of residence, and while some registrars work from home, or from small offices with limited scope for development, recent investment on the part of local councils has led to many marriage-rooms of commendably high quality. The Registrar General further said that until April 1995 English civil marriages were restricted to specific registration office(s), for the district(s) in which the couple lived, but the Marriage Act 1994¹⁶⁰, provided for the kind of choice of local office which was already available in Scotland - and in addition allowed local authorities in England and Wales to approve specific buildings for the celebration of civil marriages, and to set fees both for consideration of applications for approval and for the attendance of registrars on specific occasions to solemnise marriages there. It was noted that the first feature of the English Act was important for many people, removing an irksome restriction, but the second feature has also proved popular. English law already designated specific buildings for religious marriages, so the 1994 Act fitted into the tradition of specifying buildings rather than celebrants, in contrast to Scotland.

2.22.26 During the summer of 1997, the Convention of Scottish Local Authorities (COSLA) indicated that they would like to see the second feature of the English 1994 Act - the

¹⁵⁹ The Registrar General indicated that the total number of weddings in Scotland has fallen, from a peak of over 53,000 in 1940 and some 43,000 annually in the early 1970s to 30,000 in 1996, the lowest figure since 1909, and since 1940, when marriages were first solemnised by registrars, Scotland has seen a steady rise in the ratio of civil to religious weddings, now approaching a half and half split (46:54). The ratio is slightly different (42:58) if one excludes the 4,000 weddings celebrated annually in the district of Gretna, popular with couples who are visitors to Scotland.

¹⁶⁰ A Private Member's Bill, enacted as the Marriage Act 1994.

approval of specific buildings for civil marriages - extended to Scotland.¹⁶¹ The Registrar General and COSLA agreed that the 1977 Act arrangements for civil marriages have in general worked well and relatively few people complained to local registrars about lack of choice of marriage venues, and very few indeed complain to the Registrar General or to Ministers. It was stated that the freeing-up of the restrictive pre-1995 English & Welsh arrangements nevertheless generated UK-wide publicity, and this led to a significant number of enquiries to local registrars about the possibility of having a civil marriage at one or other attractive location, outside the confines of the local registration office. The Registrar General pointed out that these enquiries nearly all fell short of being complaints, but some registrars - and COSLA - felt that it is ultimately difficult to defend a position where couples have less choice in Scotland than in England & Wales and informal surveys of couples in a few registration districts have also pointed to a wish for a wider range of options. The Registrar General explained that the case for change is really a matter of principle, based on the desirability of extending freedom of choice.

2.22.27 The Registrar General and COSLA agreed that any new arrangement should be 'resource-neutral'. It was noted that an approval scheme would require a council official to inspect the marriage venue beforehand, and to consult with the council's local registrar, and that

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COSLA's proposed:

- * Local councils should be given power to approve specific sites as venues for civil marriages; to set and to charge a fee for considering an application for approval, lasting for an appropriate period; and to set and to charge a fee for the attendance of a registrar to solemnise each such marriage (broadly as in England & Wales).
- * A temporary approval should also be available to cover use of a site for a specific civil marriage, at an appropriate fee taking into account the cost of one-off site inspection. (This is not offered in England & Wales.)
- * Fees to customers would need to be set to recover full costs, including staff to cover during the office hours while the local registrar was away solemnising a marriage outside the office.
- * Local councils were highly motivated to preserve the dignity of the marriage ceremony and would certainly be mindful of this in taking approval decisions. They would be happy to work to guidelines set for this purpose by the Registrar General.
- * COSLA saw no attraction in sending two registrars to marriages outside the office (required in England & Wales for legal/historical reasons) and thought that with suitable guidance to those responsible for the venue, a single registrar would have the moral authority to remain in control of the ceremony as readily as he or she would in the local office.
- * COSLA saw no attraction in extending the class of civil celebrants wider than registrars (for example to justices of the peace, as had been mooted at one point in the 1980s).
- * Guidance from the Registrar General to councils on approving buildings for civil marriages would have to take account of the need to preserve the clear distinction between a civil and a religious marriage. Sites with strong religious connotations, for example ruined Border abbeys, should not be approved for civil marriages. However hotels, castles or stately homes seeking approval as civil-marriage venues should not be ruled out just because they might already be in use as venues for religious marriages. (This dual use of hotels etc does not normally occur in England & Wales, where religious marriages are in effect tied to designated religious buildings.)

the additional costs of the approval process would need to be met by the fee charged to the manager of the venue, whose prices would reflect it, so the costs would ultimately be met by the couple, or whoever paid for the wedding. The significant extra costs of staffing the local registration service to solemnise marriages at various locations in the district would similarly need to be met by an increased fee charged directly to the couple and the analogous fees charged vary fairly widely across England & Wales but, as might be expected, were nowhere trivial. Scotland would however have lower costs in that a marriage requires attendance of only one rather than two registrars. It was also pointed out that in general the experience in England & Wales has been encouraging and the key finding was that, after two years, few problems in practice have been identified which can be attributed to any loss of control by registrars operating off their home territory, although even in their own offices, registrars had to cope with occasional customers with unusual wishes¹⁶² and with problem customers¹⁶³ even though such difficulties were rare.

2.22.28 The Registrar General and COSLA thought it might be worth considering minor extensions beyond what is allowed by the English scheme. One extension considered was the approval of “locations” or “places” rather than specific buildings, as in England & Wales which would allow a civil marriage within the curtilage of a building, for example in a marquee in the grounds, or on board a vessel provided it remained within the appropriate registration district, both circumstances which would already have been possible for religious marriages in Scotland. Another extension mentioned was to permit a location to have a temporary approval for a single specific wedding, not just a three-year authorisation as in England & Wales, and it was pointed out that a temporary approval would clearly be quite expensive, given that all the local council's costs had to be met. The Registrar General did not think there is any reason to rule out such flexibility if couples prove prepared to pay.

2.22.29 The Registrar General indicated that there was widespread support for the idea of extended choice of venues for couples about to be married and of the 39 responses received, 36 were clearly in favour, although some did have reservations about certain aspects of the

¹⁶² Like the couple who asked to be married dressed as popular TV cartoon characters, and were reluctantly allowed.

¹⁶³ Like couples or guests who have had too much to drink, where the event is generally delayed a bit till greater sobriety is evidenced.

proposals.¹⁶⁴ The Registrar General pointed out that many responses underlined the need, articulated in the consultation paper, to retain the seemliness and dignity of the marriage ceremony, and several reservations related to the kinds of practical difficulties registrars might encounter should approval be allowed of temporary “one-off” venues, and several to the approval of various kinds of outdoor venues for weddings. COSLA's response confirmed their continuing support for the proposals. While there was agreement that the costs of new arrangements should fall on those benefiting rather than on council-tax payers some concern was expressed that the pricing should not result in choice being available only to the rich. The Registrar General noted that humanist respondents, and more tentatively the Law Society of Scotland, suggested that consideration should be given to allowing civil marriages to be solemnised by parties other than local council registrars. The conclusion was that those consulted were overwhelmingly in favour of the principle of new primary legislation to authorise civil marriage outside registration offices and that none of the several issues on which reservations were expressed appeared to be incapable of being addressed if the proposals are taken forward. It was explained that opportunities would exist to do this by means of the enabling primary legislation itself, by regulations under such an Act, by inclusion in the Registrar General's Handbook of Instructions to Registrars, or by more detailed local guidance issued by councils to their registrars. It was noted that the Registrar General's consultation paper recognised - and all the responses served to confirm - that the detail of the guidance given on the operation of any new arrangements will be crucial to the acceptability and to the success of such arrangements, perhaps as much as the wording of the primary legislation, and if the proposals were to proceed, the co-operation of local councils and of local registrars in drawing up such practical guidance would be of great importance.

2.22.30 It was also noted that the New Zealand Marriage Act provides on the issue of these formalities under discussion that every marriage solemnised by a marriage celebrant shall be solemnised at a place described in the marriage licence issued in respect of that marriage.¹⁶⁵ It also provides that subject to section 31(3) every such marriage shall take place between the persons named in the licence according to such form and ceremony as they may think fit to adopt. The Act also requires that every marriage must be celebrated with open doors in the presence of a marriage celebrant and 2 or more witnesses at any time between 6 a.m. and 10

¹⁶⁴ *Civil Marriages Outwith Registration Offices: Results of Public Consultation by the Registrar General* February - April 1998 obtained from marriage@gro-scotland.gov.uk

¹⁶⁵ Section 31.

p.m. The Act prescribes that during the celebration of every marriage each party to it shall say to the other: "... I, AB, take you CD, to be my legal wife (or husband)," or words to the same effect.¹⁶⁶

2.22.31 The British Columbia Marriage Act states simply¹⁶⁷ that all marriages solemnised under the Act by a religious representative must be in the presence of 2 or more witnesses besides the religious representative, the ceremony must be performed in a public manner, unless otherwise permitted by licence, and both parties to the marriage must be present at the ceremony. The requirements for a civil marriage are that the marriage may be contracted before and solemnised by a marriage commissioner under a licence under the Act and on payment of the prescribed fee. The Act provides that if the marriage is contracted in a public manner in the presence of the marriage commissioner and 2 or more witnesses-

- C each of the parties to the marriage in the presence of the marriage commissioner and the witnesses declares-
 - "I solemnly declare that I do not know of any lawful impediment why I, AB, may not be joined in matrimony to CD", and
- C each of the parties to the marriage says to the other,
 - "I call on those present to witness that I, AB, take CD to be my lawful wedded wife (or husband)".

2.22.32 In the case of *Ex Parte Dow*¹⁶⁸ Mr Justice Broome notes that the question raised by the application in the case is whether the marriage must be declared null and void on account of non-compliance with the provisions of s 29(2) of the Marriage Act 25 of 1961. What happened in the case was that the marriage was solemnised by a minister of the Presbyterian Church (he being a duly designated marriage officer) at a privately owned property on which stood a private dwelling house. In breach of the provisions of s 29(2), the entire ceremony took place in the front garden in the open. The Court notes that this is the only defect alleged. The applicant cited the oft-quoted case of *Sutter v Scheepers*¹⁶⁹ and *Messenger of the Magistrate's Court, Durban v Pillay*¹⁷⁰ in which Van den Heever JA made reference to the use in the Afrikaans version of the categorical imperative 'moet' as does section 29(2). The Court states that Mr Justice Van den Heever contended this was a strong indication that the Legislature intended disobedience to be

¹⁶⁶ Section 31(3).

¹⁶⁷ Sections 9(1) — (3).

¹⁶⁸ 1987 3 SA 829 (DCLD).

¹⁶⁹ 1932 AD 165 at 174.

¹⁷⁰ 1952 (3) SA 678 (A).

visited with nullity. The Court further notes that the applicant drew attention to the exception contained in s 29(2) commencing with the word 'but,' which provides that non-compliance on account of serious or long-standing illness or serious bodily injuries to one or both of the parties, 'shall not be construed as prohibiting a marriage officer from solemnizing a marriage in any other place', and this, the applicant contended, was an indication that a marriage officer was prohibited from solemnizing a marriage outside a private dwelling house if, as in this case, there was no question of illness or injury.

2.22.33 Mr Justice Broome considers in the *Ex Parte Dow* case that this exception tends to confuse, or render uncertain, the alleged prohibition because it opens up an enquiry into what, for the purposes of the exception, constitutes serious or long-standing illness or serious bodily injury. He poses the question whether this means any illness or injury which renders it impossible or merely inconvenient or difficult to get into a church, public office or dwelling house. The Court notes that the applicant also relied on the provisions of s 35 which make it an offence for a marriage officer knowingly to solemnise a marriage in contravention of the provisions of the Act, and that the applicant submitted that this was another indication that the Legislature intended the provisions of s 29(2) to be complied with strictly or exactly.

2.22.34 The Court notes the history of the move away from the rule that an absolute (peremptory) enactment must be obeyed or fulfilled exactly, and that Colman J traced in *Shalala v Klerksdorp Town Council and Another*¹⁷¹ that it is sufficient if a directory enactment be obeyed or fulfilled substantially' where he concluded by quoting the judgment in *Maharaj and Others v C Rampersad*¹⁷²:

"The enquiry, I suggest, is not so much whether there has been 'exact', 'adequate' or 'substantial' compliance with this injunction but rather whether there has been compliance therewith. This enquiry postulates an application of the injunction to the facts and a resultant comparison between what the position is and what, according to the requirements of the injunction, it ought to be. It is quite conceivable that a Court might hold that, even though the position as it is not identical with what it ought to be, the injunction has nevertheless been complied with. In deciding whether there has been a compliance with the injunction, the object sought to be achieved by the injunction and the question of whether this object has been achieved are of importance."

2.22.35 Mr Justice Broome states in the *Ex Parte Dow* case that in considering what the

¹⁷¹ 1969 (1) SA 582 (T) at 587A - H.

¹⁷² 1964 (4) SA 638 (A) at 646C.

objects sought to be achieved are, it is necessary to trace the changes that have taken place in the formalities required for the conclusion of a valid marriage. He notes that in Roman law marriages were contracted by consent evinced by word or act in any way whatever, and refers to Hahlo's *South African Law of Husband and Wife*¹⁷³ who describes how, when in the Middle Ages marriage in Western Europe passed under the jurisdiction of the Church, it became the practice for the parties to declare their consent to marry before a priest who would confer the Church's blessing on the couple, and that "it was the consent of the parties, and not the blessing by the priest, which brought the marriage into existence". Mr Justice Broome notes that as early as 1215 the Fourth Lateran Council prescribed the publication of banns "in order to do away with the evils and abuses inherent in a system that permitted clandestine (ie secret) marriages". He states that a contravention of these rules did not, however, affect the validity of the marriage, and the evil of clandestine marriages continued until the Church Council of Trent in 1563 prescribed that henceforth a marriage was to be invalid unless banns had been published and the parties had declared their consent to marry before a priest and no fewer than two witnesses. Mr Justice Broome notes that this form of marriage before a priest or marriage officer and witnesses became the standard form.

2.22.36 Mr Justice Broome states in the *Ex Parte Dow* case that he has not been referred to, nor has he found, any reference to the reason or need for the ceremony to take place indoors. He notes that the Natal Marriage Ordinance 17 of 1846, the Transvaal *Huwelijks Ordonnantie* 3 of 1871 and the Orange Free State *Huwelijks Wet* 26 of 1899 each provided for the publishing of banns or the issue of a special licence, and, as regards the time and place of the ceremony, the Natal Ordinance stated in s 21 as follows:

And in order to preserve evidence of marriages, and to make the proof thereof certain and easy, and for the direction of such ministers and marriage officers as aforesaid in the registration thereof, it is hereby further ordered that from and after the passing and taking effect of this Order, all marriages (except marriages by special licence to marry at any time and place where such special licences can be lawfully granted), shall be solemnised with open doors between the hours of eight in the forenoon and four in the afternoon, in the presence of two or more credible witnesses beside the minister or marriage officer who shall solemnise the same . . .

2.22.37 Mr Justice Broome further notes that section 13 of the Transvaal Law and section 17 of the Orange Free State Law provided respectively as follows:

¹⁷³ Sixth edition at 6 *et seq.*

13. No marriage shall be solemnised except between eight o'clock in the morning and four o'clock in the afternoon, and such in any church or other public building (used-Tr.) for religious service, public office or private dwelling house with open doors, and in the presence of at least two persons competent by law to act as witnesses; only in unforeseen circumstances shall it be permitted to solemnise marriages outside the hours provided.
17. A marriage may be legally solemnised on a Sunday or on any other day of the week, provided always that no marriage may be solemnised except between the hours of 8 in the morning and 4 in the afternoon, in some church or other public building devoted to divine service, public office or private house with open doors, and in the presence of at least two legally qualified witnesses.

2.22.38 Mr Justice Broome remarks in the *Ex Parte Dow* case that each statute made provision for the keeping of a register which had to be entered immediately after the solemnisation of the marriage, and that, unfortunately, he has not been able to have a sight of the relevant Cape statute. He notes that it is, however, interesting to note that on 29 May 1812 there was published the opinion of the Law Officers in England, dealing with the doubts that arose over the validity of marriages solemnised at the Cape by a Dr Halloran who posed as a clergyman, and that the opinion was “that the marriages solemnised at the Cape by the person officiating as a clergyman, under assumed or forged orders, cannot be vitiated or invalidated in any manner by the defect of the holy orders of priesthood imputed to him”. Mr Justice Broome also notes that substantially similar provisions were enacted in the Marriage Act 25 of 1961. He considers that the object of these provisions was essentially to ensure that marriages took place in public, that the public were to be informed of intended marriage so that any objections could be raised, and that a register to which the public had access be kept. He states that the constant reference to open doors is an indication that the public were to be permitted access to every marriage ceremony, the mischief being clandestine marriages. Mr Justice Broome refers to *Voet* 23.2.3¹⁷⁴ where there is also reference to, “in a private house” in the passage dealing with the dispensation in the need for three public callings of banns in the passage:

Marriage in private houses. It is the same if, when the triple calling has already been completed, ill health of the betrothed man or woman does not at all allow of a journey to the church or court or other place publicly appointed for the entering into of marriages; and for that reason it is requested that it may be allowed to conduct the formalities of marriage in a private house before a meeting of the neighbours. One who calls banns would not act with wisdom in Holland if he thinks that such a course is to be essayed without the consent of the magistracy, as can be gathered from enactments which have been made by the States of Holland.

¹⁷⁴ Gane's translation vol 1 at 36 — 7.

2.22.39 Mr Justice Broome states in the *Ex Parte Dow* case that he has not been able to ascertain the basis for, or object of, the requirement that a marriage must be solemnised in a private dwelling as opposed to at, or in the precincts of, a private dwelling. He remarks that it seems to him that the object of these provisions is to avoid clandestine marriages, and that since its enactment the Marriage Act 25 of 1961 has been amended quite drastically in that the Marriage Act Amendment Act 51 of 1970 repealed ss 13 - 21 inclusive. Mr Justice Broome notes that these were the sections which provided for the publication of banns, proof thereof, the publication of notice of intention to marry, the issue of special licences to marry without the publication of banns or notice of intention to marry, the marriage officer by whom the marriage could be solemnised and the lapse of banns, etc after three months. He remarks that it follows that there has been a complete abolition of the provisions which previously served to inform the public of an intended marriage. He states that a marriage is such an important contract and relationship, and the consequences of a decree of nullity can be so far-reaching, that he does not consider that the Legislature intended non-compliance with the two-letter word "in" to be visited with nullity. He says that indications which support his view are to be found in section 22, for instance, which in its original form provided that if the provisions relating to the publication of banns and notice of intention to marry, or to the issue of a special marriage licence, were not strictly complied with owing to an error committed in good faith by either of the parties, or to an error by the person who made the publication or issued the licence, the marriage shall be as valid and binding as it would have been if the provisions had been strictly complied with.

2.22.40 Mr Justice Broome further notes in the *Ex Parte Dow* case that section 24 provides that no marriage officer shall solemnise a marriage to which a minor is party unless the necessary consent is obtained, but that section 24A then provides that the marriage shall not be void, but may be dissolved by a Court on grounds of want of consent if application is made by a parent of the minor before he attains the age of 21 and then only if the Court is satisfied that the dissolution of the marriage is in the interests of the minor or minors. He further notes that section 26 provides, similarly, for the prohibition of marriages of boys under 18 or girls under 15 except with permission from the Minister or consent of a Judge, but that it then proceeds in subsection (2) to provide that, if no such consent has been obtained, the Minister may direct that it shall for all purposes be a valid marriage. He states that the point he is attempting to make is that in cases where there would seem to him to be far more compelling reason to treat a marriage as void *ab initio* the statute does not do so, and he treats this as an indication that the Legislature did not intend strict compliance with the provision that a marriage be solemnised in a private dwelling house, and that where, as in this case, the parties were competent to marry,

that is there was no legal impediment to their marriage, the ceremony was performed by a marriage officer and all concerned *bona fide* intended and believed it to be a valid marriage, the objects of the Act have been achieved despite the fact that the marriage was solemnised in the garden outside the house and not inside the house with open doors.

2.22.41 It was stated in the discussion paper that the question arises whether it is still practicable to insist that section 29(2) should restrict the places where a marriage can be conducted or whether the example of the Australian Marriage Act should rather be followed. It was explained that the Commission also noted Advocate Burman's opinion that there is a reasonable prospect that section 29(2) will be held to be unconstitutional as a result of the provisions of section 15 of the Constitution. It was further noted that it seems in any case as if this provision of the Marriage Act is not strictly complied with. Sections 29(2) presently sets out the following places for parties being joined in marriage, namely churches, other buildings used for religious service, public places and private dwelling-houses *with open doors*. The Commission provisionally proposed two options in this regard. In terms of the first option the range of places where parties may be joined in marriage would be less limited than is presently the case although still limited to some extent. The Commission provisionally proposed the deletion of the statutory requirement of marriages having to be performed with *open doors* and the addition in regard to places of marriage "or in any other building or facility used for conducting marriages". The second option the Commission provisionally proposed was that there should not be any limitations with regard to places where marriages may be conducted. The Commission requested comment on these two options: should the places where marriage may be conducted limited or should there be no limitations?

2.22.42 Furthermore, the fact that the Department of Home Affairs excluded section 29(3) from their proposal seemed to indicate that the Department is of the view that this provision is presently superfluous. It was noted in discussion paper 88 that it would, however, still seem necessary to make provision for the validity of marriages conducted in places other than the prescribed ones and its deletion would therefore appear to be unwarranted. It was pointed out that the question arises whether the scope of section 29(3) should not be extended. The section presently provides for the validity only of marriages in two circumstances, namely those marriages conducted in the Orange Free State and Transvaal before the commencement of the Marriage Act in any place other than a place appointed by prior law as a place where a marriage may be conducted, or which by the reason of the serious or longstanding illness of, or serious bodily injury to, one or both of the parties was conducted before the commencement of the

Marriage Amendment Act, 1968, in a place other than an appointed place. It was stated that if respondents consider that the places where marriages may be conducted should still be limited, then it seems that section 29 should also provide for the validity of marriages conducted at places other than the appointed ones.

C Recommendation contained in discussion paper 88

2.22.43 It was provisionally recommended that sections 29(1) and (4) should remain mainly unamended except for the substitution of the term “solemnisation” for “conduct a marriage” but that section 29(2) should be amended to provide either —

- C that a marriage officer may conduct a marriage at any place and in the presence of the parties themselves and at least two competent witnesses; or
- C that a marriage officer may conduct a marriage not only in the places presently set out in the Act, (which are churches, other buildings used for religious service, public places or private dwelling-houses) but also in any other building or facility used for conducting marriages and in the presence of the parties themselves and at least two competent witnesses.

2.22.44 However, it was also stated that if respondents consider that the places where marriages may be conducted should still be limited, then it seems that the Act should also provide for the validity of marriages conducted at places other than the appointed ones.

(f) Comment on discussion paper 88

2.22.45 Rev Andre le Roux of the Trinity United Church¹⁷⁵ points out that he would recommend the first option, ie that a marriage may be performed in any place and in the presence of the parties and at least two competent witnesses. He considers that the restriction on the place is unnecessary given the authority of the marriage officer to conduct the marriage, and the presence of witnesses to confirm the marriage.

2.22.46 Mr FC Cantatore of the Society of Advocates of Natal remarks that although this issue is not relevant to their field of practise, it merits some comment. He submits that the

¹⁷⁵ A congregation of the Methodist Church of Southern Africa.

present provisions are unnecessary and somewhat antiquated . He suggests that the example of the Australian Marriage Act should be followed and that the Marriage Act should not prescribe specific places where marriages may be conducted. The Family Law Committee of the Law Society of Cape of Good Hope also suggests that there should be no restriction on the use of any specific venue.

2.22.47 Mr Paul de Wet remarks on behalf of his client the Church of Jesus Christ of Latter Day Saints that they confirm their opinion that it would be most provident to select the first option (ie no limitations with regard to venue) in connection with the proposed amendment to section 29(2). He states that this is more in line with the needs of South African society and will in no way detract from the propriety of the actual ceremony. He considers that it may in certain instances afford the parties the opportunity by their choice or necessity to improve on what are currently the legally available options of marriage venue. He says that for certain parties, indeed, the choice of appropriate venue may be based on religious considerations and compliance. He notes that no doubt many motivations can be put in support of the afore-mentioned and the experience of marriage officers will probably be consistent with this view. He remarks that they do not, however, propose to labour what they feel is a simple, self-evident standing and trust that the relevant authorities are capable of moving forward in a responsive and equitable manner with specific reference to amending section 29(2) as proposed.

2.22.48 iJubilee ConneXion remark that they support the preliminary recommendation and that the “open door” rule need not be required, provided there are two witnesses and the marriage officer.

2.22.49 Rev Vivian W Harris of the Brooklyn Methodist Church remarks that option one is too broad as it permits a marriage in circumstances which would make it completely secret except for the two witnesses and the marriage officer. She notes that there are those who wish to be married under water or in an aircraft. She considers that because marriage has a community element it is desirable that there be adequate community access to the ceremony. Rev Harris is of the view that option two is too narrow, that it requires the marriage to be conducted in a building. She remarks that today, a marriage officer often receives requests for a marriage to be conducted out-of-doors. She notes that the general provision of “any other building or facility” is restricted by the requirement that it be “used for conducting marriages” and the only exception is in cases of “serious or longstanding illness of, or serious injury to one or both of the parties”. Rev Harris proposes that marriages may be conducted at any place

provided that members of the public have adequate access to the place. She considers that the objection raised by Adv BW Burman on behalf of the Church of Jesus Christ of Latter Day Saints should not be allowed to restrict unconstitutionally what seems to be a completely innocent, and perhaps even desirable, practice by those who wish to be married out-of-doors or at some other place not provided for in the proposed Bill.

2.22.50 The Department of Home Affairs state that they agree with the preliminary recommendations made in regard to sections 29(1) and (4). They note in regard to section 29(2) concerning the place of marriage that it happens quite often these days that marriages take place in gardens restaurants and various other places than the traditional places of marriage. They consider that it therefore appears that there is a need for a more open approach in terms of the place of marriage provided that the solemnity of the occasion can be maintained. The Department of Home Affairs is of the view that option one would probably be too wide and option two too restrictive. They suggest that option one may address the dilemma to some extent subject to a proviso being added to the provision such as "Provided that the marriage officer shall refuse to conduct a marriage which will detract from the solemnity of the occasion".

2.22.51 Pastor Sid Hartley of the Hatfield Christian Church remarks that they support the second option as reasonable. They consider no limitations as unadvisable and are persuaded that situations could arise where, without any limitation, people could enter marriage without being in control of their full senses which could create problems afterwards. They note that it is also a joyous and solemn occasion and the venue should enhance that atmosphere.

(g) Evaluation and recommendation

2.22.52 It is noteworthy that option one is supported by five respondents, that option one is supported with qualification by two respondents (the one proposal being that marriages may be conducted at any place provided that members of the public have adequate access to the place, and secondly, that the marriage officer shall refuse to conduct a marriage which will detract from the solemnity of the occasion) and that option two is supported by one respondent. (It should also be noted that the issue of formalities in relation to the time, place and manner of solemnisation of Islamic marriages still need to be resolved in the Commission's investigation into Islamic Marriages and related matters.¹⁷⁶)

¹⁷⁶ Issue Paper 15 contained the suggestion that provisions similar to section 29 of the Marriage Act, appropriately changed for purposes of Islamic law, should be incorporated in the legislation emanating from that investigation.

2.22.53 The Commission has noted the recent developments in the United Kingdom in regard to venues for conducting religious and civil marriages and the fact that parties contemplating marriages are afforded a lot of freedom to exercise a choice in regard to the marriage venue. The Commission has duly considered the two suggestions that the places at which marriages may be conducted should be limited. Whilst these proposals might serve to prevent weddings underwater or in hot-air balloons, the Commission is of the view that such a requirement might not survive constitutional scrutiny. The requirement of public access might violate the rights of adherents to certain religions where exclusion of the general public is of the very essence to the solemnity of the occasion. (As Adv Burman noted, the essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to manifest religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious beliefs by worship and practice or by teaching and dissemination.) Since the Commission considers that the first option be followed, there is no need to retain section 29(3).¹⁷⁷

2.22.54 The Commission thus recommends that option one should be followed, that the places for conducting marriages should not be limited in section 29(2), that the term “conduct” or “conducted” should be substituted in sections 29(1), (2) and (4) for the term “solemnise” or “solemnised”, as the case may be, and that section 29(3) be repealed.

2.23 REGISTRATION OF MARRIAGES

(a) The provision contained in the Marriage Act

2.23.1 The Marriage Act contains the following provision:

29A(1) The marriage officer solemnizing any marriage, the parties thereto and two competent witnesses shall sign the marriage register concerned immediately after such marriage has been solemnised.

(2) The marriage officer shall forthwith transmit the marriage register and records

¹⁷⁷ This section governs the validity of marriages which were conducted in the Orange Free State or the Transvaal before the commencement of the Marriage Act in any place other than a place appointed by a prior law as a place where for the purposes of such law a marriage must be conducted, or those marriages which by reason of the serious or longstanding illness of, or serious bodily injury to, one or both of the parties were conducted before the commencement of the Marriage Amendment Act, 1968, in a place other than an appointed place.

concerned, as the case may be, to a regional or district representative designated as such under section 21(1) of the Identification Act, 1986 (Act 72 of 1986).

(b) The Department of Home Affairs' suggested provision

2.23.2 The Department of Home Affairs suggested the following provisions:

4(1) Each marriage officer shall keep a record of all marriages or customary unions conducted by him or her.

(2) A marriage or customary union solemnised under or recognised in terms of the provisions of this Act must be recorded in the prescribed register and the register must be signed by the marriage officer who solemnised the marriage or customary union as well as the parties thereto and two competent witnesses, immediately after such solemnization.

(3) The marriage officer concerned shall forthwith transmit the marriage register and records concerned, as the case may be, to a regional or district representative of the Department in whose district or region the marriage or customary union was solemnised.

(4) Upon receipt of the said register and records the regional or district representative, as the case may be, shall cause the particulars of the marriage or customary union concerned to be included in the population register in accordance with the provisions of the Identification Act, 1986 (Act 72 of 1986).

(c) Evaluation contained in discussion paper 88

2.23.3 It was stated in discussion paper 88 that the suggestions made on the registration of marriages by the Department of Home Affairs (excluding the issue of customary unions) and the administrative procedures to be followed in regard of the registration of marriages seem persuasive.

(d) Recommendation contained in discussion paper 88

2.23.4 It was recommended that section 29A of the Marriage Act should be amended as suggested by the Department of Home Affairs (although the references in the Department's provisions to customary unions should be deleted).

(6) Comment on discussion paper 88

2.23.5 iJubilee ConneXion¹⁷⁸ remark that there is value in adapting tribal customs to the

¹⁷⁸ Mr Hugh Wetmore commented on their behalf.

advantages of legal marriage record-keeping, and giving the rights of legal marriage to people married by tribal custom. They consider that this does not discriminate against customary unions as if they were less than marriages conducted by other religious traditions. They propose the following wording:

The Minister shall recognise the chiefs of the tribal authorities as responsible for the recording of customary union marriages in their areas of jurisdiction, with the responsibility to keep records and inform the Department of Home Affairs of all marriages that take place.

2.23.6 iJubilee ConneXion point out that their understanding of customary unions in tribal areas is that the local chief performs the duties normally done by a marriage officer, that no customary union is recognised culturally unless the chief is informed and the details is recorded in his tribal authority records. They suggest that this be formally recognised in the wording of the Marriage Act. They remark that a system can in this way too be easily developed by which tribal authorities notify the Department of Home Affairs of such marriages and that they may then receive a form of legal status. They consider that because such marriages are potentially polygamous, prime legal status could be given to the first wife, and a lesser “customary union” status accorded to subsequent wives. They also suggest that on the death of the first wife, the second wife could then assume prime legal status. They consider that adopting this recommendation would mean deleting the parts in brackets in paragraph 2.23.4 above.

2.23.7 The Department of Home Affairs point out that they support the preliminary recommendation.

(7) Evaluation and recommendation

2.23.8 The Commission recommended in its report on customary marriages that customary marriages should be registered to ensure that marital status is made certain and easier to prove, and to encourage more people to register their marriages, the traditional authorities should be constituted registering officers. Section 4 of the Recognition of Customary Marriages Act, 120 of 1998 gave effect to this recommendation.¹⁷⁹ The Commission does not therefore support

¹⁷⁹ 4. (1) The spouses of a customary marriage have a duty to ensure that their marriage is registered.
(2) Either spouse may apply to the registering officer in the prescribed form for the registration of his or her customary marriage and must furnish the registering officer with the prescribed information and any additional information which the registering officer may require in order to satisfy himself or herself as to the existence of the marriage.

the recommendations made in relation to the registration of customary marriages as other legislation already deals adequately with this aspect.

2.23.9 The Commission has also noted Prof June Sinclair's remark in her *The Law of Marriage*¹⁸⁰ that section 42(3) of the Births, Marriages and Deaths Registration Act¹⁸¹ provided that a duly signed certificate of marriage was prima facie evidence of the particulars set forth therein, that this Act was repealed by the Births and Deaths Registration Act¹⁸² and that the Marriage Act does not contain a similar provision. Prof Sinclair suggests that this lacuna is an oversight and that the legislature could surely not have intended that a duly signed certificate of marriage should no longer be prima facie evidence of the particulars set forth in it. Hence, the Commission considers that a provision should be included in the Marriage Act that a duly signed certificate of marriage presents prima facie evidence of the particulars set forth therein.

(3) A customary marriage-

1. entered into before the commencement of this Act, and which is not registered in terms of any other law, must be registered within a period of 12 months after that commencement or within such longer period as the Minister may from time to time prescribe by notice in the Gazette; or
2. entered into after the commencement of this Act, must be registered within a period of three months after the conclusion of the marriage or within such longer period as the Minister may from time to time prescribe by notice in the Gazette.

(4) (a) A registering officer must, if satisfied that the spouses concluded a valid customary marriage, register the marriage by recording the identity of the spouses, the date of the marriage, any lobolo agreed to and any other particulars prescribed.

(b) The registering officer must issue to the spouses a certificate of registration, bearing the prescribed particulars.

(5) (a) If for any reason a customary marriage is not registered, any person who satisfies a registering officer that he or she has a sufficient interest in the matter may apply to the registering officer in the prescribed manner to enquire into the existence of the marriage.

(6) If the registering officer is satisfied that a valid customary marriage exists or existed between the spouses, he or she must register the marriage and issue a certificate of registration as contemplated in subsection (4).

(6) If a registering officer is not satisfied that a valid customary marriage was entered into by the spouses, he or she must refuse to register the marriage.

(7) A court may, upon application made to that court and upon investigation instituted by that court, order-

- (a) the registration of any customary marriage; or
- (b) the cancellation or rectification of any registration of a customary marriage effected by a registering officer.

(8) A certificate of registration of a customary marriage issued under this section or any other law providing for the registration of customary marriages constitutes prima facie proof of the existence of the customary marriage and of the particulars contained in the certificate.

(9) Failure to register a customary marriage does not affect the validity of that marriage.

¹⁸⁰ Assisted by J Heaton Volume 1 Kenwyn: Juta & Co 1996 at 355.

¹⁸¹ Act 81 of 1963.

¹⁸² Act 51 of 1992.

2.23.10 The Commission recommends that provision be made in section 29A for the administrative procedures to be followed with regard to the registration of marriages as was proposed in the discussion paper and that a duly signed certificate of marriage presents prima facie evidence of the particulars set forth therein.

2.24 MARRIAGE FORMULA

(a) The provisions contained in the Marriage Act

2.24.1 The Marriage Act contains the following provisions:

30(1) In solemnizing any marriage any marriage officer designated under section 3 may follow the marriage formula usually observed by his religious denomination or organisation 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 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 the parties shall give each other the right hand and the marriage officer concerned shall declare the marriage solemnised in the following words:

‘I declare that A.B. and C.D. here present have been lawfully married.’.

(2) Subject to the provisions of subsection (1), a marriage officer, if he is a minister of religion or a person holding a responsible position in a religious denomination or organization, may in solemnizing a marriage follow the rites usually observed by his religious denomination or organization.

(3) If the provisions of this section or any former law relating to the questions to be put to each of the parties separately or to the declaration whereby the marriage shall be declared to be solemnised or to the requirement that the parties shall give each other the right hand, have not been strictly complied with owing to-

(a) an error, omission or oversight committed in good faith by the marriage officer; or

(b) an error, omission or oversight committed in good faith by the parties or owing to the physical disability of one or both of the parties,

but the marriage has in every other respect been solemnised in accordance with the provisions of this Act, or as the case may be, a former law, that marriage shall, provided there was no other lawful impediment thereto and provided further that such marriage, if it was solemnised before the commencement of the Marriage Amendment Act, 1970 (Act 51 of 1970), has not been dissolved or declared invalid by a competent court or neither of the parties to 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.

(b) The provisions suggested by the Department of Home Affairs

2.24.2 The Department of Home Affairs' suggested clause 26 follows the wording of the existing section 29. The only amendment that the Department suggested is the deletion of the words "if it was solemnised before the commencement of the Marriage Amendment Act, 1970 (Act 51 of 1970)" in subsection (3).

(c) Comments on the media statement

2.24.3 We noted above that Mr De Wet commenting on behalf of the Church of Jesus Christ of Latter-day Saints suggested that the Church's marriage formula should be an acceptable marriage formula for the purpose of concluding a legally recognised civil marriage in a Church Temple. However, since the words of the formula may not be said outside the Temple the Commission was not supplied with the words of the formula. Mr De Wet further notes section 34 of the Marriage Act and clause 28 of the Department of Home Affairs' proposed Bill and states that they already provide for the making of special rules and regulations in terms of Church doctrine.¹⁸³

(d) Evaluation contained in discussion paper 88

2.24.4 The Australian Marriage Act contains the following provision on the prescribed marriage formula:

45. (1) Where a marriage is solemnised by or in the presence of an authorized celebrant, being a minister of religion, it may be solemnised according to any form and ceremony recognized as sufficient for the purpose by the religious body or organization of which he or she is a minister.

45(2) Where a marriage is solemnised by or in the presence of an authorized celebrant, not being a minister of religion, it is sufficient if each of the parties says to the other, in the presence of the authorized celebrant and the witnesses, the words:

"I call upon the persons here present to witness that I, A.B. (or C.D.), take thee, C.D. (or A.B.), to be my lawful wedded wife (or husband)";
or words to that effect.

45(2) Where a marriage has been solemnised by or in the presence of an authorized celebrant, a certificate of the marriage prepared and signed in accordance with section 50 is conclusive evidence that the marriage was solemnised in accordance with this section.

¹⁸³ See the discussion under par 2.28 below.

45(3) Nothing in subsection (3) makes a certificate conclusive:

- (1) where the fact that the marriage ceremony took place is in issue-as to that fact; or
- (2) where the identity of a party to the marriage is in issue-as to the identity of that party.

46.(1) Subject to subsection (2), before a marriage is solemnised by or in the presence of an authorized celebrant, not being a minister of religion of a recognized denomination, the authorized celebrant shall say to the parties, in the presence of the witnesses, the words:

"I am duly authorized by law to solemnise marriages according to law.

"Before you are joined in marriage in my presence and in the presence of these witnesses, I am to remind you of the solemn and binding nature of the relationship into which you are now about to enter.

"Marriage, according to law in Australia, is the union of a man and a woman to the exclusion of all others, voluntarily entered into for life.";

or words to that effect.

46(2) Where, in the case of a person authorized under subsection 39(2) to solemnise marriages, the Minister is satisfied that the form of ceremony to be used by that person sufficiently states the nature and obligations of marriage, the Minister may, either by the instrument by which that person is so authorized or by a subsequent instrument, exempt that person from compliance with subsection (1) of this section.

2.24.5 It was said in discussion paper 88 that the question arises whether the present marriage formula, contained in the Marriage Act, meets present demands or whether it should be amended. It was stated that since only one respondent addressed this issue it was not entirely clear to the Commission whether there is a need for amending the present marriage formula. The Commission said that the question arises whether it would not be expedient if the words "or words to that effect" were to be added to the present marriage formula since the Marriage Act already envisages that there may be cases where the formula is not strictly complied with. The Commission did not consider that it would be advisable to add these words. The Commission considered, furthermore, that the words "and thereupon the parties shall give each other the right hand" should be critically considered. The Commission was provisionally of the view that the retention of these words is unwarranted and recommended their deletion. It was likewise considered that the proviso dealing with the validity of marriages where the requirement that the parties shall give each other the right hand has not strictly been complied with should also be deleted.

(e) Recommendation contained in discussion paper 88

2.24.6 The Commission provisionally recommended that section 30(1) be amended by the

deletion of the words "and thereupon the parties shall give each other the right hand" as well as the proviso in section 30(3) regulating the validity of marriages conducted without strictly complying with section 30(1).

(f) Comments on discussion paper 88

2.24.7 Mr Paul de Wet commented that the Church of Jesus Christ of Latter-day Saints submit the following reasons why section 30 should be amended: They confirm that the sacred nature of the marriage ceremony in their client's Temples dictates that the actual wording used in the Temple marriage ceremony cannot be disclosed to those who are not in attendance within the Temple. It will thus not be possible to submit the relevant words to the Department of Home Affairs for their approval. He suggests that an appropriate relaxation and amendment of the current section 30 would thus be required in addition to the amending of section 29(2) before marriages in their clients' Temples can be recognised as valid in civil law.

2.24.8 Mr Paul de Wet suggests in a subsequent submission that they would be most appreciative if the Marriage Act was amended so as to follow substantially the Australian model which provides that where a marriage is solemnised by or in the presence of an authorised celebrant, being a minister of religion, it may be solemnised according to any form and ceremony recognised as sufficient for the purpose by the religious body or organisation of which the celebrant is a minister. Mr De Wet point out that if a marriage is being performed by a minister of religion, the Australian model does not require that the particular marriage formula used by the minister be approved by the government, as long as the formula is recognised as sufficient for the purpose by the religious body of which the celebrant is minister. He remarks that they believe that a provision like the Australian model is adequate to protect the government's interest with respect to the language to be used in a marriage ceremony. He points out that they do not believe that the government has a constitutional right to impose more specific requirements, such as requiring the use of specific language in a marriage formula or requiring the approval of any alternate marriage formula by the Minister of Home Affairs. He notes that such requirements seem to them to allow government too much influence on the free exercise of an individual's religious beliefs. He suggests that an amendment to the Act to reflect a provision substantially similar to that used in Australia would, in their view, remedy their present concern in respect of their not being able to submit the Temple marriage formula or wording to the Minister for his approval for the reasons before explained. Mr De Wet proposes that in order to achieve the same result as the Australian model, the Marriage Act should be amended by

substituting in the first line of section 30(1) the words “who is a minister of religion or a person holding a responsible position in a religious denomination or organisation” for the words “designated under section 3” and by deleting in section 30(1) the words “if such marriage formula has been approved by the Minister, but if such marriage formula has not been approved by the Minister”. Mr De Wet suggests that if these amendments are made, then section 30(2) becomes superfluous and can be deleted.

2.24.9 The Department of Home Affairs is of the view that the phrase “give each other the right hand “ has become a firmly entrenched requirement over the years and recommends that it be retained.

2.24.10 Mr FC Cantore of the Society of Advocates of Natal also considers that the words “and thereupon the parties shall give each other the right hand” should be deleted in section 30(1) and (3).

2.24.11 iJubilee Connexion remark that they support the recommendation which endorses the formula as presently used, with the exception of “taking the right hand” which they consider is clearly superfluous. They are of the view that this is perfectly adequate in terms of the legal requirements for marriage.

2. Evaluation and recommendation

2.24.12 The provisions contained in the Indian Hindu Marriage Act of 1955 on Hindu marriage ceremonies are also noteworthy. A Hindu marriage may be solemnised according to the customary rites and ceremonies of either of the parties. Only where the rites and ceremonies include “*sapthapadi*”, ie, the taking of seven steps, such marriage becomes complete and binding when the seventh step is taken. Customary rites and ceremonies mean religious rites traditionally performed by the caste or community to which the party to the marriage belongs. It should be shown that such custom¹⁸⁴ has been followed from ancient times and the members of the caste, community or subcaste had recognised such ceremonies as obligatory.

¹⁸⁴ Under Section 3 of the Hindu Marriage Act, custom and usage would mean any rule that has been continuously and uniformly observed for a long time and has obtained the force of law among Hindus. A single instance of such marriage cannot be a custom or usage. Custom that allows such marriages should be ancient, certain and reasonable and should not be opposed to public policy, decency or morality.

If it is proved that “*sapthapadi gaman*”, is not a part of the ceremony of marriage followed by the caste, community or subcaste to which the party to the marriage belongs, it need not be performed. Otherwise “*sapthapadi*” remains an essential ceremony in a Hindu marriage. Where “*sapthapadi*” and invocation before the fire is observed, in the absence of customary ceremonies, which are neither ancient and definite nor obligatory and unalterable, such marriage would still be valid.¹⁸⁵ It was noted in the first Chapter above that the issue of, *inter alia*, the appropriate marriage formula for Islamic marriages has not been resolved yet, that it will be dealt with in the Commission’s investigation into Islamic Marriages and related Matters, and that the Commission will not be making specific recommendations on Islamic marriages in this report.

2.24.13 The issue to be resolved with regard to a marriage formula is therefor whether the Commission agrees with Mr De Wet’s reasoning that the Marriage Act should be amended to follow the wording of the Australian Marriage Act. As we saw above Mr De Wet argues that as long as the marriage formula is recognised as sufficient for the purpose by the religious denomination or organisation of which the marriage officer is a minister, it is adequate to protect the State’s interest with respect to the language to be used in a marriage ceremony. He considers further that the State does not have a constitutional right to impose more specific requirements, such as requiring the use of specific language in a marriage formula or requiring the approval of any alternate marriage formula by the Minister of Home Affairs.

2.24.14 De Waal *et al* explain that the limitation clause should play a crucial role in resolving disputes involving the individual right to the free exercise of religion:¹⁸⁶

... the High Court has recently held that both the purpose and effect of legislation may violate the freedom of religion. A generally-applicable law with a neutral purpose may therefore violate s 15 if its effect is to restrict someone’s freedom to exercise his or her religion.

But, while there may be good reasons for resorting to s 36, the courts tend to avoid limitation

¹⁸⁵ Once it is proved that the marriage had taken place, it is presumed that the essential ceremonies for the solemnisation of such marriage have been followed. Only where there is a dispute that the marriage had actually taken place, would it be necessary to plead and prove that the essential ceremonies constituting the marriage have been performed. Rites and ceremonies consistently followed for more than 25 years within a particular community, uniformly observed and not discontinued at any point of time would be said to be the customary rites and ceremonies for the solemnisation of a valid legal marriage. According to the Arya samaj rites, the invocation before the sacred fire and the “*sapthapadi*” are essential ceremonies.

¹⁸⁶ De Waal Johan, Iain Currie & Gerhard Erasmus *The Bill of Rights Handbook* 4th edition Lansdowne: Juta & Co 2001 at 293 *et seq.*

clause analysis where possible, preferring instead to restrict the scope of the right. The effect is that not every practice claiming to be an exercise of the freedom of religion, belief, conscience and thought, is treated as such by the courts. At least three techniques used to restrict the scope of the right can be identified. The first is to question the sincerity of the claimant's belief. ... The second technique is to require the claimant to show a 'substantial burden' on the exercise of the freedom of religion or that the prohibited practice is a 'central tenet' of the religion. ... The third method of avoiding limitation analysis is a form of contextual interpretation: the courts will not protect practices under s 15 that are specifically excluded from protection elsewhere in the Constitution. ...

Whichever theoretical approach is followed, the substantive questions remain the same. The first question to ask is whether different degrees of protection must be afforded to different beliefs depending on their content. If so, religions that promote key constitutional values, such as dignity, equality and freedom, must be afforded greater protection than those that seek to undermine them. However, if content differentiation is rejected, one must try to identify a content-neutral principle to differentiate between legitimate and illegitimate types of limiting the freedom of religion. Denise Meyerson has presented a powerful argument that the most appropriate principle is harm: religious practices may only be limited if they cause harm.

Our courts have thus far avoided asking these crucial questions, let alone opting for either of these approaches. Instead, the courts have used the techniques of avoidance discussed above. We believe that many of the freedom of religion disputes should be resolved under the limitation clause. This will be no easy task. According to the Constitutional Court it is difficult, 'first because of the problems of weighing considerations of faith against those of reason, and secondly because of the problems of separating out what aspects of an activity are religious and protected by the Bill of Rights and what are secular and open to regulation in the ordinary way.' While the state should avoid forcing believers to choose between their faith and respect for the law, society can only cohere if certain basic norms and standards apply to all. There is no automatic right to be exempted from the laws of the land on the grounds of belief.

This dictum throws one back to the balancing exercise under the limitations clause to draw the line between the laws that members of religious communities will have to obey and those from which they must be exempt. In this regard it must be remembered that our courts seem to apply the criteria mentioned in s 36 quite loosely. That is, factors such as the nature of the right, the purpose of the limitation, its nature and extent, the relation between the limitation and its purpose and the question whether there are lesser restrictive means, are thrown onto the scales and a balancing exercise is then performed. For example, in South Africa, the determination of legislative purpose is not a threshold enquiry (at least not under s 36) as it is in Canada. In Canada, if the purpose is invalid, the effects cannot be relied upon to save the legislation. In South Africa, the only threshold enquiry under s 36 is whether law of general application sanctions the limitation. If so, the purpose is considered with other factors, such as the effect of the legislation, in order to determine whether it is reasonable and justifiable in an open and democratic society based on human dignity, freedom and equality.

Loose as the balancing may be, it is difficult to imagine how the freedom to believe can ever be legitimately restricted by the state. As there can be no such thing as a wrong belief or idea, and as beliefs as such cannot cause harm, there is no justification for thought control. A distinction must however be made between the holding of a belief and the public expression of a belief.

2.24.15 In *Christian Education v Minister of Education*¹⁸⁷ the Constitutional Court considered whether section 10 of the Schools Act constituted a reasonable and justifiable

¹⁸⁷ 2000 (10) BCLR 1051 at 1060 *et seq.*

limitation of the parents' practice rights under section 15 and section 31 in regard to corporal punishment, and whether, under section 36 (the limitations clause), the negative impact which the Schools Act had on the practice of corporal correction in the schools of appellant's religious community was to be regarded as reasonable and justifiable in an open and democratic society based on human dignity, freedom and equality.

[29] I turn now to the question of whether the limitation on the rights of the appellants can be justified in terms of section 36, the limitations clause. . . .

To sum up: limitations on constitutional rights can pass constitutional muster only if the Court concludes that, considering the nature and importance of the right and the extent to which it is limited, such limitation is justified in relation to the purpose, importance and effect of the provision which results in this limitation, taking into account the availability of less restrictive means to achieve this purpose. Though there might be special problems attendant on undertaking the limitations analysis in respect of religious practices, the standard to be applied is the nuanced and contextual one required by section 36 and not the rigid one of strict scrutiny. . . .

[35] The answer cannot be found by seeking to categorise all practices as religious, and hence governed by the factors relied upon by the appellant, or secular, and therefore controlled by the factors advanced by the respondent. They are often simultaneously both. Nor can it always be secured by defining it either as private or else as public, when here, too, it is frequently both. The underlying problem in any open and democratic society based on human dignity, equality and freedom in which conscientious and religious freedom has to be regarded with appropriate seriousness, is how far such democracy can and must go in allowing members of religious communities to define for themselves which laws they will obey and which not. Such a society can cohere only if all its participants accept that certain basic norms and standards are binding. Accordingly, believers cannot claim an automatic right to be exempted by their beliefs from the laws of the land. At the same time, the State should, wherever reasonably possible, seek to avoid putting believers to extremely painful and intensely burdensome choices of either being true to their faith or else respectful of the law.

(b) The nature of the rights and the scope of their limitation

[36] There can be no doubt that the right to freedom of religion, belief and opinion in the open and democratic society contemplated by the Constitution is important. The right to believe or not to believe, and to act or not to act according to his or her beliefs or non-beliefs, is one of the key ingredients of any person's dignity. Yet freedom of religion goes beyond protecting the inviolability of the individual conscience. For many believers, their relationship with God or creation is central to all their activities. It concerns their capacity to relate in an intensely meaningful fashion to their sense of themselves, their community and their universe. For millions in all walks of life, religion provides support and nurture and a framework for individual and social stability and growth. Religious belief has the capacity to awake concepts of self-worth and human dignity which form the cornerstone of human rights. It affects the believer's view of society and founds the distinction between right and wrong. It expresses itself in the affirmation and continuity of powerful traditions that frequently have an ancient character transcending historical epochs and national boundaries.

[37] As far as the members of the appellant are concerned, what is at stake is not merely a question of convenience or comfort, but an intensely held sense about what constitutes the good and proper life and their place in creation. . . .

[38] Yet, while they may no longer authorise teachers to apply corporal punishment in their name pursuant to their beliefs, parents are not being deprived by the Schools Act of their general right and capacity to bring up their children according to their Christian beliefs. The effect of the Schools Act is limited merely to preventing them from empowering the schools to administer

corporal punishment.

(c) The purpose, importance and effect of the limitation, and the availability of less restrictive means
[39] The respondent has established that the prohibition of corporal punishment is part and parcel of a national programme to transform the education system to bring it into line with the letter and spirit of the Constitution. The creation of uniform norms and standards for all schools, whether public or independent, is crucial for educational development. A coherent and principled system of discipline is integral to such development. ...

[51] I do not wish to be understood as underestimating in any way the very special meaning that corporal correction in school has for the self-definition and ethos of the religious community in question. Yet their schools of necessity function in the public domain so as to prepare their learners for life in the broader society. Just as it is not unduly burdensome to oblige them to accommodate themselves as schools to secular norms regarding health and safety, payment of rates and taxes, planning permissions and fair labour practices, and just as they are obliged to respect national examination standards, so is it not unreasonable to expect them to make suitable adaptations to non-discriminatory laws that impact on their codes of discipline. The parents are not being obliged to make an absolute and strenuous choice between obeying a law of the land or following their conscience. They can do both simultaneously. What they are prevented from doing is to authorise teachers, acting in their name and on school premises, to fulfill what they regard as their conscientious and biblically-ordained responsibilities for the guidance of their children. Similarly, save for this one aspect, the appellant's schools are not prevented from maintaining their specific Christian ethos.

[52] When all these factors are weighed together, the scales come down firmly in favour of upholding the generality of the law in the face of the appellant's claim for a constitutionally compelled exemption.

2.24.16 It is alleged that it is an infringement of the right to freedom of religion if the state imposes an obligation on religious bodies to comply strictly with the prescribed marriage formula and if the formula used by a religious body wishing to depart therefrom should be approved by the Minister of Home Affairs. The Commission notes the Constitutional Court case of *Christian Education v Minister of Education* which pointed out the constitutional recognition and acknowledgment of diversity and pluralism in our society, and the right of people to be who they are without being forced to subordinate themselves to the cultural and religious norms of others. The Commission also takes into account the Constitutional Court's reasoning in this case where it posed the question how far an open and democratic society based on human dignity, equality and freedom can and must go in allowing members of religious communities to define for themselves which laws they will obey and which not; that such a society can cohere only if all its participants accept that certain basic norms and standards are binding and that believers cannot claim an automatic right to be exempted by their beliefs from the laws of the land, although, at the same time, the State should, wherever reasonably possible, seek to avoid putting believers to extremely painful and intensely burdensome choices of either being true to their faith or else respectful of the law.

2.24.17 The Commission considers that the limitation of the religious right to conduct marriages according to the dictates and precepts of religious bodies would be constitutionally justifiable if the following approach was followed: the State should recognise that a marriage officer who is a minister of religion or a person holding a responsible position in a religious body may perform the marriage according to the marriage formula usually observed by the religious body, provided that the marriage formula at least includes the words presently prescribed in the Marriage Act (subject to the minor amendments proposed below). The Commission is further of the view that if the Marriage Act were to require as a minimum content the prescribed wording, then the approval religious bodies have to obtain from the Minister for using their marriage formula, can be discarded. It seems to the Commission that the State's interest lies in ensuring that the marriage formula makes it clear to the people present at the marriage ceremony that the parties contemplating marriage declare that there are no impediments to their marriage and that they take each other as spouses. The Commission also considers that to effect legal certainty it is vital that the marriage formula makes clear the point at which the parties become husband and wife. The Commission considers that the present formulation, that the marriage officer "shall declare the marriage conducted . . .", is actually correct, although the wording, "shall conclude the ceremony by declaring . . ." is another option. The Commission is of the view that the words "and the marriage officer shall conclude the ceremony in the following words . . ." is preferable. This is the point at which the marriage officer acts for the State in conferring a new status on the parties. Secondly, the words "AB and CD here present have been lawfully married", is grammatically ambiguous and confusing. What one wants to say is that the parties *are now lawfully married*. The words "have been married" prompts the question: "Do you mean they are no longer married?" The words "I declare that AB and CD here present are now lawfully married" is one option. The Commission is of the view that it may be better to avoid the problem altogether by using the words "I declare that AB and CD here present are now husband and wife".

2.24.18 The Commission considers that section 30(2) should be deleted in view of the amendment made to section 30(1). The Commission further considers that there is no need for the retention of the words "and thereupon the parties shall give each other the right hand" in section 30(1) or the words "or to the requirement that the parties shall give each other the right hand" in section 30(3).

2.24.19 The Commission recommends the following clause:

“30(1) In conducting any marriage a marriage officer who is a minister of religion or a person holding a responsible position in a religious denomination or organisation may follow the marriage formula usually observed by his or her religious denomination or body: Provided that the marriage officer shall put at least the following questions to each of the parties separately, each of whom shall reply in the affirmative:

‘Do you, A.B., declare that as far as you know there is no lawful impediment to your proposed marriage to C.D here present, and that you call upon all here present to witness that you take C.D. as your lawful wife (or husband)?’,
and the marriage officer shall conclude the ceremony in the following words:
‘I declare that A.B. and C.D. here present are now husband and wife.’”

2.25 CERTAIN MARRIAGE OFFICERS MAY REFUSE TO CONDUCT CERTAIN MARRIAGES

(a) The provision contained in the Marriage Act

2.25.1 Section 31 of the Marriage Act contains the following provision:

31 Nothing in this Act contained shall be construed so as to compel a marriage officer who is a minister of religion or a person holding a responsible position in a religious denomination or organization to solemnise a marriage which would not conform to the rites, formularies, tenets, doctrines or discipline of his religious denomination or organization.

(b) The Department of Home Affairs’ suggested provision

2.25.2 The Department of Home Affairs’ suggested clause 14 follows the wording of section 31 exactly the only difference being that it refers to clause 9 which governs the appointment of Ministers of religion and persons attached to religious denominations or organisations as marriage officers and it refers to the marriage officers as being male or female.

(c) Comment on the media statement

2.25.3 Mr De Wet commenting on behalf of the Church of Jesus Christ of Latter-Day Saints remark that the Church proposes and request legislation providing that Church marriage officers be entitled to refuse to conduct a marriage which would not be in accordance with the rites, tenets, doctrine or discipline of the Church.

(d) Evaluation contained in discussion paper 88

2.25.4 It was noted in discussion paper 88 that the Australian Marriage Act contains the following provision in this regard:

3. Nothing in this Part:
 - (a) imposes an obligation on an authorized celebrant, being a minister of religion, to solemnise any marriage; or
 - (b) prevents such an authorized celebrant from making it a condition of his or her solemnizing a marriage that:
 - (i) longer notice of intention to marry than that required by this Act is given; or
 - (ii) requirements additional to those provided by this Act are observed.

2.25.5 It was provisionally remarked that it is evident that there is a need for a provision such as is presently contained in the Marriage Act and that it should be retained in the Marriage Act.

5. Recommendation contained in discussion paper 88

2.25.6 It was provisionally recommended that there is no need to amend section 31 and that it be retained in the Marriage Act.

6. Comment on discussion paper 88

2.25.7 The Department of Home Affairs and iJubilee Connexion point out that they support the preliminary recommendation. iJubilee ConneXion add that the right of marriage officers not to conduct a marriage must be upheld.¹⁸⁸

7. Evaluation and recommendation

2.25.8 The Commission recommends that, in the absence of dissent, section 31 should remain

¹⁸⁸ iJubilee ConneXion says because of their proposal that the distinction must be continually upheld that it is the State that is responsible for the orderly conduct of civil society, including the legal recognition and registration of marriage and family — the most basic social foundation of the nation. Religion and other components of civil society may and should play a role in such an important institution as marriage, and must be free to add their unique ingredients to the ceremony. In a democratic society, religions are even free not to recognise a legal marriage within their religious context, and recognise an illegitimate marriage within their religious context. The Marriage Act deals with legality — not with the institution of marriage, which is perceived in a variety of ways by various cultures and faiths.

unamended.

2.26 FEES PAYABLE TO MARRIAGE OFFICERS

(b) The provision contained in the Marriage Act

2.26.1 The Marriage Act contains the following provision:

32(1) No marriage officer may demand or receive any fee, gift or reward, for or by reason of anything done by him as marriage officer in terms of this Act: Provided that a minister of religion or a person holding a responsible position in a religious denomination or organization may, for or by reason of any such thing done by him, receive-

- (a) such fees or payments as were immediately prior to the commencement of this Act ordinarily paid to any such minister of religion or person in terms of the rules and regulations of his religious denomination or organization, for or by reason of any such thing done by him in terms of a prior law; or
- (b) such fee as may be prescribed.

32(2) Any marriage officer who contravenes the provisions of sub-section (1) shall be guilty of an offence and liable on conviction to a fine not exceeding one hundred rand or, in default of payment, to imprisonment for a period not exceeding six months.

(b) The Department of Home Affairs' suggested provision

2.26.2 The Department of Home Affairs' suggested clause 15 follows the wording of section 32 of the Marriage Act, the only differences are that clause 15 refers to clause 9 which governs the appointment of Ministers of religion and persons attached to religious denominations or organisations as marriage officers, it refers to the marriage officers as being male or female, and it further omits the reference to "a fine not exceeding one hundred rand or, in default of payment".

(c) Evaluation contained in discussion paper 88

2.26.3 It was noted in discussion paper 88 that the Australian Marriage provides that the parties to a marry solemnised overseas shall pay to the marriage officer the prescribed fee,¹⁸⁹ and that nothing in the Act affects the right of a minister of religion who is an authorised celebrant to require or receive a fee for or in respect of the solemnisation of a marriage.

¹⁸⁹ Section 70.

2.26.4 It was provisionally stated in discussion paper 88 that there does not seem to be any apparent reason why this section should be amended especially since the Department of Home Affairs also suggested the retention of the section with minor amendments being made.

(d) Recommendation contained in discussion paper 88

2.26.5 It was provisionally recommended that section 32 which governs the payment of fees to marriage officers, should be retained. It was recommended that the section should be amended to refer to marriage officers as being male or female, and the reference to “a fine not exceeding one hundred rand or, in default of payment” should be deleted to serve as a deterrent against a marriage officer contravening the provisions of the Marriage Act — that is the prohibition that a marriage officer may not demand or receive gifts, fees or rewards for or by reason of him or her doing anything as a marriage officer in terms of the Act. The effect of the amendment were to be that a contravention of the section would be punishable with imprisonment not exceeding six months.

(e) Comment on discussion paper 88

2.26.6 iJubilee ConneXion state that the fees payable to marriage officers is legally unenforceable in their opinion and that ministers of religion may only receive a fee at a rate applicable prior to the introduction of the Act. They are of the view that the fact that the fee is unspecified makes a mockery of this clause, no-one can decide and that inflation reduces the value of such a fee even if it was specified. They suggest that legal wisdom be applied to settle the matter unambiguously and that the balance be kept between the temptation to make a profit out of marrying people, and not paying a private marriage officer for his or her time.

2.26.7 Pastor Sid Hartley of the Hatfield Christian Church point out that they suggest that section 32 be retained and also that the option of the fine be retained but increased. Rev Vivian W Harris of the Brooklyn Methodist Church notes that there is a widespread practice for religious marriage officers to be paid a fee for their services. She poses the questions whether the present section 32 allow for this and if so, what is forbidden by section 32(2), is there provision for the increase of these fees because of inflation, and who would prescribe the fee referred to in subparagraph (b).

2.26.8 The Department of Home Affairs point out that they support the preliminary

recommendation.

(f) Evaluation and recommendation

2.26.9 The Marriage Act makes provision that no marriage officer may demand or receive any fee, gift or reward, for or by reason of anything done by him or her as marriage officer in terms of the Act. The Act however provides also that a minister of religion or a person holding a responsible position in a religious organisation may receive such fees or payments as were ordinarily paid to any such minister of religion or person in terms of the rules and regulations of his or her religious denomination or such fee as may be prescribed. An enquiry at the Department of Home Affairs established that no fees are presently prescribed by the Minister of Home Affairs which would entitle a minister of religion or a person holding a responsible position in a religious body to receive such a fee. It is further apparent that the fees prior to the commencement of the Act in 1962 can hardly be substantial after almost four decades. According to an official at the Department of Home Affairs, the Department initiates steps for revoking a minister of religion's designation as a marriage officer whenever they are informed that a minister receives a fee for conducting a marriage. The Commission considers that if the intention is that no fees should be payable at all to ministers of religion, then the Act should provide thus and not create the impression that there might be some obscure regulation sanctioning the payment of a set fee. The Commission however is worried that the rationale for denying a fee to ministers of religion or persons holding responsible positions in religious bodies is weak. One can understand that it should constitute an offence if a marriage officer were to demand excessive fees or rewards for conducting a marriage but it seems questionable that the receipt of a prescribed fee should not be sanctioned.

2.26.10 The Commission provisionally recommended that the penalty should be imprisonment without the option of a fine for contravening section 32 when it was not aware that there are no fees prescribed. The Commission considers that this fact presents a totally different scenario than was foreseen when the preliminary recommendation was considered. The Commission therefore reconsidered its preliminary proposal and is of the view that it would be excessive if the only penalty option for contravening this provision were to be imprisonment. The Commission is of the view that the relative seriousness of a contravention of the section warrants the option of the imposition of a fine, that the fine option should therefore be retained in section 32 although the reference to the amount of one hundred rand should be deleted in order to keep up with inflation without having to amend the section from time to time.

2.26.11 The Commission considers that there are two options in regard to the payment of fees to marriage officers who are ministers of religion or persons holding responsible positions in religious bodies which should be considered. The first option is that the proviso which makes provision in section 32(1) for the payment of fees to certain marriage officers should be deleted. The second option is to follow the wording of section 34 which provides that nothing contained in the Act shall prevent the acceptance by any person of any fee charged by such religious denomination or organisation for the blessing of any marriage, provided the exercise of such authority is not in conflict with the civil rights and duties of any person. The Commission considers that if the intention is to prevent ministers of religion and persons holding responsible positions in religious bodies from demanding or receiving excessive fees, it could in all probability be best regulated if these fees were to be determined from time to time by the religious bodies concerned. Religious bodies would seem to be ideally placed to determine an appropriate fee payable by the members of their community. If a marriage officer were to demand an amount which exceeded the one determined by the organisation or denomination, then it would constitute an offence for which the officer could be prosecuted. The Commission considers that the intention of the legislature in 1961 was surely that ministers of religion and persons holding responsible positions in religious bodies should be entitled to receive a fee and that a fee should have been prescribed.

2.26.12 The Commission recommends that a minister of religion or a person holding a responsible position in a religious denomination or organisation may, in conducting a marriage, receive such fees or payments as his or her religious body may from time to time determine. The Commission further recommends that the option of the imposition of a fine be retained in section 32 but that the maximum amount of one hundred rand provided for be deleted.

2.27 BLESSING OF MARRIAGE

(a) The provision contained in the Marriage Act

2.27.1 The Marriage Act contains the following provision:

33 After a marriage has been solemnised by a marriage officer, a minister of religion or a person holding a responsible position in a religious denomination or organization may bless such marriage according to the rites of his religious denomination or organization.

(b) The Department of Home Affairs' Bill

2.27.2 The Department of Home Affairs did not include a similar provision in its suggested Bill.

(c) Evaluation contained in discussion paper 88

2.27.3 It was pointed out in discussion paper 88 that the question arises as to the need for the inclusion of this section in the Marriage Act in view of section 34 of the Marriage Act. The latter section governs the making of such rules or regulations in connection with the religious blessing of a marriage as may be in conformity with the religious view of such religious denomination or organisation. It was stated that it can be argued that section 33 is superfluous in view of section 34. On the other hand it was said that it can be argued that section 34 merely governs the power of making rules and regulations whereas section sets out the details of when a marriage may be blessed and by whom, and that there is therefore a need for the retention of section 33. It was noted that it is clear that the aim of the Marriage Act is to set out the procedure for parties being lawfully joined in marriage. The question arose as to the necessity for setting out that after the parties get married by a marriage officer, the procedure whereby the marriage is blessed. The question was asked whether provision should then not also be made for the blessing of a marriage in whatever form after parties were joined in a customary marriage? The Commission therefore provisionally considered that there is no need for the retention of section 33.

(d) Recommendation contained in discussion paper 88

2.27.4 It was provisionally recommended that section 33 not be retained in the Marriage Act.

(ii) Comment on discussion paper 88

2.27.5 iJubilee ConneXion state that they would strongly resist any attempt to amend this clause and the clause on religious rules and regulations. They state that they harmonise completely with the principles they set out¹⁹⁰. They are of the view that they respect the rights of religions to bless marriages in their own way, and set their own regulations for meeting their specific religious requirements over and above the legal requirements set by the State. iJubilee ConneXion point out that the powers granted to state officials eg magistrates to perform

¹⁹⁰ See under the heading *Introduction* at the beginning of this chapter.

marriages may be utilised by such religious or other group which are not qualified to have marriage officers. They note that they are present at a civil ceremony and then conduct their own religious or other ceremony afterwards. iJubilee ConneXion remark that the belief of the Church of Jesus Christ of the Latter Day Saints that the “Temple marriage is the ‘real’ marriage, not the civil one” would be reflected in most religions, and should not in any way affect the legislation on the subject. They note that legislation has to do with laws and legality, necessary for public order, that religious ceremonies deal with marriage in a religious, spiritual, theological and or credal/doctrinal sense and that the secular State does not concern itself with such matters. They note that similarly, Mrs Samjhawan’s marriage by Hindu rites and based on “affection and understanding” regrettably does not make it legal. They say that they agree that the Hindu priest ought to have been legally authorised to conduct the marriage, and that this would have avoided the legal complications she experienced in executing her husbands will.

2.27.6 Rev Vivian W Harris comments that section 11(b) provides adequately for the religious practice of the blessing of an existing marriage and that no further legislation is necessary. She considers that such religious ceremony does not fall within the ambit of the law, provided it does not purport to be a marriage.

2.27.7 The Department of Home Affairs point out that they support the preliminary recommendation. Mr FC Cantatore of the Society of Advocates of Natal remarks that he agrees that there is no need to retain section 33 as is discussed in par 2.1.26.3 of the discussion paper.

(ii) Evaluation and recommendation

2.27.8 The Commission considers that there is no need for the inclusion of section 33 in the Marriage Act in view of section 34 of the Marriage Act. The latter section governs the making of such rules or regulations in connection with the religious blessing of a marriage as may be in conformity with the religious view of such religious denomination or organisation and section 33 is therefor superfluous in view of section 34. The Commission therefore recommends that section 33 be deleted.

2.28 RELIGIOUS RULES AND REGULATIONS

(a) The provision contained in the Marriage Act

2.28.1 The Marriage Act contains the following provision:

34 Nothing in this Act contained shall prevent-

- (a) the making by any religious denomination or organization of such rules or regulations in connection with the religious blessing of marriages as may be in conformity with the religious views of such denomination or organization or the exercise of church discipline in any such case; or
- (b) the acceptance by any person of any fee charged by such religious denomination or organization for the blessing of any marriage,

provided the exercise of such authority is not in conflict with the civil rights and duties of any person.

(b) The Department of Home Affairs' suggested provision

2.28.2 The Department of Home Affairs' suggested clause 28 was identical to section 34 of the Marriage Act.

(c) Comments on the media statement

2.28.3 Mr De Wet commenting on behalf of the Church of Jesus Christ of Latter-Day Saints proposes, inter alia, as was noted above, that the Church's marriage formula be an acceptable marriage formula for the purpose of concluding a legally recognised civil marriage in a Church Temple and notes the Department of Home Affairs' proposed clause 28.

(d) Evaluation contained in discussion paper 88

2.28.4 Discussion paper 88 pointed out that this section seemed to be necessary to grant the power to religious denominations and religious organisations for the blessing of marriages and acceptance of fees by them for the blessing of marriages. The retention of this section therefore provisionally seemed justified.

(e) Recommendation contained in discussion paper 88

2.28.5 It was provisionally recommended that section 34 of the Marriage Act not be amended.

2. Comment on discussion paper 88

2.28.6 The Department of Home Affairs point out that they support the preliminary recommendation.

3. Evaluation and recommendation

2.28.7 The Commission considers this section to be necessary for granting the power to religious denominations and religious organisations for the blessing of marriages and acceptance of fees by them for the blessing of marriages. The Commission therefore recommends the retention of this section.

2.29 PENALTIES FOR CONDUCTING A MARRIAGE CONTRARY TO THE PROVISIONS OF THE ACT

(a) The provision contained in the Marriage Act

2.29.1 The Marriage Act contains the following provision:

35 Any marriage officer who knowingly solemnises a marriage in contravention of the provisions of this Act shall be guilty of an offence and liable on conviction to a fine not exceeding one hundred rand or, in default of payment, to imprisonment for a period not exceeding six months.

(b) The Department of Home Affairs' suggested provision

2.29.2 The Department of Home Affairs' Bill did not contain this section.

(c) Evaluation contained in discussion paper 88

2.29.3 Discussion paper 88 pointed out that the New Zealand Marriage Act contains the following provision:

58 Every Registrar who knowingly and wilfully issues any marriage licence or solemnises any marriage contrary to the provisions of this Act, or where there is any other lawful impediment to the marriage, and every [marriage celebrant] who knowingly and wilfully solemnises any marriage contrary to the provisions of this Act, or where there is any other lawful impediment to the marriage, commits an offence and shall be liable on conviction on indictment to imprisonment for a term not exceeding 5 years, or to a fine not exceeding [\$600], or to both.

2.29.4 It was noted that the question arises whether there is a need for section 35 in view of section 11 of the Marriage Act. Section 35 makes provision for penalties for conducting marriages contrary to the provisions of the Act. Section 11 makes it an offence for a marriage officer to purport to conduct a marriage which he or she is not authorised to conduct or which to his or her knowledge is legally prohibited. Marriages conducted by persons who are not marriage officers are similarly prohibited. It was therefore clear that section 11 is more restricted in its scope than section 35 since section 35 penalises the joining of parties in marriage in contravention of the provisions of the Marriage Act as a whole while the former enumerates only a few grounds of criminality. It was noteworthy that the New Zealand Marriage Act contains two similar provisions corresponding largely with the provisions of our Marriage Act. It was considered that it would therefore seem that there is a need for retaining sections 35 and 11 and no amendments were consequently recommended in regard to section 35.

(d) Recommendation contained in discussion paper 88

2.29.5 It was provisionally recommended that section 35 be retained in the Marriage Act unamended.

(e) Comment on discussion paper 88

2.29.6 The Department of Home Affairs and Mr FC Cantatore of the Society of Advocates of Natal point out that they support the preliminary recommendation. Mr FC Cantatore submits that both sections find application, should be retained and that no amendments are necessary in respect of section 35.

(f) Evaluation and recommendation

2.29.7 The Commission remains of the view that section 35 of the Act penalises the joining of parties in marriage in contravention of the provisions of the Marriage Act as a whole while section 11 enumerates only a few grounds of criminality. Furthermore, in view of the lack of calls for amending this section, it would seem that there is a need for retaining sections 35 and 11.

2.29.8 No amendments are consequently recommended in regard to section 35, apart from the deletion of the words "not exceeding one hundred rand". The Commission considers it beneficial

if the provisions of the Adjustment of Fines Act of 1991 also apply in this respect and hence the need for constant amendments to the Act in order to keep abreast with inflation will be obviated.

2.30 PENALTIES FOR FALSE REPRESENTATIONS OR STATEMENTS

(a) The provision contained in the Marriage Act

2.30.1 The Marriage Act contains the following provision:

36 Any person who makes for any of the purposes of this Act, any false representation or false statement knowing it to be false, shall be guilty of an offence and liable on conviction to the penalties prescribed by law for perjury.

(b) The Department of Home Affairs' suggested provision

2.30.2 The Department of Home Affairs' clause 38 was identical to section 36 of the Marriage Act.

(c) Evaluation contained in discussion paper 88

2.30.3 Discussion paper 88 noted that the New Zealand Marriage Act likewise provides that every person commits an offence and shall be liable on conviction on indictment to imprisonment for a term not exceeding 2 years, or to a fine not exceeding \$400, or to both, who-

- C knowingly and wilfully makes or causes to be made any false declaration for the purposes of the Act; or
- C makes or causes to be made, for the purpose of being inserted in any register book, a false statement of any of the particulars required to be known and registered under the provisions of the Act; or
- C notifies any Registrar of the lodgment of a *caveat* under section 25 if in fact no such *caveat* has been lodged.¹⁹¹

2.30.4 In the absence of comments by respondents or the Department of Home Affairs arguing for the amendment of section 36 of the Marriage Act it seemed clear that an amendment of this section is unjustified.

(d) Recommendation

¹⁹¹ Section 60.

2.30.5 It was provisionally recommended that section 36 of the Marriage Act should not be amended. No respondent addressed this aspect. The Commission is therefore of the view that section 36 should not be amended.

2.31 OFFENCES COMMITTED OUTSIDE THE REPUBLIC OF SOUTH AFRICA

(a) The provision contained in the Marriage Act

2.31.1 The Marriage Act contains the following provision:

37 If any person contravenes any provision of this Act in any country outside the Union the Minister of Justice shall determine which court in the Union shall try such person for the 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.

(b) The Department of Home Affairs' suggested Bill

2.31.2 The Department of Home Affairs did not include a similar provision in its Bill.

(c) Evaluation contained in discussion paper 88

2.31.3 The question arose whether there is a need for section 37 in view of the provisions of the Criminal Procedure Act of 1977, which provides as follows:

110(1) Where an accused does not plead that the court has no jurisdiction and it at any stage-

- (a) after the accused has pleaded a plea of guilty or of not guilty; or
- (b) where the accused has pleaded any other plea and the court has determined such plea against the accused,

appears that the court in question does not have jurisdiction, the court shall for the purposes of this Act be deemed to have jurisdiction in respect of the offence in question.

110(2) Where an accused pleads that the court in question has no jurisdiction and the plea is upheld, the court shall adjourn the case to the court having jurisdiction.

2.31.4 Prof Dugard states that generally the laws of a country extend only to acts committed within a country's geographical boundaries as there is a presumption in most legal systems

against the extraterritorial operation of laws.¹⁹² However, a sovereign legislature may penalise its citizens as a result of acts committed on foreign soil and they may be tried when they return to their domicile.¹⁹³ The former Union of South Africa also gained its power to make provision for legislation conferring extra-territorial jurisdiction under section 3 of the Statute of Westminster and this position was confirmed by subsequent Constitutions.

2.31.5 The Commission noted that there may be a number of offences parties may commit outside the geographical borders of South Africa in contravention of the provisions of the Marriage Act. One example is where a person who is already a party to a marriage contracts a second marriage in another country without obtaining a prior divorce, thereby committing the offence of bigamy. It was provisionally considered that it should be possible under these circumstances to try the offender in South Africa.

(d) Recommendation contained in discussion paper 88

2.31.6 The Commission provisionally recommended that there is no need to amend section 37 besides the substitution of the term “Republic” for the term “Union”.

(5) Comment on discussion paper 88

2.31.7 Pastor Sid Hartley of the Hatfield Christian Church point out their support for the substitution of the term “Republic” for the term “Union” throughout the Act. The Department of Home Affairs also supports the preliminary recommendation.

(6) Evaluation and recommendation

2.31.8 In the absence of dissenting views from respondents, the Commission recommends that section 37 be amended by the substitution of the term “Republic” for the term “Union”.

2.32 REPEAL AND SAVINGS

¹⁹² *South African Criminal Procedure Vol IV Introduction to Criminal Procedure* Cape Town: Juta & Co 1977 at 58.

¹⁹³ *Hiemstra Suid-Afrikaanse Strafproses* J Krieglér 5 th edition Durban: Butterworths 1993 at 277.

(a) Evaluation

2.32.1 The Department of Home Affairs notes in its comment on discussion paper 88 that the proposed Amendment Bill does not provide for repeal and savings and suggests that the repeal of the Transkei, Bophuthatswana, Venda and Ciskei marriage laws be provided for.

2.32.2 The Home Affairs Laws Rationalisation Act 41 of 1995 provided, inter alia, that section 29 of the Marriage Act, 1961 shall apply uniformly throughout the Republic. There were, however, separate Marriage Acts in existence in the former homelands, as the Department of Home Affairs indicate. The Bophuthatswana Marriage Act No 15 of 1980 governed the law of joining of parties in marriage in Bophuthatswana. The provisions of this Act corresponds with the present provisions of the Marriage Act of 1961. The Bophuthatswana Marriage Act differs from the South African Marriage Act of 1961 in that the first-mentioned Act contains a provision dealing with property rights of parties to a “customary union”. Since customary marriages are now regulated by the Recognition of Customary Marriages Act of 1998, and Bophuthatswana forms part of the Republic of South Africa there is no need for the further existence of the Bophuthatswana Marriage Act. Enquiries at the regional offices of the Department of Home Affairs in Sibasa established that the South African Marriage Act of 1961 was applied in the former Venda and there is therefore no separate legislation in force in Venda which needs to be repealed. The Republic of Ciskei passed its own Marriage Act No 24 of 1988 and it commenced in 1989. There seems to be no need to retain this Act.

(b) Recommendation

2.32.3 The Commission agrees with the proposal made by the Department of Home Affairs and recommends the repeal of the Transkei Marriage Act of 1978, the Bophuthatswana Marriage Act of 1980 and the Ciskei Marriage Act of 1988.

THE COMMISSION'S FINAL PROPOSED MARRIAGE AMENDMENT BILL

GENERAL EXPLANATORY NOTE

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

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

BILL

To amend the Marriage Act, 1961, so as to provide further for the delegation of the Minister's powers; to provide further for the appointment of marriage officers; to regulate further the consequences of a change of the name or the objects or an amalgamation of a religious denomination or organisation; to provide further for the revocation of the appointment of a person as a marriage officer; to regulate further marriages conducted outside the Republic; to provide further for the consequences for conducting an unauthorised marriage; to provide further for publications of bans; to provide further for objections to marriage; to provide further for the marriage of minors; to provide further for the prohibition of marriage of persons under certain ages; to regulate further marriages between a person and relatives of his or her deceased or divorced spouse; to provide further for the time and place and presence of parties and witnesses at conducting marriages; to provide further for the registration of marriages; to regulate further the marriage formula; to provide further for the penalties for joining parties in marriage contrary to the provisions of the Act; and to provide for matters connected therewith.

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

Amendment of section 1 of Act 25 of 1961, as amended by section 1(a) of Act 51 of 1970

(d) Section 1 of the Marriage Act, 1961, (hereinafter referred to as the principal Act) is hereby amended by the omission of the following definition:

['Commissioner' includes an Additional Commissioner, an Assistant Commissioner, a Native Commissioner, an Additional Native Commissioner and Assistant Native Commissioner;]

Amendment of section 2 of Act 25 of 1961, as amended by section 2 of Act 51 of 1970 and section 1 (2) of Act 114 of 1991

2. The following section is hereby substituted for section 2 of the principal Act:

(1) Every magistrate, **[every special justice of the peace and every Commissioner]**~~every Ambassador, every High Commissioner and every Consul~~ shall by virtue of his or her office and so long as he or she holds such office, be a marriage officer for the district or other area in respect of which he or she holds office.

(2) The Minister **[and any officer in the public service authorized thereto by him]** may designate any officer or employee in the public service or the

diplomatic or consular service of the Republic to be, by virtue of his or her office and so long as he or she holds such office, a marriage officer, either generally or for any specified class of persons or country or area.

- (3) A marriage conducted in the Republic by a diplomatic or consular officer of a foreign country designated by the Minister shall be recognised as valid in the Republic if-
- (a) neither of the parties to the marriage is a South African citizen;
 - (b) the marriage would not be void for the reason that-
 - (i) either of the parties is, at the time of the marriage, lawfully married to some other person;
 - (ii) the parties are within a prohibited relationship; or
 - (iii) either of the parties is under marriageable age.
 - (c) the marriage is recognised as a valid marriage by the law or custom of the designated foreign country;
 - (d) the marriage is registered in terms of the Act.

Insertion of section 2A in Act 25 of 1961

1. The following section is inserted after section 2 of the principal Act:

2A. The Minister may, subject to the conditions he or she may deem necessary, delegate any power conferred on him or her by this Act to a person in the service of the Department, but shall not be divested of any power so delegated and may set aside or amend any decision of the delegate made in the exercise of such power.

Amendment of section 3 of Act 25 of 1961, as amended by section 3 of Act 51 of 1970

2. The following section is substituted for section 3 of the principal Act:

(1) The Minister **[and any officer in the public service authorized thereto by him]** may designate any minister of religion of, or any person holding a responsible position in, any religious denomination or organization recognized by the Minister by notice in the Gazette to be, so long as he or she is such a minister or occupies such position, a marriage officer for the purpose of **[solemnizing] joining parties in marriage[s]** according to **[Christian, Jewish or Mohammedan rites or the rites of any Indian religion]** the tenets of the religious denomination or organization concerned.

(2) A designation under sub-section (1) may further limit the authority of any such minister of religion or person to the **[solemnization] joining of parties in marriage[s]-**

- (a) within a specified area;
- (b) for a specified period.

(3) Any religious denomination or organization may apply to the Minister to be recognised as an religious denomination or organization which may nominate persons for designation by the Minister as marriage officers, and every such application for recognition must contain information setting out whether-

- (a) the religious denomination or organization professes a belief in a religious doctrine, dogma or creed and is organised for religious worship;

- (b) the rites and usages of the marriage ceremony followed by the religious denomination or organisation fulfil the requirements of South African marriage law; and
 - (c) the religious denomination or organization is sufficiently well established, both as to continuity of existence and as to recognised rites and usages respecting the conduct of marriages, to warrant the designation of its religious representatives as authorised to conduct marriages.
- (4) Any nomination submitted to the Minister by a recognized religious denomination or organisation of a person for designation by the Minister as a marriage officer, must set out particulars as to whether-
- (a) the person nominated is a religious representative ordained or appointed according to the rites and usages of the denomination or organization concerned; and
 - (b) that nominated person is, as a religious representative, recognised by the religious denomination or organization to which he or she belongs as authorized to conduct marriages according to its rites and usages; and
 - (c) adequate notice of the nomination has been given to its members in order to afford an opportunity to them to raise objections against such nomination.
- (5) Any decision made by the Minister under this section to appoint a marriage officer or to revoke the designation of any person as a marriage officer under section 9 shall be reviewable by any provincial or local division of the High Court of South Africa, and the Court-
- (a) may call upon the Minister to furnish reasons and to submit such information as the Court deems fit; and
 - (b) may-
 - (i) consider the merits of the matter under review; and
 - (ii) confirm, vary or set aside the decision of the Minister.

Amendment of section 5 of Act 25 of 1961, as amended by section 4 (a) of Act 51 of 1970 and section 1 of Act 112 of 1990

5. The following section is substituted for section 5(1) of the principal Act:

(1) Any person who, at the commencement of this Act, or of the Marriage Amendment Act, 1970, is under the provisions of any prior law authorized to **[solemnize] join any party in [any] marriage[s]**, shall continue to have such authority **[to solemnize such marriages]** as if such law had not been repealed, but shall exercise such authority in accordance with the provisions of this Act.

Amendment of section 6 of Act 25 of 1961

6. The following section is substituted for section 6 of the principal Act:

6(1) Whenever any person has acted as a marriage officer during any period or within any area in respect of which he or she was not a marriage officer under this Act or any prior law, and the Minister **[or any officer in the public service authorized thereto by the Minister]** is satisfied that such person did so under the bona fide belief that he

or she was a marriage officer during that period or within that area, he or she may direct in writing that such person shall for all purposes be deemed to have been a marriage officer during such period or within such area, duly designated as such under this Act or such law, as the case may be.

(2) Whenever any person acted as a marriage officer in respect of any marriage while he or she was not a marriage officer and both parties to that marriage bona fide believed that such person was in fact a marriage officer, the Minister **[or any officer in the public service authorized thereto by him]** may, after having conducted such inquiry as he or she may deem fit, in writing direct that such person shall for all purposes be deemed to have been duly designated as a marriage officer in respect of that marriage.

(3) Any marriage **[solemnized] conducted** by any person who is in terms of this section to be deemed to have been duly designated as a marriage officer shall, provided such marriage was in every other respect **[solemnized] conducted** in accordance with the provisions of this Act or any prior law, as the case may be, and there was no lawful impediment thereto, be as valid and binding as it would have been if such person had been duly designated as a marriage officer.

(4) Nothing in this section contained shall be construed as relieving any person in respect of whom a direction has been issued thereunder, from the liability to prosecution for any offence committed by him or her.

(5) Any person who acts as a marriage officer in respect of any marriage, shall complete a certificate on the prescribed form in which he or she shall state that at the time of the **[solemnization] conducting** of the marriage he or she was in terms of this Act or any prior law entitled to **[solemnize] conduct** that marriage.

Amendment of section 8 of Act 25 of 1961

7. The following section is substituted for section 8 of the principal Act:

8(1) If a religious denomination or organization changes the name whereby it was known or amalgamates with any other religious denomination or organization or changes its objects or there is a material change in its circumstances, **[such change in name or amalgamation shall have no effect on the designation of any person as a marriage officer by virtue of his occupying any post or holding any position in any such religious denomination or organization.**

(2) **If a religious denomination or organization in such circumstances as are contemplated in sub-section (1) changes the name whereby it was known or amalgamates with any other religious denomination or organization or changes its objects or there are a material change in its circumstances,]** it shall immediately advise the Minister thereof who may revoke its recognition for any of these reasons.

(2) The Minister must inform the denomination or organization concerned in writing of the revocation.

Amendment of section 9 of Act 25 of 1961

8. The following section is substituted for section 9 of the principal Act:

9(1) The Minister **[or any officer in the public service authorized thereto by him]** may **[,on the ground of misconduct or for any other good cause,]** revoke in writing

the designation of any person as a marriage officer or the authority of any other person to **[solemnize]** join parties in marriage[s] under this Act, or in writing limit in such respect as he or she may deem fit the authority of any marriage officer or class of marriage officers to **[solemnize]** conduct marriages under this Act, on the following grounds namely that-

- (a) a marriage officer no longer wishes to be a marriage officer;
 - (b) the denomination by which that person was nominated for designation as a marriage officer, or in respect of which that person is designated, no longer desires that that person be designated as a marriage officer;
 - (c) the denomination by which a marriage officer was nominated for designation, or in respect of which that person is designated, has ceased to be a recognized denomination;
 - (d) the marriage officer has been guilty of such contraventions of the Act or the regulations as to show him or her not to be a fit and proper person to be designated as a marriage officer;
 - (e) a marriage officer has, in contravention of section 32, been making a business of the joining of parties in marriage for the purpose of profit or gain;
 - (f) a marriage officer is, for any other reason not entitled to designation.
- (2) The Minister must inform-
- (a) the person whose designation has been revoked; and
 - (b) the religious denomination or organization-
 - (i) which nominated that person for designation as a marriage officer; or
 - (ii) which no longer desires that that person be designated as a marriage officer.
- in writing about the revocation and the grounds founding it.

[(2) Any steps taken by any officer in the public service under sub-section (1) may be set aside by the Minister.]

Amendment of section 10 of Act 25 of 1961

9. Section 10 of the principal Act is amended by-

(a) the substitution for subsection (1) of the following subsection:

(1) Any person who is under the provisions of this Act authorized to **[solemnize]** join any party in marriage[s] in any country outside the **[Union] Republic-**

- (a) may so **[solemnize]** join any parties in such marriage only if at least one of the parties thereto [are both] is a South African citizen[s] domiciled in the **[Union] Republic;** and
- (b) shall **[solemnize]** conduct any such marriage in accordance with the provisions of this Act.

(2) Any marriage so **[solemnized]** conducted shall for all purposes be deemed to have been **[solemnized]** conducted in the **[province of the Union] Republic [in which the male party thereto is domiciled].**

(3) A marriage shall not be conducted in any country outside the Republic unless the marriage officer is satisfied-

(a) that each of the parties to the intended marriage is a South African citizen;

(b) where one party to the intended marriage is not a South African citizen-

(i) that that party is not a subject or citizen of the country outside the Republic; or

(ii) sufficient facilities do not exist for conducting the marriage in the country outside the Republic in accordance with the law of that country;

(c) where one party to the intended marriage is a subject or citizen of the country outside the Republic.

(i) that objection will not be taken by the authorities of that country to the intended marriage being conducted in that country; or

(ii) that a marriage in that country between the parties in accordance with the law of that country would not be recognised in South Africa.

Amendment of section 11 of Act 25 of 1961

10. Section 11 of the principal Act is amended by-

(a) the substitution for the following subsection for subsection (2):

(2) Any marriage officer who purports to **[solemnize]** conduct a marriage which he or she is not authorized under this Act to **[solemnize]** conduct or which to his or her knowledge is legally prohibited, and any person not being a marriage officer who purports to **[solemnize]** join parties in a marriage, shall be guilty of an offence and liable on conviction to a fine **[not exceeding four hundred rand]** or, in default of payment, to imprisonment for a period not exceeding **[twelve months]** two years, or to both **[such]** a fine and **[such]** imprisonment.

(b) the substitution for subsection (3) of the following subsection:

(3) Nothing in sub-section (2) contained shall apply to any marriage ceremony **[solemnized]** conducted in accordance with the rites or formularies of any religion, if such ceremony does not purport to effect a valid marriage.

Amendment of section 12 of Act 25 of 1961, as amended by section 1(1) of Act 11 of 1964, section 5 of Act 51 of 1970, section 1 of Act 112 of 1990 and section 1(2) of Act 114 of 1991

11. The following section is substituted for section 12 of the principal Act-

12.(1) No marriage officer shall **[solemnize]** join any parties in marriage unless-

(a) each of the parties in question produces to the marriage officer his or her identity document issued under the provisions of the Identification Act, **[1986 (Act 72 of 1986)]** 1997 (Act 68 of 1997); or

- (b) each of such parties furnishes to the marriage officer the prescribed affidavit; or
- (c) one of such parties produces his or her identity document referred to in paragraph (a) to the marriage officer and the other furnishes to the marriage officer the affidavit referred to in paragraph (b).

(2) If parties were joined in marriage and the provisions of subsection (1) were not strictly complied with but such marriage was in every other respect conducted in accordance with the provisions of 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, lawfully married another, be as valid and binding as it would have been if the said provisions had been strictly complied with.

Amendment of section 22 as substituted by section 3 of Act 19 of 1968, amended by section 7 of Act 51 of 1970 and substituted by section 1 of Act 26 of 1972

12. The following section is substituted for section 22 of the principal Act:

22. If in the case of any marriage **[solemnized]** conducted 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]** conducted in accordance with the provisions of 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.

Amendment of section 23 of Act 25 of 1961 as amended by section 8 of Act 51 of 1970

13. Section 23 of the principal Act is amended by-

- (a) the substitution of the following section for section 23:
 - (1) Any person desiring to raise any objection to any proposed marriage shall lodge such objection in writing with the marriage officer who is to **[solemnize]** conduct such marriage and with the parties contemplating marriage at least 24 hours before the contemplated marriage is to be conducted.
 - (2) Upon receipt of any such objection the marriage officer concerned shall inquire into the grounds of the objection and if he or she is satisfied that there is no lawful impediment to the proposed marriage, he or she may **[solemnize]** conduct the marriage in accordance with the provisions of

this Act.

- (3) If he or she is not so satisfied he or she shall refuse to **[solemnize]** conduct the marriage.

- (b) the insertion of the following section:

23A Grounds on which marriages are void or voidable

- (1) A marriage that takes place is void where-
- (a) either of the parties was, at the time of the marriage, lawfully married to some other person;
 - (b) the parties are within a prohibited relationship;
 - (c) the consent of either of the parties was not real consent because that party was mentally incapable of understanding the nature and effect of the marriage ceremony; or
 - (d) subject to sections 24A, 25 and 26, either of the parties was under marriageable age.
2. A marriage is voidable —
- (a) on application by the coerced party where at the time of the marriage the consent of either of the parties was not real consent because it was obtained by duress;
 - (b) on application by the mistaken party where at the time of the marriage that party was mistaken as to the identity of the other party or as to the nature of the ceremony performed;
 - (c) on application by a spouse where at the time of the marriage the other spouse was afflicted with permanent impotence; or
 - (d) on application by the husband where at the time of the marriage the wife was pregnant by a person other than the husband.

Amendment of section 24 of Act 25 of 1961

14. Section 24 of the principal Act is amended-

- (a) by the substitution of the following subsection for subsection (1):

(1) No marriage officer shall **[solemnize]** conduct a marriage between parties of whom one or both are minors unless the consent to the party or parties which is legally required for the purpose of contracting the marriage has been granted and furnished to him or her in writing.

- (b) by the insertion of the following subsection after subsection (2):

- (3)** “Legally required consent” means for the purposes of this Act that —
- (a) if both the minor's parents are alive, consent shall be obtained from both parents;
 - (b) if the minor's parents are divorced and he or she is in the custody of one parent, consent shall be obtained from both parents;
 - (c) if the minor's parents are divorced and sole guardianship is awarded to one parent-
 - (i) in terms of section 5(1) of the Matrimonial Affairs Act, Act No 37 of 1953; or
 - (ii) section 6(3) of the Divorce Act, Act No 70 of 1979.

- the minor shall obtain the consent from that parent;
- (d) the minor shall obtain the consent of his or her mother in any case where his or her parents have never been married;
 - (e) if one of the parents of the minor is deceased and the parents had at any time been married to each other, consent shall be obtained from the surviving parent and, if applicable, any other person who is the legal guardian of the minor;
 - (f) if both parents of the minor are deceased and they had at any time been married to each other, consent shall be obtained from any person who is the legal guardian of the minor;
 - (g) if the minor's parents had never been married to each other and one or both of them are deceased, consent shall be obtained from the mother if she is alive and from any person who is the legal guardian of the minor if she is deceased; or
 - (h) if the consent of the parent or legal guardian cannot be obtained, section 25 applies;

Provided that a minor who was previously married, or a minor who has been declared a major under the provisions of the age of Majority Act, Act No 57 of 1972, does not require parental consent to marry.

Amendment of section 24A of Act 25 of 1961

15. Section 24A of the principal Act is amended by the substitution for paragraphs (a) and (b) of the following paragraphs:
- (a) 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
 - (b) by the minor before he or she attains majority or within three months thereafter.

Amendment of section 25 of Act 25 of 1961 as amended by section 62 of Act 74 of 1983

16. Section 25 of the principal Act is amended by-
- (a) the substitution of the following subsection for subsection (1):
 - (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 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 may in his or her discretion grant written consent to such minor to marry a specified person, but such commissioner of child welfare 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.
 - (b) by the substitution of the following subsection for subsection (2):
 - (2) A commissioner of child welfare shall, before granting his or her consent to a marriage under sub-section (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.

(c) by the substitution of the following subsection for subsection (4):

(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] 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 is without adequate reason and contrary to the interests of such minor.

Amendment of section 26 of Act 25 of 1961

17. Section 26 is amended by-

(a) the substitution of the following subsection for subsection (1):

(1) No boy or girl 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,]** 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.

(b) by the substitution of the following subsection for subsection (2):

(2) If any person referred to in subsection (1) who was not capable of contracting a valid marriage without the written permission of the Minister **[or any officer in the public service authorized thereto by him or her,]** in terms of this Act or a prior law, contracted a marriage without such permission and the Minister **[or such officer,]** as the case may be, considers such marriage to be desirable and in the interests of the parties in question, he or she may, provided such marriage was in every other respect **[solemnized] conducted** 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 marriage.

(c) by the substitution of the following subsection for subsection (3):

(3) If the Minister **[or any officer in the public service authorized thereto by him]** so directs it shall be deemed that he or she granted written permission to such marriage prior to the **[solemnization] conducting** thereof.

Amendment of section 27 of Act 25 of 1961

18. Section 27 of the principal Act is amended by the substitution of the following subsection for subsection (3):

(3) If parties appear before a marriage officer for the purpose of contracting a marriage with each other and such marriage officer reasonably suspects that either of them is of an age which debars him or her from contracting a valid marriage without the consent or permission of some other person, he or she may refuse to **[solemnize] conduct** a marriage between them unless he or she is furnished with such consent or permission in writing or with satisfactory proof showing that the party in question is entitled to contract a marriage without such consent or permission.

Amendment of section 28 of Act 25 of 1961

19. The following section is hereby substituted for section 28 of the principal Act:

(1) Subject to the provisions of section 28(2) and (3), a marriage between the following parties shall be void-

(d) a man and-

- (i) his grandmother;
- (ii) his grandfather's wife;
- (iii) his wife's grandmother;
- (iv) his father's sister;
- (v) his mother's sister;
- (vi) his mother;
- (vii) his stepmother;
- (viii) his wife's mother;
- (ix) his daughter;
- (x) his wife's daughter;
- (xi) his sons' wife;
- (xii) his sister;
- (xiii) his son's daughter;
- (xiv) his daughter's daughter;
- (xv) his sons's son's wife;
- (xvi) his daughter's son's wife;
- (xvii) his wife's son's daughter;
- (xviii) his wife's daughter's daughter;
- (xix) his brother's daughter; or
- (xx) his sister's daughter;

(b) a woman and-

- (i) her grandfather;
- (ii) her grandmother's husband;
- (iii) her husband's grandfather;
- (iv) her father's brother;
- (v) her mother's brother;
- (vi) her father;
- (vii) her stepfather;
- (viii) her husband's father;
- (ix) her son;
- (x) her husband's son;
- (xi) her daughter's husband;
- (xii) her brother;
- (xiii) her son's son;

- (xiv) her daughter's son;
- (xv) her son's daughter's husband;
- (xvi) her daughter's daughter's husband;
- (xvii) her husband's son's son;
- (xviii) her husband's daughter's son;
- (xix) her brother's son;
- (xx) her sister's son;

Provided that the provisions of this section with respect to any relationship shall apply whether the relationship is by the whole blood or by the half blood; and provided further that an adoptive child as defined in the Child Care Act, No 74 of 1983, shall be deemed to be the legitimate child of the adoptive parent(s), as if he or she was born of such parents during the existence of a lawful marriage, and an order of adoption shall not have the effect of permitting or prohibiting any marriage which, but for the adoption, would have been prohibited or permitted.

28(2) Where both parties have reached the age of 18 years they may apply to the Minister for his or her consent to their marriage if they are not within the degrees of consanguinity (relationships between blood relatives) but are within the degrees of affinity (relationships created by marriage) prohibited by section 28A(1).

- (3) Any legal provision to the contrary notwithstanding it shall be lawful for-
- (a) any widower to marry the sister of his deceased wife or any female related to him through his deceased wife in any more remote degree of affinity than the sister of his deceased wife, other than an ancestor or descendant of such deceased wife;
 - (b) any widow to marry the brother of her deceased husband or any male related to her through her deceased husband in any more remote degree of affinity than the brother of her deceased husband, other than an ancestor or descendant of such deceased husband;
 - (c) any man to marry the sister of a person from whom he has been divorced or any female related to him through the said person in any more remote degree of affinity than the sister of such person, other than an ancestor or descendant of such person; and
 - (d) any woman to marry the brother of a person from whom she has been divorced or any male related to her through the said person in any more remote degree of affinity than the brother of such person, other than an ancestor or descendant of such person.

Amendment of section 29 of Act 25 of 1961, as amended by section 4 of Act 19 of 1968

20. The following section is substituted for section 29 of the principal Act:

- (1) A marriage officer may **[solemnize] conduct** a marriage at any time on any day of the week but shall not be obliged to **[solemnize] conduct** a marriage at any other time than between the hours of eight in the morning and four in the afternoon.
- (2) A marriage officer **[shall] may [solemnize] conduct** any marriage **[in a church or other building used for religious service, or in a public office or private dwelling-house, with open doors] at any place [and] but shall conduct the marriage** 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

(3) Every marriage-

- (a) which was solemnized in the Orange Free State or the Transvaal before the commencement of this Act in any place other than a place appointed by a prior law as a place where for the purposes of such law a marriage shall be solemnized; or
- (b) which by reason of the serious or longstanding illness of, or serious bodily injury to, one or both of the parties was solemnized before the commencement of the Marriage Amendment Act, 1968, in a place other than a place appointed by subsection (2) of this section as a place where for the purposes of this Act a marriage shall be solemnized,

shall, 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 it had been solemnized in a place appointed therefor by the applicable provisions of the prior law or, as the case may be, of this Act.

(4) (3) No person shall under the provisions of this Act be capable of contracting a valid marriage through any other person acting as his or her representative.

Amendment of section 29A of Act 25 of 1961

21. The following section is substituted for section 29A of the principal Act:

(1) **[The]** Each marriage officer shall keep a record of all marriages conducted by him or her.

(2) A marriage conducted under or recognised in terms of the provisions of this Act must be recorded in the prescribed register and the register must be signed by the marriage officer who **[solemnized]** conducted **[any]** the marriage, as well as the parties thereto and two competent witnesses **[shall sign the marriage register concerned]** immediately after such marriage has been **[solemnized]** conducted.

[(2)] (3) The marriage officer concerned shall forthwith transmit the marriage register and records concerned, as the case may be, to a regional or district representative **[designated as such under section 21 (1) of the Identification Act, 1986 (Act 72 of 1986)]** of the department in whose district or region the marriage was conducted.

(4) Upon receipt of the said register and records the regional or district representative, as the case may be, shall cause the particulars of the marriage concerned to be included in the population register in accordance with the provisions of the Identification Act, 1997 (Act 68 of 1997).

(5) A duly signed certificate of marriage shall present prima facie evidence of the particulars set forth therein.

Amendment of section 30 of act 25 of 1961 as amended by section 10 of Act 51 of 1970, section 2 of Act 26 of 1972 and section 1 of Act 12 of 1973

22. The following section is substituted for section 30 of the principal Act:

30(1) In **[solemnizing]** conducting any marriage **[any]** a marriage officer **[designated under section 3]** who is a minister of religion or a person holding a responsible position in a religious denomination or organisation may follow the marriage formula usually observed by his or her religious denomination or organisation **[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]** : Provided that the marriage officer shall put at least the following questions to each of the parties separately, each of whom shall reply in the affirmative:

‘Do you, A.B., declare that as far as you know there is no lawful impediment to your proposed marriage **[with]** to C.D here present, and that you call upon all here present to witness that you take C.D. as your lawful wife (or husband)?’, **[and thereupon the parties shall give each other the right hand]** and the marriage officer **[concerned]** shall **[declare]** conclude the **[marriage solemnized]** ceremony in the following words:

‘I declare that A.B. and C.D. here present **[have been lawfully married]** are now husband and wife.’.

[(2) Subject to the provisions o subsection (1), a marriage officer, if he is a minister of religion or a person holding a responsible position in a religious denomination or organization, may in solemnizing a marriage follow the rites usually observed by his religious denomination or organization.

(3)] (2) Subject to the provisions of this section or any former law relating to the questions to be put to each of the parties separately or to the declaration whereby the **[marriage] parties** shall be declared to be **[solemnized]** joined in marriage [or to the requirement that the parties shall give each other the right hand,] have not been strictly complied with owing to-

- (a) an error, omission or oversight committed in good faith by the marriage officer, or
- (b) an error, omission or oversight committed in good faith by the parties or owing to the physical disability of one or both of the parties,

but such marriage has in every other respect been **[solemnized]** conducted in accordance with the provisions of 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, if it was **[solemnized]** conducted before the commencement of the Marriage Amendment Act, 1970, (Act 51 of 1970), 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.

Amendment of section 31 of Act 25 of 1961

23. The following section is substituted for section 31 of the principal Act:

31 Nothing in this Act contained shall be construed so as to compel a marriage

officer who is a minister of religion or a person holding a responsible position in a religious denomination or organization to **[solemnize] conduct** a marriage which would not conform to the rites, formularies, tenets, doctrines or discipline of his or her religious denomination or organization.

Amendment of section 32 of Act 25 of 1961

24. Section 32 is amended by-

(a) the substitution of the following subsection for subsection (1):

32(1) No marriage officer may demand or receive any fee, gift or reward, for or by reason of anything done by him or her as marriage officer in terms of this Act: Provided that a minister of religion or a person holding a responsible position in a religious denomination or organization may, for or by reason of any such thing done by him or her, receive-

[(a)] such fees or payments as **[were immediately prior to the commencement of this Act ordinarily paid to any such minister of religion or person in terms of the rules and regulations of]** his or her religious denomination or organization, may from time to time determine **[for or by reason of any such thing done by him in terms of a prior law; or**

(b) such fee as may be prescribed].

(b) the substitution of the following subsection for subsection (2):

32(2) Any marriage officer who contravenes the provisions of sub-section (1) shall be guilty of an offence and liable on conviction to a fine **[not exceeding one hundred rand]** or, in default of payment, to imprisonment for a period not exceeding six months.

Amendment of section 33 of Act 25 of 1961

25. Section 33 of the principal Act is omitted:

[33 After a marriage has been solemnized by a marriage officer, a minister of religion or a person holding a responsible position in a religious denomination or organization may bless such marriage according to the rites of his religious denomination or organization.]

Amendment of section 35 of Act 25 of 1961

26. The following section is substituted for section 35 of the principal Act:

35 Any marriage officer who knowingly **[solemnizes] conducts** a marriage in contravention of the provisions of this Act shall be guilty of an offence and liable on conviction to a fine **[not exceeding one hundred rand or, in default of payment,]** or to imprisonment for a period not exceeding six months.

Amendment of section 37 of Act 25 of 1961

27. The following section is substituted for section 37 of the principal Act:

37 If any person contravenes any provision of this Act in any country outside the **[Union] Republic** the Minister of Justice shall determine which court in the **[Union] Republic** shall try such person for the 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.

Repeal and savings

28. (1) Subject to the provisions of subsection (2), the laws specified in the Schedule are hereby repealed to the extent set out in the third column thereof.

(2) Anything done under any provision of a law repealed by subsection (1) shall be deemed to have been done under the corresponding provision of the Marriage Act, 1961, if any.

Short title and commencement

29. This Act shall be called the Marriage Amendment Act, 200. . . and will come into operation on a date fixed by the President by proclamation in the *Gazette*.

SCHEDULE

| No. and year of law | Short title | EXTENT |
|----------------------------|--|---------------|
| Act No. 21 of 1978 | Transkei Marriage Act, 1978 (Transkei) | The whole |
| Act No. 15 of 1980 | Bophuthatswana Marriage Act, 1980 (Bophuthatswana) | The whole |
| Act No. 24 of 1988 | Ciskei Marriage Act, 1988 (Ciskei) | The whole |

ANNEXURE B

THE PROPOSED MARRIAGE AMENDMENT BILL AS CONTAINED IN DISCUSSION PAPER 88

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 amend the Marriage Act, 1961, so as to further provide for the delegation of the Minister's powers; to further provide for the appointment of marriage officers; to further regulate the consequences of a change of the name or the objects or an amalgamation of a religious denomination or organisation; to further provide for the revocation of the appointment of a person as a marriage officer; to further regulate marriages conducted outside the Republic; to further provide for the consequences for conducting an unauthorised marriage; to further provide for publications of bans; to further provide for objections to marriage; to further provide for the marriage of minors; to further provide for the prohibition of marriage of persons under certain ages; to further regulate marriages between a person and relatives of his or her deceased or divorced spouses; to further provide for the time and place and presence of parties and witnesses at conducting marriages; to further provide for the registration of marriages; to further regulate the marriage formula; to further provide for the penalties for joining parties in marriage contrary to the provisions of the Act; and to provide for matters connected therewith.

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

Amendment of section 1 of Act 25 of 1961, as amended by section 1(a) of Act 51 of 1970

1. Section 1 of the Marriage Act, 1961, (hereinafter referred to as the principal Act) is hereby amended by the omission of the following definition:

['Commissioner' includes an Additional Commissioner, an Assistant Commissioner, a Native Commissioner, an Additional Native Commissioner and Assistant Native Commissioner;]

Amendment of section 2 of Act 25 of 1961, as amended by section 2 of Act 51 of 1970 and section 1 (2) of Act 114 of 1991

2. The following section is hereby substituted for subsection (1) of section 2 of the principal Act:

(1) Every magistrate, **[every special justice of the peace and every Commissioner]**~~every Ambassador, every High Commissioner and every Consul~~ shall by virtue of his or her office and so long as he or she holds such office, be a marriage officer for the district or other area in respect of which he or she holds office.

- (2) The Minister **[and any officer in the public service authorized thereto by him]** may designate any officer or employee in the public service or the diplomatic or consular service of the Republic to be, by virtue of his or her office and so long as he or she holds such office, a marriage officer, either generally or for any specified class of persons or country or area.

Insertion of section 2A in Act 25 of 1961

3. The following section is inserted after section 2 of the principal Act:

2A. The Minister may, subject to the conditions he or she may deem necessary, delegate any power conferred on him or her by this Act to a person in the service of the Department, but shall not be divested of any power so delegated and may set aside or amend any decision of the delegate made in the exercise of such power.

Amendment of section 3 of Act 25 of 1961, as amended by section 3 of Act 51 of 1970

4. The following section is substituted for section 3 of the principal Act:

OPTION ONE:

3(1) The Minister **[and any officer in the public service authorized thereto by him]** 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 or she is such a minister or occupies such position, a marriage officer for the purpose of **[solemnizing] joining parties in marriage[s]** according to **[Christian, Jewish or Mohammedan rites or the rites of any Indian religion]** the tenets of the religious denomination or organization concerned.

(2) A designation under sub-section (1) may further limit the authority of any such minister of religion or person to the **[solemnization] joining of parties in marriage[s]-**

- (a) within a specified area;
- (b) for a specified period.

(3) Any decision made by the Minister under this section to appoint a marriage officer or to revoke the designation of any person as a marriage officer under section 9 shall be reviewable by any provincial or local division of the High Court of South Africa, and the Court-

- (a) may call upon the Minister to furnish reasons and to submit such information as the Court deems fit; and
- (b) may-
 - (i) consider the merits of the matter under review; and
 - (ii) confirm, vary or set aside the decision of the Minister.

OPTION TWO:

3(1) The Minister **[and any officer in the public service authorized thereto by him]** may **[designate any] appoint a** minister of religion of, or any person holding a responsible position in, any religious denomination or organization designated by such denomination or organization in the prescribed form to be, so long as he or she is such

a minister or occupies such position, a marriage officer for the purpose of **[solemnizing] joining parties in marriage[s]** according to **[Christian, Jewish or Mohammedan rites or the rites of any Indian religion]** the tenets of the religious denomination or organization concerned.

- (2) A designation under sub-section (1) **[may]-**
- (a) must be accepted by the Minister unless it is proven to the satisfaction of him or her that the denomination or organization who made the designation is not a bona fide religious denomination or organization.
 - (b) may further limit the authority of any such minister of religion or person to the **[solemnization] joining of parties in marriage[s]-**
 - [(a)]** (i) within a specified area;
 - [(b)]** (ii) for a specified period.

(3) Any decision made by the Minister under this section to appoint a marriage officer or to revoke the designation of any person as a marriage officer under section 9 shall be reviewable by any provincial or local division of the High Court of South Africa, and the Court-

- (a) may call upon the Minister to furnish reasons and to submit such information as the Court deems fit; and
- (b) may-
 - (i) consider the merits of the matter under review; and
 - (ii) confirm, vary or set aside the decision of the Minister.

OPTION THREE:

3(1) The Minister **[and any officer in the public service authorized thereto by him]** may designate any minister of religion of, or any person holding a responsible position in, any religious denomination or organization recognised by the Minister by notice in the Gazette to be, so long as he or she is such a minister or occupies such position, a marriage officer for the purpose of **[solemnizing] joining parties in marriage[s]** according to **[Christian, Jewish or Mohammedan rites or the rites of any Indian religion]** the tenets of the religious denomination or organization concerned.

(2) A designation under sub-section (1) may further limit the authority of any such minister of religion or person to the **[solemnization] joining of parties in marriage[s]-**

- (a) within a specified area;
- (b) for a specified period.

(3) Any decision made by the Minister under this section to appoint a marriage officer or to revoke the designation of any person as a marriage officer under section 9 shall be reviewable by any provincial or local division of the High Court of South Africa, and the Court-

- (a) may call upon the Minister to furnish reasons and to submit such information as the Court deems fit; and
- (b) may-
 - (i) consider the merits of the matter under review; and
 - (ii) confirm, vary or set aside the decision of the Minister.

Amendment of section 5 of Act 25 of 1961, as amended by section 4 (a) of Act 51 of 1970 and section 1 of Act 112 of 1990

5. The following section is substituted for section 5(1) of the principal Act:

(1) Any person who, at the commencement of this Act, or of the Marriage Amendment Act, 1970, is under the provisions of any prior law authorized to **[solemnize] join any party in [any] marriage[s]**, shall continue to have authority to **[solemnize such] join such parties in marriage[s]** as if such law had not been repealed, but shall exercise such authority in accordance with the provisions of this Act.

Amendment of section 6 of Act 25 of 1961

6. The following section is substituted for section 6 of the principal Act:

6(1) Whenever any person has acted as a marriage officer during any period or within any area in respect of which he or she was not a marriage officer under this Act or any prior law, and the Minister **[or any officer in the public service authorized thereto by the Minister]** is satisfied that such person did so under the bona fide belief that he or she was a marriage officer during that period or within that area, he or she may direct in writing that such person shall for all purposes be deemed to have been a marriage officer during such period or within such area, duly designated as such under this Act or such law, as the case may be.

(2) Whenever any person acted as a marriage officer in respect of any marriage while he or she was not a marriage officer and both parties to that marriage bona fide believed that such person was in fact a marriage officer, the Minister **[or any officer in the public service authorized thereto by him]** may, after having conducted such inquiry as he or she may deem fit, in writing direct that such person shall for all purposes be deemed to have been duly designated as a marriage officer in respect of that marriage.

(3) Any marriage **[solemnized] conducted** by any person who is in terms of this section to be deemed to have been duly designated as a marriage officer shall, provided such marriage was in every other respect **[solemnized] conducted** in accordance with the provisions of this Act or any prior law, as the case may be, and there was no lawful impediment thereto, be as valid and binding as it would have been if such person had been duly designated as a marriage officer.

(4) Nothing in this section contained shall be construed as relieving any person in respect of whom a direction has been issued thereunder, from the liability to prosecution for any offence committed by him or her.

(5) Any person who acts as a marriage officer in respect of any marriage, shall complete a certificate on the prescribed form in which he or she shall state that at the time of the **[solemnization] joining** of the parties in marriage he or she was in terms of this Act or any prior law entitled to **[solemnize] conduct** that marriage.

Amendment of section 8 of Act 25 of 1961

7. The following section is substituted for section 8 of the principal Act:

8(1) If a religious denomination or organization changes the name whereby it was known or amalgamates with any other religious denomination or organization or changes

its objects or there is a material change in its circumstances, **[such change in name or amalgamation shall have no effect on the designation of any person as a marriage officer by virtue of his occupying any post or holding any position in any such religious denomination or organization.**

(2) If a religious denomination or organization in such circumstances as are contemplated in sub-section (1) changes the name whereby it was known or amalgamates with any other religious denomination or organization or changes its objects or there are a material change in its circumstances,] it shall immediately advise the Minister thereof.

(2) The Minister may revoke the designation of a religious denomination or organization if it changes its name by which it was known or amalgamates with any other religious denomination or organization or changes its objects or if there is a material change in its circumstances.

Amendment of section 9 of Act 25 of 1961

8. The following section is substituted for section 9 of the principal Act:

9(1) The Minister **[or any officer in the public service authorized thereto by him]** may **[,on the ground of misconduct or for any other good cause,]** revoke in writing and by notice in the *Gazette* the designation of any person as a marriage officer or the authority of any other person to **[solemnize] join parties in marriage[s]** under this Act, or in writing limit in such respect as he or she may deem fit the authority of any marriage officer or class of marriage officers to **[solemnize] conduct** marriages under this Act, on the following grounds namely that .

(a) a marriage officer has died:

(b) a marriage officer no longer wishes to be a marriage officer:

(c) the denomination by which that person was nominated for registration as a marriage officer, or in respect of which that person is registered, no longer desires that that person be registered as a marriage officer:

(d) the denomination by which a marriage officer was nominated for registration, or in respect of which that person is registered, has ceased to be a recognized denomination:

(e) the marriage officer has been guilty of such contraventions of the Act or the regulations as to show him or her not to be a fit and proper person to be registered as a marriage officer:

(f) a marriage officer has been making a business of joining parties in marriage for the purpose of profit or gain:

(g) a marriage officer is for any other reason, not entitled to registration.

[(2) Any steps taken by any officer in the public service under sub-section (1) may be set aside by the Minister.]

Amendment of section 10 of Act 25 of 1961

9. Section 10 of the principal Act is amended by-

(a) the substitution for subsection (1) of the following subsection:

(1) Any person who is under the provisions of this Act authorized to

[solemnize] join any party in marriage[s] in any country outside the **[Union] Republic-**

- (a) may so **[solemnize] join any parties in** such marriage only if at least one of the parties thereto [are both] is a South African citizen[s] domiciled in the [Union] Republic ; and
- (b) any marriage so **[solemnized] conducted** shall for all purposes be deemed to have been **[solemnized] conducted** in the **[province of the Union] Republic [in which the male party thereto is domiciled]**.

Amendment of section 11 of Act 25 of 1961

10. Section 11 of the principal Act is amended by-

- (a) the substitution for the following subsection for subsection (2):

(2) Any marriage officer who purports to **[solemnize] conduct** a marriage which he or she is not authorized under this Act to **[solemnize] conduct** or which to his or her knowledge is legally prohibited, and any person not being a marriage officer who purports to **[solemnize] join parties in** a marriage, shall be guilty of an offence and liable on conviction to a fine **[not exceeding four hundred rand]** or, in default of payment, to imprisonment for a period not exceeding **[twelve months] two years**, or to both **[such] a fine and [such] imprisonment**.

- (b) the substitution for subsection (3) of the following subsection:

(3) Nothing in sub-section (2) contained shall apply to any marriage ceremony **[solemnized] conducted** in accordance with the rites or formularies of any religion, if such ceremony does not purport to effect a valid marriage.

Amendment of section 12 of Act 25 of 1961, as amended by section 1(1) of Act 11 of 1964, section 5 of Act 51 of 1970, section 1 of Act 112 of 1990 and section 1(2) of Act 114 of 1991

11. The following section is substituted for section 12 of the principal Act-

12.(1) No marriage officer shall **[solemnize] join any parties in** marriage unless-

- (c) each of the parties in question produces to the marriage officer his or her identity document issued under the provisions of the Identification Act, **[1986 (Act 72 of 1986)] 1997 (Act 68 of 1997)**; or
- (d) each of such parties furnishes to the marriage officer the prescribed affidavit; or
- (e) one of such parties produces his or her identity document referred to in paragraph (a) to the marriage officer and the other furnishes to the marriage officer the affidavit referred to in paragraph (b).

(2) If parties were joined in marriage and the provisions of subsection (1) were not strictly complied with but such marriage was in every other respect conducted in

accordance with the provisions of 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, lawfully married another, be as valid and binding as it would have been if the said provisions had been strictly complied with.

Amendment of section 22 as substituted by section 3 of Act 19 of 1968, amended by section 7 of Act 51 of 1970 and substituted by section 1 of Act 26 of 1972

12. The following section is substituted for section 22 of the principal Act:

22. If in the case of any marriage **[solemnized]** conducted 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]** conducted in accordance with the provisions of 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.

Amendment of section 23 of act 25 of 1961 as amended by section 8 of Act 51 of 1970

13. The following section is substituted for section 23 of the principal Act:

- (1) Any person desiring to raise any objection to any proposed marriage shall lodge such objection in writing with the marriage officer who is to **[solemnize]** conduct such marriage at least 24 hours prior to the contemplated marriage and with the parties contemplating marriage.
- (2) Upon receipt of any such objection the marriage officer concerned shall inquire into the grounds of the objection and if he or she is satisfied that there is no lawful impediment to the proposed marriage, he or she may **[solemnize]** conduct the marriage in accordance with the provisions of this Act.
- (3) If he or she is not so satisfied he or she shall refuse to **[solemnize]** conduct the marriage.

Amendment of section 24 of Act 25 of 1961

14. Section 24 of the principal Act is amended by the substitution of the following subsection for subsection (1):

- (1) No marriage officer shall **[solemnize]** conduct a marriage between parties of whom one or both are minors unless the consent to the party or parties which is legally required for the purpose of contracting the marriage has been granted and furnished to

him or her in writing.

Amendment of section 24A of Act 25 of 1961

15. Section 24A of the principal Act is amended by the substitution for paragraphs (a) and (b) of the following paragraphs:
- (a) 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
 - (b) by the minor before he or she attains majority or within three months thereafter.

Amendment of section 25 of Act 25 of 1961 as amended by section 62 of Act 74 of 1983

16. Section 25 of the principal Act is amended by-
- (a) the substitution of the following subsection for subsection (1):

(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 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 may in his or her discretion grant written consent to such minor to marry a specified person, but such commissioner of child welfare 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.
 - (b) by the substitution of the following subsection for subsection (2):

(2) A commissioner of child welfare shall, before granting his or her consent to a marriage under sub-section (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.
 - (c) by the substitution of the following subsection for subsection (4):

(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] 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 is without adequate reason and contrary to the interests of such minor.

Amendment of section 26 of Act 25 of 1961

17. Section 26 is amended by-

- (a) the substitution of the following subsection for subsection (1):
- (1) No boy or girl 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,]** 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.
- (b) by the substitution of the following subsection for subsection (2):
- (2) If any person referred to in subsection (1) who was not capable of contracting a valid marriage without the written permission of the Minister **[or any officer in the public service authorized thereto by him or her,]** in terms of this Act or a prior law, contracted a marriage without such permission and the Minister **[or such officer,]** as the case may be, considers such marriage to be desirable and in the interests of the parties in question, he or she may, provided such marriage was in every other respect **[solemnized]** conducted 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 marriage.
- (c) by the substitution of the following subsection for subsection (3):
- (3) If the Minister **[or any officer in the public service authorized thereto by him]** so directs it shall be deemed that he or she granted written permission to such marriage prior to the **[solemnization]** conducting thereof.

Amendment of section 27 of Act 25 of 1961

18. The following subsection is substituted in the principal Act for subsection (3):
- (3) If parties appear before a marriage officer for the purpose of contracting a marriage with each other and such marriage officer reasonably suspects that either of them is of an age which debars him or her from contracting a valid marriage without the consent or permission of some other person, he or she may refuse to **[solemnize]** conduct a marriage between them unless he or she is furnished with such consent or permission in writing or with satisfactory proof showing that the party in question is entitled to contract a marriage without such consent or permission.

Amendment of section 28 of Act 25 of 1961

19. The following section is hereby substituted for section 28 of the principal Act:
- (1) Any legal provision to the contrary notwithstanding it shall be lawful for-

- (a) any widower to marry the sister of his deceased wife or any female related to him through his deceased wife in any more remote degree of affinity than the sister of his deceased wife, other than an ancestor or descendant of such deceased wife;
 - (b) any widow to marry the brother of her deceased husband or any male related to her through her deceased husband in any more remote degree of affinity than the brother of her deceased husband, other than an ancestor or descendant of such deceased husband;
 - (c) any man to marry the sister of a person from whom he has been divorced or any female related to him through the said person in any more remote degree of affinity than the sister of such person, other than an ancestor or descendant of such person; and
 - (d) any woman to marry the brother of a person from whom she has been divorced or any male related to her through the said person in any more remote degree of affinity than the brother of such person, other than an ancestor or descendant of such person.
- (2) A Provincial or Local Division of the High Court shall have jurisdiction to consent to a marriage between a man or a women and the direct descendant of his or her deceased spouse if both parties have reached the age of 18 years and they are not related to each other by blood.

Amendment of section 29 of Act 25 of 1961, as amended by section 4 of Act 19 of 1968

20. The following section is substituted for section 29 of the principal Act:

- (1) A marriage officer may **[solemnize]** conduct a marriage at any time on any day of the week but shall not be obliged to **[solemnize]** conduct a marriage at any other time than between the hours of eight in the morning and four in the afternoon.

SUBSECTION (2) OPTION ONE:

- (2) A marriage officer **[shall]** may **[solemnize]** conduct any marriage **[in a church or other building used for religious service, or in a public office or private dwelling-house, with open doors]** at any place and 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].**

SUBSECTION (2) OPTION TWO:

- (2) A marriage officer **[shall]** may **[solemnize]** conduct any marriage in a church or other building used for religious service, or in a public office or private dwelling-house, or in any other building or facility used for conducting marriages **[with open doors]** and 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]** conducting a marriage in any place other than a place mentioned therein if the marriage must be **[solemnized]** conducted in such other place by reason of the serious or

longstanding illness of, or serious bodily injury to, one or both of the parties.

- (3) Every marriage-
- (a) which was **[solemnized]** conducted in the Orange Free State or the Transvaal before the commencement of this Act in any place other than a place appointed by a prior law as a place where for the purposes of such law a marriage shall be **[solemnized]** conducted; or
 - (b) which by reason of the serious or longstanding illness of, or serious bodily injury to, one or both of the parties was **[solemnized]** conducted before the commencement of the Marriage Amendment Act, 1968, in a place other than a place appointed by subsection (2) of this section as a place where for the purposes of this Act a marriage shall be **[solemnized]** conducted,
- shall, 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 it had been **[solemnized]** conducted in a place appointed therefor by the applicable provisions of the prior law or, as the case may be, of this Act.
- (3) No person shall under the provisions of this Act be capable of contracting a valid marriage through any other person acting as his or her representative.

Amendment of section 29A of Act 25 of 1961

21. The following section is substituted for section 29A of the principal Act:

- (1) **[The]** Each marriage officer shall keep a record of all marriages conducted by him or her.
- (2) A marriage conducted under or recognised in terms of the provisions of this Act must be recorded in the prescribed register and the register must be signed by the marriage officer who **[solemnized]** conducted **[any]** the marriage, as well as the parties thereto and two competent witnesses **[shall sign the marriage register concerned]** immediately after such marriage has been **[solemnized]** conducted.
- ~~[(2)]~~ (3) The marriage officer concerned shall forthwith transmit the marriage register and records concerned, as the case may be, to a regional or district representative **[designated as such under section 21 (1) of the Identification Act, 1986 (Act 72 of 1986)]** of the department in whose district or region the marriage was conducted.
- (4) Upon receipt of the said register and records the regional or district representative, as the case may be, shall cause the particulars of the marriage concerned to be included in the population register in accordance with the provisions of the Identification Act, 1997 (Act 68 of 1997).

Amendment of section 30 of act 25 of 1961 as amended by section 10 of Act 51 of 1970, section 2 of Act 26 of 1972 and section 1 of Act 12 of 1973

22. The following section is substituted for section 30 of the principal Act:

- 30(1) In **[solemnizing]** conducting any marriage any marriage officer designated under section 3 may follow the marriage formula usually observed by his or her religious

denomination or organisation 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 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 the parties shall give each other the right hand] and the marriage officer concerned shall declare the marriage **[solemnized] conducted** in the following words:

‘I declare that A.B. and C.D. here present have been lawfully married.’.

(2) Subject to the provisions of subsection (1), a marriage officer, if he or she is a minister of religion or a person holding a responsible position in a religious denomination or organization, may in **[solemnizing] conducting** a marriage follow the rites usually observed by his or her religious denomination or organization.

(3) Subject to the provisions of this section or any former law relating to the questions to be put to each of the parties separately or to the declaration whereby the **[marriage] parties** shall be declared to be **[solemnized] joined in marriage [or to the requirement that the parties shall give each other the right hand,]** have not been strictly complied with owing to-

- (a) an error, omission or oversight committed in good faith by the marriage officer, or
- (b) an error, omission or oversight committed in good faith by the parties or owing to the physical disability of one or both of the parties,

but such marriage has in every other respect been **[solemnized] conducted** in accordance with the provisions of 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, if it was **[solemnized] conducted** before the commencement of the Marriage Amendment Act, 1970, (Act 51 of 1970), 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.

Amendment of section 31 of Act 25 of 1961

23. The following section is substituted for section 31 of the principal Act:

31 Nothing in this Act contained shall be construed so as to compel a marriage officer who is a minister of religion or a person holding a responsible position in a religious denomination or organization to **[solemnize] conduct** a marriage which would not conform to the rites, formularies, tenets, doctrines or discipline of his or her religious denomination or organization.

Amendment of section 32 of Act 25 of 1961

24. Section 32 is amended by-

- (a) the substitution of the following subsection for subsection (1):

32(1) No marriage officer may demand or receive any fee, gift or reward, for or by reason of anything done by him or her as marriage officer in terms of this Act: Provided that a minister of religion or a person holding a responsible position in a religious denomination or organization may, for or by reason of any such thing done by him or her , receive-

(a) such fees or payments as were immediately prior to the commencement of this Act ordinarily paid to any such minister of religion or person in terms of the rules and regulations of his or her religious denomination or organization, for or by reason of any such thing done by him or her in terms of a prior law; or

(b) such fee as may be prescribed.

(b) the substitution of the following subsection for subsection (2):

32(2) Any marriage officer who contravenes the provisions of sub-section (1) shall be guilty of an offence and liable on conviction to a fine **[not exceeding one hundred rand]** or **[, in default of payment,]** to imprisonment for a period not exceeding six months.

Amendment of section 33 of Act 25 of 1961

25. Section 33 of the principal Act is omitted:

[33 After a marriage has been solemnized by a marriage officer, a minister of religion or a person holding a responsible position in a religious denomination or organization may bless such marriage according to the rites of his religious denomination or organization.]

Amendment of section 35 of Act 25 of 1961

26. The following section is substituted for section 35 of the principal Act:

35 Any marriage officer who knowingly **[solemnizes]** conducts a marriage in contravention of the provisions of this Act shall be guilty of an offence and liable on conviction to a fine **[not exceeding one hundred rand or, in default of payment,]** or to imprisonment for a period not exceeding six months.

Amendment of section 37 of Act 25 of 1961

27. The following section is substituted for section 37 of the principal Act:

37 If any person contravenes any provision of this Act in any country outside the **[Union]** Republic the Minister of Justice shall determine which court in the **[Union]** Republic shall try such person for the 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.

Short title and commencement

- 28.** This Act shall be called the Marriage Amendment Act, 200. . . and will come into operation on a date fixed by the President by proclamation in the *Gazette*.

ANNEXURE C

RESPONDENTS WHO COMMENTED ON THE COMMISSION'S MEDIA STATEMENT¹⁹⁴

JUDICIARY

1. Mr Justice S Selikowitz of the Cape of Good Hope Provincial Division of the High Court

ATTORNEYS

2. Mr D De Wet on behalf of the Church of Jesus Christ of the Latter-Day Saints
3. Mr T Bouwer, of Bouwer and Cardona on behalf of the Pagan Federation of South Africa
4. Mr DP Kent of Douglas Kent and Co

RELIGIOUS BODIES

5. Mr Moosa Valli Ismail, the Muslim Assembly
6. Chief Rabbi CK Harris of the Union of Orthodox Synagogues of South Africa
7. Rev K Mofokeng, Federal Council of Indigenous Churches
8. Rev Andre le Roux of the Trinity United Church
9. Rev Ryan Hogarth, Church of Scientology in South Africa

UNIVERSITIES

10. The Gender Research Project: Centre for Applied Legal Studies, University of the Witwatersrand
11. The Campus Law Clinic of the University of Natal

INDIVIDUALS

12. Rev DR Loius Bosch
13. Faizal Jacobs
14. Zuleka Adam
15. Mrs P Samjhawan
16. Prof JC Bekker
17. Mrs Olga Kruger
18. Mr Richard Garratt

¹⁹⁴ As explained in Chapter one, the comments of those respondents who commented on partnerships and the recognition or not of same sex marriages, will be taken into account in the Commission's investigation entitled "Domestic Partnerships" (Project 118). These respondents are therefore not reflected here.

ANNEXURE D

RESPONDENTS WHO COMMENTED ON THE COMMISSION'S DISCUSSION PAPER 88

JUDICIARY

1. Transvaal Provincial Division of the High Court

BAR SOCIETIES

2. Mr FC Cantatore of the Society of Advocates of Natal

LAW SOCIETIES

3. The Family Law Committee of the Law Society of the Cape of Good Hope

GOVERNMENT DEPARTMENTS

4. Department of Correctional Services
5. Department of Home Affairs
6. Department of Housing
7. Department of Sport and Recreation

RELIGIOUS BODIES

8. The Church of Scientology in South Africa
9. The Dutch Reformed Church
10. The Evangelical Lutheran Church in Southern Africa (Natal-Transvaal)
11. Hatfield Christian Church
12. The iJubilee ConneXion (Mr Hugh Wetmore commented on their behalf)
13. The National Spiritual Assembly of the Bahá'ís of South Africa
14. The Church of Jesus Christ of the Latter-Day Saints (Mr Paul de Wet of Attorneys D de Wet and Partners commented on their behalf)

OTHER ORGANISATIONS

15. Pastor MJ Sebake of the African Parents League
16. Phiroshaw Camay of the Co-operative for Research and Education

INDIVIDUALS

17. Mr Dudley Franklin Arends
18. Rev Vivian W Harris of the Brooklyn Methodist Church
19. Rev Andre le Roux of the Trinity United Church
20. Ms ACJ Prinsloo of the Magistrates' Offices Pretoria North