

SOUTH AFRICAN LAW REFORM COMMISSION

Project 59

ISLAMIC MARRIAGES AND RELATED MATTERS

REPORT

July 2003

To Dr P M Maduna, MP, Minister for Justice and Constitutional Development

I have the honour to submit to you in terms of section 7(1) of the South African Law Reform Commission Act, 1973 (Act 19 of 1973), for your consideration the Commission's report on Islamic Marriages and Related Matters.

**Madam Justice Y Mokgoro
Chairperson
July 2003**

INTRODUCTION

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

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CHAPTER 1

THE BACKGROUND TO THE INVESTIGATION

1.1 The political transformation in the country, commencing with the adoption of the Interim Constitution on 27 April 1994, (Act 200 of 1993) and a Final Constitution (Act 108 of 1996) which came into force on 4 February 1997, was the catalyst for renewed attempts at the legal recognition and enforcement of aspects of Muslim Personal Law.¹

1.2 Both the Interim and Final Constitutions, in guaranteeing freedom of religion, provided that the State may pass legislation recognising systems of personal and family law, but subject to the Constitution. Section 15 of the Final Constitution provides as follows:

(1) Everyone has the right to freedom of conscience, religion, thought, belief and opinion.

(2) Religious observances may be conducted at state or state-aided institutions, provided that –

- (a) those observances follow rules made by the appropriate public authorities;**
- (b) they are conducted on an equitable basis; and**
- (c) attendance at them is free and voluntary.**

(3) (a) This section does not prevent legislation recognising –

- (i) marriages concluded under any tradition, or a system of religious, personal or family law; or**
- (ii) systems of personal and family law under any tradition, or adhered to by persons professing a particular religion.**

(b) Recognition in terms of paragraph (a) must be consistent with this section and the other provisions of the Constitution.

1.3 Under the new dispensation various endeavours on the part of the Muslim community to seek legal recognition of aspects of Muslim Personal Law finally led to the establishment of a Project Committee of the South African Law Commission in respect of its investigation into Islamic Marriages and Related Matters.²

¹ The previous attempts, during the apartheid era, at securing recognition of Islamic marriages did not enjoy the support of the broader community, because they were *inter alia* perceived as giving legitimacy to the white minority regime and its unjust policies.

² This was not the first Project Committee of the Commission to give attention to the recognition of Islamic marriages. As far back as 1990 a previous committee met to consider a working paper dealing with the nature of Islamic law and the conflict between the common law and Islamic law as well as the

1.4 The then Minister of Justice established this Project Committee on 30 March 1999 in terms of section 7A(b)(ii) of the South African Law Commission Act, 1973.

1.5 The terms of reference of the Project Committee was “to investigate Islamic marriages and related matters with effect from 1 March 1999 for the duration of the investigation”.

1.6 The deliberations of the project committee since 15 May 1999 (the date of its first meeting) led to the compilation of an Issue Paper³ which was circulated for public comment in July 2000.

1.7 The purpose of the Issue Paper was to identify the issues and the problem areas, arising out of the investigation, with a view to maximum consultation with all interested parties and bodies, so as to obtain their responses and inputs in arriving at an appropriate solution to the issues and problems as identified therein.

1.8 The following tentative proposals were put forward in the Issue Paper:

- * Couples contemplating a marriage should have the right to choose a marital system which is compatible with their religious beliefs and with the Constitution.
- * To the extent that legislation is to give effect to the recognition of Muslim marriages, the new statute ought to provide for both new marriages and existing marriages.
- * In the case of new marriages, the legislation should provide at least for the following matters:
 - (i) the age of consent, which should be 18 years;
 - (ii) actual and informed consent to the conclusion of a marriage in written form;
 - (iii) the designation of marriage officers who are entitled to perform Muslim marriages;
 - (iv) the registration of marriages by the signing of a marriage register;

observance of Islamic law in South Africa. A comparative legal study received further attention during the year. Further work in the investigation was delayed by, amongst others, the finalisation of the 1996 Constitution. The Commission reconsidered the status of the project in 1996 and decided to accord the investigation the highest possible priority rating and to recommend the appointment of a Project Committee. During March 1997 two workshops were held in order to involve the public in the planning of the investigation and to elicit nominations for appointment to the Project Committee. As a result of advertisements in the press and the open invitation extended at the workshops 78 nominations were received. The constitution of the present Project Committee is the result of those nominations.

³ **Issue Paper 15** – published in May 2000.

- (v) the formalities pertaining to the time, place and manner of solemnisation of Muslim marriages;
- (vi) the appropriate marriage formula for the solemnisation of a Muslim marriage;
- (vii) a prohibition on marriages within certain prohibited degrees of relationship, including the rules relating to fosterage according to Muslim Personal Law;
- (viii) a standard contractual provision in terms of which a Muslim Personal Law system is established in the event of parties contemplating a Muslim marriage;
- (ix) the prescription of penalties for false representations or statements.

* In the case of existing marriages, and in view of the decision in **Amod & Another v Multilateral Motor Vehicle Accidents Fund**, in which the Court gave legal recognition to a Muslim marriage for purposes of the duty of support, little difficulty arises in affording recognition to *de facto* monogamous marriages. It was suggested that such marriages would require registration upon satisfactory proof to a designated marriage officer that there is an existing Muslim marriage. Proposals were invited concerning the affording of recognition to polygynous marriages entered into before the commencement of a new statute, particularly in regard to potential complications such as existing proprietary rights, maintenance, succession and social welfare benefits.

* Regarding the consequences of registration of existing Muslim marriages, it was suggested that parties who choose to register existing Muslim marriages must reach agreement as to the appropriate matrimonial property regime. Again no particular difficulties were envisaged in respect of *de facto* monogamous marriages. In respect of existing polygynous marriages account would have to be taken of the rights of each of the parties. Proprietary rights and interests as well as the interests of the children born of the various marriages would have to be protected.

* Competing rights in the event of an existing civil marriage and a subsequent or prior Muslim marriage have to be addressed.

* Regarding divorce and the issue of dissolution of a marriage by *Talaq*, it was suggested that the bonds of marriage should be dissolved on grounds contemplated in the Divorce Act, 1979. It was suggested that marriage officers should be required to recognise a *Talaq* in the presence of the parties and for record and official purposes and for consonance with the Constitution, a *Talaq* should be confirmed by

a court. Moreover, it was suggested that legislation which recognises aspects of Muslim Personal Law must also provide for an effective system of dispute resolution.

- * In order to avoid abuse, it was suggested that any proposed legislation stipulating the grounds on which the conclusion of a polygynous marriage would be permissible, had to be narrowly circumscribed in recognition of the limitations set out by the *Qur'an* itself. Comment was required on whether a court should objectively decide that the factual (*Qur'anic*) circumstances exist justifying a second marriage.

- * In view of the fact that wives and children frequently require protection to ensure their continued welfare upon the dissolution of a marriage, it was proposed that protections similar to those in the Divorce Act, 1979, and the Recognition of Customary Marriages Act, 1998, should be included in any statute giving recognition to Muslim Personal Law.

1.9 As a result of the circulation of the Issue Paper, various interested parties responded (**Annexure D** to this Report reflects the persons, bodies and institutions who submitted written comment on the Issue Paper). The responses were extremely useful in the proper consideration of all issues raised, and in developing both a vision, and practical solutions, to the legal implementation of Muslim Personal Law in South Africa. This enabled the Project Committee to proceed with the compilation of a Discussion Paper,⁴ which included a proposed draft Bill (see **Annexure B**) giving effect to the legal recognition of Muslim marriages. The gist of the draft Bill is expounded in the next Chapter.

⁴ **Discussion Paper 101** – published in December 2001.

CHAPTER 2

PROPOSALS IN DISCUSSION PAPER 101

2.1 Muslim Personal Law is a substantive and comprehensive system of law. Its core principles are contained in the Holy *Qur'an* itself, as explained, in practice, through the Prophetic model, known as the *Sunnah*.⁵

2.2 Because of its intrinsically divine basis and character, the preservation and effective implementation of this system is integral to, and is at the heart of, the preservation of the community itself, its distinct identity, character and ethos.⁶

2.3 In the context of a secular state in which Muslims constitute a minority community, the non-recognition by the state of the system of Muslim Personal Law, or aspects thereof, has caused serious hardships and produced grossly unjust consequences.⁷

2.4 Historically, and until the landmark 1999 Supreme Court of Appeal decision in **Amod v Multilateral Motor Vehicle Accidents Fund**,⁸ a marriage contracted according to Islamic Law was regarded by our courts as null and void *ab initio*, and contrary to public policy, with the result that the marriage and its consequences were not legally recognised in any form.⁹

⁵ The first and primary source of Islamic Law is the Holy *Qur'an*, which is regarded by Muslims as the Word of God (Allah). The second primary source of Islamic Law, which follows the Holy *Qur'an* in importance is the *Sunnah*. The *Sunnah* is an independent source of Islamic Law and may be defined as "a word spoken or an act done or a confirmation given by the Holy Prophet Muhammad". Muslims are ordered in the Holy *Qur'an* to obey Allah and his Holy Prophet, both forms of obedience being mandatory in all circumstances. For example, the Holy *Qur'an* states: "And obey Allah and the Messenger so that you may be blessed" (3:132). See also (4:59), (5:92), (8:1), (8:20), (8:46), (24:54), (47:33), (58:13) and (64:12). The third source of Islamic Law is the consensus of jurists, known as IJMA. The fourth source is known as *Qiyas* which is a form of analogical deduction based on the Holy *Qur'an* and *Sunnah*, to be applied in the specific case where no express text of the Holy *Qur'an* or *Sunnah* exists on a particular issue. The *Sunnah* has been authentically preserved in the form of the *Hadith*. See generally the authority of *Sunnah* Justice Mufti Muhammad Taqi Usmani – *Idaratul Qur'an*, Karachi, Pakistan.

⁶ The main principles governing Muslim Personal Law is expounded by the Holy *Qur'an* itself in a number of verses. For example, *Surah Talaq* (being Chapter 65) is devoted primarily to the issues of *Talaq*, *Iddah* and maintenance.

⁷ See paragraph 2.6.

⁸ 1999 (4) SA 1319 (SCA).

⁹ The apparent rationale for not recognising Islamic marriages was because they were regarded by our courts as being polygynous. The Appellate Division reaffirmed this in **Ismail v Ismail** 1983 (1) SA 1006 (AD) when it stated that an Islamic marriage was "*contra bonos mores* in the wider sense of the phrase *ie* as being contrary to the accepted customs and usages which are regarded as morally binding upon all members of our society" (at p 1026). This approach may be traced to as early as 1860, being the case of **Brown v Fritz Brown's Executors and Others** (1860 3 Searle 313 at 318) which described an

2.5 The decision in **Amod**¹⁰ recognised a monogamous Muslim marriage for the purposes of support only, the case dealing with a widow's claim for loss of support suffered by her in the context of the common law dependant's remedy. The case itself focuses on the urgent need for a comprehensive recognition of aspects of Muslim Personal Law.

2.6 In the result, the current position is that the legislature has still not redressed the gross inequities and hardships arising from the non-recognition of Muslim marriages. The issues requiring attention *inter alia* are:

- * the status of a spouse or spouses in a Muslim marriage or marriages;
- * the status of children born of a Muslim marriage;
- * the regulation of the termination of a Muslim marriage;
- * the difficulties in enforcing maintenance and other obligations arising from a Muslim marriage;
- * the difficulties in enforcing custody of, and access to, minor children;
- * the proprietary consequences arising automatically from a Muslim marriage or its termination are not recognised at law, and therefore not enforceable.

2.7 Discussion Paper 101 was aimed at addressing these issues. The proposed draft Bill contained in that paper was based on the following points of departure:

Enforcement through the courts

2.8 The Project Committee considered the call by Ulama bodies that there should be separate *Shari'ah* courts, presided over by competent *Qadis* (or judges), who are expert jurists in Islamic law.

Islamic marriage as "recognized concubinage". In essence, Muslim values and values of significant parts of our diverse population were not recognized.

¹⁰ This case radically departed from previous decisions by recognising a duty of support flowing *ex lege*, as an incident of a *de facto* Islamic marriage, as being worthy of legal protection, having regard to the new ethos which prevailed on 25 July 1993 when the cause of action arose. The common law was developed to accommodate the new ethos.

2.9 It found this option not to be feasible¹¹ having regard, *inter alia*, to limited state resources, and the fact that separate dispute resolution institutions cannot be provided for our country's many religions.

2.10 It was therefore proposed that aspects of Muslim Personal Law be implemented through the secular courts.

2.11 Because the judges of our secular courts are by and large non-Muslims, it was proposed that, in the adjudication of disputes relating to Muslim Personal Law, a judge be assisted by two assessors who are experts in Islamic Law.

2.12 The assessors would have the power, together with the judge, to determine disputes of fact and law, and the decision of the majority shall represent a decision of the court.

2.13 A decision of the court would be subject to appeal, in the usual way, to a higher court. It was envisaged that indigent Muslims would be entitled to state funded legal aid in matrimonial matters.

2.14 The appointment of assessors would imply that the court presiding over a dispute involving Islamic Law would have the necessary expertise in Islamic Law to resolve such dispute effectively.

2.15 Where a wife applies for a dissolution of her marriage, on defined grounds, in the form of a *Faskh*¹², the decree would be pronounced, in addition, by the two Muslim assessors. This, it was hoped, would resolve the debate as to whether a non-Muslim Judge has the power, acting on his or her own, to dissolve a marriage, as a decree of *Faskh*, on the application of the wife on a ground recognised by Islamic Law (eg: the failure of the husband to maintain his wife).

2.16 The provisions relating to assessors were contained in clause 13 of the draft Bill included in Discussion Paper 101.

¹¹ According to the 1996 population census the population of Muslims in South Africa was recorded at 553 585 out of a total population of 40,5 million.

¹² A *Faskh* means a decree of dissolution of the marriage granted by a judge upon the application of the wife upon recognised grounds, such as the husband's failure to maintain his wife. A decree of *Faskh* has the effect of dissolving the marriage immediately. It must be distinguished from a *Talaq* which is the right of the husband to terminate the marriage and which is referred to in footnote 21.

The scope of the Bill: clauses 2 and 4

2.17 The proposed Bill¹³ drew a clear distinction between a Muslim marriage and a civil marriage. It is only Muslim marriages that fall within the ambit of the proposed Bill, that is, marriages concluded according to Islamic law with the formula prescribed in the draft Bill being applied. They were treated on par with civil marriages. Proprietary consequences were regulated. Provision was made for changes to matrimonial property systems, with due regard to existing and vested rights. Provision was also made to regulate polygynous marriages.

2.18 The proposed Bill recognised as a valid marriage, a Muslim marriage or marriages contracted in accordance with Islamic Law only (and not registered under the Marriage Act as a civil marriage).

Existing monogamous and polygynous Muslim marriages

2.19 All existing Muslim marriages would accordingly be recognised as valid marriages, for all purposes, upon the commencement of the proposed legislation. This would cover both monogamous and polygynous Muslim marriages which, if applicable, may exist alongside an existing civil marriage.

2.20 In the case of an existing registered civil marriage, therefore, the parties thereto were presumed to intend the civil consequences to apply to their marriage, hence the civil marriage would fall outside the ambit of the proposed Bill, but subject to what is stated in the next paragraph.

2.21 Where the parties to an existing civil marriage, however, wished to cause the provisions of the proposed Bill to apply to their marriage, they were free to do so at any time after the commencement of the statute. Appropriate regulations would be formulated to enable both spouses to an existing civil marriage to adopt the provisions of the proposed Act by means of an appropriate declaration.

2.22 In short, therefore, the proposed legislation would apply retrospectively by validating all Muslim marriages which exist, at the commencement thereof, as valid marriages for all purposes upon such commencement.

¹³ It should be kept in mind that the present discussion, up until the end of this Chapter, refers to the draft Bill as proposed in Discussion Paper 101 – see **Annexure B**.

Muslim marriages contracted after commencement of the Bill

2.23 As regards Muslim marriages contracted after the commencement of the proposed Bill, a distinction was drawn between monogamous and polygynous Muslim marriages.

2.24 In relation to monogamous Muslim marriages, these would enjoy recognition as valid marriages, provided the requirements set out in clause 5 of the proposed Bill were complied with. These relate primarily to the minimum marriageable age, and consent of the prospective spouses.

Future polygynous Muslim marriages

2.25 In relation to the situation where a husband in an existing Muslim marriage wished, after the commencement of the proposed statute, to conclude a further Muslim marriage, the provisions of clause 8(7) of the proposed Bill would apply. It is well established in Islamic law that polygyny is circumscribed. The legislature is permitted in Islamic law to regulate polygyny to ensure that it does not lead to abuse, hardship, and oppression of women.¹⁴ It was therefore proposed that a judge sitting with two Muslim assessors should objectively decide whether the husband, in all the circumstances, was able to exercise justice between his spouses as defined in the Holy *Qur'an* itself. At the same time, it was necessary to ensure that the proprietary consequences of the existing and proposed marriages are properly regulated to avoid prejudice to existing spouses, and avoid future disputes.

Requirements for validity of Muslim marriages: clause 5 of the Bill

2.26 These provisions related essentially to the minimum age of marriage and the question of consent.

2.27 The minimum age was proposed at 18 years, as this appeared to be accepted by the majority of the respondents to the Issue Paper.

2.28 Should a prospective spouse be under the age of 18 years, provision was made in clause 5(5) for permission to marry to be granted by the Minister or a recognised body or person authorised by him or her.

¹⁴ This appears to be the consensus of contemporary *Shari'ah* experts eg, the well-known *khalif umar (Ra)* regulated marriages and divorces.

Registration of Muslim marriages: clause 6 of the Bill

2.29 The provisions relating to the registration of Muslim Marriages were contained in clause 6 of the Bill.

2.30 These provisions, which included the requirements set out in section 12 of the Marriage Act, would ensure certainty, thereby avoiding or minimising disputes.

2.31 The provisions covered the registration of Muslim marriages existing at the commencement of the Bill, and those concluded after the commencement thereof.

2.32 It was envisaged that, after the commencement of the Bill, Muslim marriages should be registered at the time of the contracting thereof. This could easily be done if all persons presently involved in facilitating the conclusion of Muslim marriages were registered as marriage officers.

Proprietary consequences of Muslim marriages: clause 8 of the Bill

2.33 The position under Islamic Law is that the conclusion of a marriage *per se*, results in the marriage being automatically out of community of property, with all forms of profit sharing being excluded. This, however, does not prevent the spouses from entering into a contractual arrangement in terms of which they may mutually agree to enter into an acceptable partnership or proprietary arrangement.¹⁵

2.34 Consistent with the Islamic Law position, all existing Muslim marriages, at the commencement of the proposed statute were deemed to be out of community of property (clause 8(1)).

¹⁵ Islamic Law recognises different types of partnership arrangements that may be concluded between spouses. A *mufaawadah* partnership concluded between the spouses means that existing and future assets would be owned in equal shares between the spouses, who would be jointly and severally liable to creditors. An *Inan* partnership, on the other hand, would permit the spouses to enter into a profit sharing arrangement in respect of future and present property, by mutual agreement. Community of property, *per se*, as a concept is unknown in Islamic law. The spouses may also separately enter into a pre-nuptial contract upon defined terms and conditions which are not contrary to the essence of the marriage contract itself. For example, the marriage contract may contain a provision to the effect that, in the event of the husband electing to conclude a second Islamic marriage, the existing wife shall be entitled (but not obliged) to apply for the dissolution of her own marriage. The Hanbali school of interpretation grants a wide latitude in respect of conditions that may be agreed upon by spouses in a pre-nuptial contract. (See the famous authoritative juristic work *Almugni* by Ibn Qudamah)

2.35 The same would apply to Muslim marriages concluded after the commencement of the Act, unless otherwise regulated contractually by the spouses (clause 8(2)).

2.36 Provision was made for spouses to change the matrimonial property system in respect of a Muslim marriage concluded before or after the commencement of the proposed Act (clause 8(3)). This was in line with section 21 of the Matrimonial Property Act, 1984. Those civic bodies involved in family matters were free to conduct public educational programs concerning the Bill, and to publicise various property regimes.

Dissolution of Muslim marriage: clause 9 of the Bill

2.37 The dissolution of a Muslim marriage was recognised.

2.38 Provision was made to register an irrevocable *Talaq*¹⁶ immediately but not later than seven days from the pronouncement or issue thereof. This would ensure certainty, and at the same time would assist in avoiding situations where the husband issued the *Talaq* arbitrarily, to the detriment of his wife and any children.

2.39 A *Talaq* issued and properly registered had to be confirmed by a court. The confirmation process would ensure that issues such as maintenance, proprietary arrangements, the welfare of minor children, etc were properly regulated and safeguarded, thereby leading to certainty and the avoidance of acrimony and abuse. It appeared crucial that all the issues arising from a dissolution of the marriage were properly resolved, for the benefit of all concerned, hence the need for a decree of confirmation together with ancillary relief.

2.40 Provision was made in clause 9(3) for a court to grant a decree of *Faskh*, being a dissolution of the marriage, on defined grounds recognised by Islamic Law. This was a pivotal provision and substantially empowered women in accordance with Islamic tenets. The husband could pronounce a *Talaq*. He could delegate this right to his wife in the form of

¹⁶ A *Talaq* pronounced by a husband is of two types: revocable and irrevocable. In the case of the revocable *Talaq (Raj'i)*, the marriage is not dissolved immediately upon pronouncement thereof but subsists until the expiry of the waiting period (*Iddah*). The marriage is only dissolved upon the expiry of the *Iddah*, with the result that the husband may take the wife back prior to the expiry of the *Iddah*, without concluding a fresh marriage contract. On the other hand, where the *Talaq* is pronounced in irrevocable form (*Ba'in*), the marriage is dissolved immediately, with the result that the husband has no right to take the wife back unless the former spouses conclude a fresh marriage contract.

a *Tafwid ul Talaq*¹⁷. Where the husband did not delegate this right and refused to pronounce a *Talaq*, the wife could on application to court and upon notice, seek a dissolution of the marriage, if there were grounds therefor, as defined in clause 1 of the Bill (in the definition of *Faskh*).

Custody and access: clause 11 of the Bill

2.41 The guidelines laid down by Muslim jurists relating to the custody of, and access to, minor children were based on the welfare of minor children as the paramount consideration.

2.42 This was also consistent with section 28(2) of the Bill of Rights which provides that -

a child's best interests are of paramount importance in every matter concerning the child.

The Divorce Act, other relevant statutory provisions, and the common law are to the same effect.

2.43 Clause 11, therefore, whilst providing that a child's best interests¹⁸ are paramount in matters of custody and access, took into account the age limits and guidelines furnished by Muslim jurists in this regard.

Maintenance: clause 12 of the Bill

2.44 In Islamic Law, a husband is obliged to support his wife and children. These Islamic principles were embodied in clause 12(2), and would provide substantial relief to spouses and children of Muslim marriages.

2.45 These maintenance obligations would be enforced through the Maintenance Act, 1998. Chapter 5 of that Act gives the Maintenance Court substantial powers to enforce maintenance orders by execution against property, by the attachment of emoluments and by

¹⁷ A delegation of the husband's power of *Talaq* to the wife may be absolute or conditional, with the result that, depending on the terms of the delegation, the wife may terminate the marriage by pronouncing a *Talaq*. Despite this delegation, the husband at all material times, retains his original right to terminate the marriage through the pronouncement of a *Talaq*, and never loses that right.

¹⁸ In interpreting what is in the best interests of a child, it may be necessary to take into account appropriate criteria from an Islamic perspective. These criteria could serve as guidelines for the family advocate and judges in dealing with custody cases.

the attachment of debts, having the effect of a civil judgment. At the same time, the failure to make payment in accordance with a maintenance order constitutes an offence and is penalised as set out in Chapter 6 of the Act.

Existing civil marriages: clause 14 of the Bill

2.46 Clause 14 was specifically inserted to deal with an existing civil marriage as defined in clause 1 of the Bill. It appeared to be imperative that the accompanying Muslim marriage should be dissolved prior to the dissolution of the civil marriage itself in terms of the Divorce Act. The failure to regulate this, could result in a situation where the existing civil marriage is dissolved, but the accompanying Muslim marriage remains in existence. This would obviously cause serious hardship to the wife, as she would be precluded from remarrying until her husband gives her a *Talaq*. Clause 14 ensured that both the existing civil and accompanying Muslim marriages were dissolved at almost the same time.

CHAPTER 3

EVALUATION OF COMMENT AND RECOMMENDATIONS

3.1 Following the publication of Discussion Paper 101, a total of 84 written submissions were received from a variety of Muslim religious institutions, gender and cultural groups as well as individuals. Another 29 submissions were received after the cut-off date of 10 April 2002, and although these submissions are not specifically addressed in the evaluation of the comment, they were taken into account by the Commission (**Annexure C** to this Report contains a list of the persons, bodies and institutions who submitted written comment on Discussion Paper 101).

3.2 At the outset it must be stated that the consultative and deliberation processes were as wide and as extensive as was possible. (In respect of exchanges with international bodies and institutions, see par 3.347.) Subsequent to the submissions referred to above workshops were conducted nationally and further opportunities were provided to groups representing women and also to Ulama bodies to make oral and written representations. Those sessions proved extremely useful and a number of changes and additions to the contemplated legislation were effected as a result. In our view, the overwhelming majority of persons and organisations who participated in the workshops supported the draft legislation. The concerns noted during those exchanges were addressed and have, for the most part, found expression in the final draft Bill. It is with a sense of humility that the Commission records its appreciation for the efforts and careful consideration that went into the majority of submissions made. What has resulted can truly be considered a collaborative work which despite human imperfection and limitations nevertheless reflects the creative energies of the Muslim community and is in line with the true spirit of Islam which is to serve Allah in faith and in service to community and humanity. The Commission believes that the promulgation of the legislation, corresponding in the main to what is contained in the draft Bill, will bring the Muslim community closer to having its value system recognised than has ever been the case in the past.

3.3 What follows is an evaluation of the comment and the Commission's recommendations. First, the appropriate clause in the draft Bill proposed in Discussion Paper 101 will be reflected; thereafter the comment received on that clause will be set out and, finally, an evaluation of the comment will be given. The Commission's recommendation appears at the end of the Chapter.

Clause 1: Definitions

3.4 The following clause on definitions appeared in the draft Bill proposed in Discussion Paper 101 (that draft Bill is reflected in **Annexure B** to this Report):

Definitions	
	<p>1. In this Act, unless the context otherwise indicates-</p>
(i)	<p>“court” means a High Court of South Africa, or a Family Court established under any law, and for purposes of section 9, a Divorce Court established in terms of section 10 of the Administration Amendment Act, 1929 (Act No. 9 of 1929). The provisions of section 2 of the Divorce Act, 1979 (Act No. 70 of 1979), shall, with the necessary changes, apply in respect of the jurisdiction of a court for the purposes of this Act;</p>
(ii)	<p>“deferred dower” means the dower or part thereof which is payable on an agreed future date but which, in any event, becomes due and payable upon dissolution of the marriage by divorce or death;</p>
(iii)	<p>“dispute,” for the purposes of section 13, means a dispute or an alleged dispute relating to the interpretation or application of any provision of this Act or any applicable law;</p>
(iv)	<p>“dower” means the money or property which must be payable by the husband to the wife as an ex lege consequence of the marriage itself in order to establish a family, and lay the foundations for affection and companionship;</p>
(v)	<p>“existing civil marriage” means an existing marriage contracted according to Islamic Law which has also been registered and solemnized in terms of the Marriage Act, 1961 (Act No. 25 of 1961), prior to the commencement of this Act, and in relation to which the parties may elect in the prescribed manner at any time after the date of commencement of this Act, to cause the provisions of this Act to apply to their marriage, in which event the provisions of this Act apply from the date of such election, but without affecting vested proprietary rights (unaffected by such election) and the rights of third parties including creditors;</p>
(vi)	<p>“Faskh” means a decree of dissolution of marriage granted by a court, upon the application of the wife, on any ground or basis permitted by Islamic Law, and including any one or more of the following grounds, namely, where the -</p>
	<p>(a) husband is missing, or his whereabouts are not known, for a substantial period of time;</p>
	<p>(b) husband fails for any reason to maintain his wife;</p>
	<p>(c) husband has been sentenced to imprisonment for a period of three years or more, provided that the wife is entitled to apply for a decree of dissolution within a period of one year as from the date of sentencing;</p>
	<p>(d) husband is mentally ill, or in a state of continued unconsciousness as contemplated by section 5 of the Divorce Act, 1979 (Act No. 70 of 1979) which provisions shall apply, with the changes required by the context;</p>
	<p>(e) husband suffers from a serious disease, including impotency, which renders cohabitation intolerable;</p>
	<p>(f) husband treats his wife with cruelty in any form, which renders cohabitation intolerable;</p>

- (g) husband has failed, without valid reason, to perform his marital obligations for a reasonable period;
- (h) husband is a spouse in more than one Islamic marriage, he fails to treat his wife justly in accordance with the injunctions of the *Qur'an*; or
- (i) marriage has irretrievably broken down, despite reasonable attempts at reconciliation;
- (vii) **“Iddah”** means the mandatory waiting period for the wife, arising from the dissolution of the marriage by divorce or death during which period she may not remarry. The *Iddah* of a divorced woman who -
 - (a) menstruates is three such menstrual cycles;
 - (b) does not menstruate for any reason, is three months;
 - (c) is pregnant, extends until the time of delivery;
- (viii) **“irrevocable Talaq”** means -
 - (a) a *Talaq* pronounced by a husband which becomes irrevocable only upon the expiry of the *Iddah*, thereby terminating the marriage upon the expiry thereof;
 - (b) according to the Hanafi School of Interpretation, a *Talaq* expressed to be irrevocable (*Bai'n*) at the time of pronouncement, thereby terminating the marriage immediately;
 - (c) the pronouncement of a third *Talaq*;
- (ix) **“Islamic marriage”** means a marriage contracted in accordance with Islamic law only, but excludes an existing civil marriage, or a civil marriage solemnized under the Marriage Act, 1961 (Act No. 25 of 1961), before or after the date of commencement of this Act;
- (x) **“Khul'a”** means the dissolution of the marriage bond, at the instance of the wife, in terms of an agreement between the spouses according to Islamic Law;
- (xi) **“marriage officer”** means any Muslim person with knowledge of Islamic Law appointed as marriage officer for purposes of this Act by the Minister or an officer acting under the Minister's written authorisation;
- (xii) **“Minister”** means the Minister of Home Affairs;
- (xiii) **“prescribed”** means prescribed by regulation made under section 15;
- (xiv) **“prompt dower”** means the dower or part thereof which is payable at the time of conclusion of the marriage or immediately thereafter upon demand by the wife;
- (xv) **“revocable Talaq”** means a *Talaq* (*“Raj'i”*) which does not terminate the marriage before the completion of the *Iddah*, and which confers upon the husband the right to take back his wife before the expiry of the *Iddah* only;
- (xvi) **“Tafwid ul Talaq”** means the delegation by the husband of his right of *Talaq* to the wife, either at the time of conclusion of the marriage or during the subsistence of the marriage, so that the wife may terminate the marriage by pronouncing a *Talaq* strictly in accordance with the terms of such delegation;
- (xvii) **“Talaq”** means the termination of the marriage according to Islamic Law, by the husband or his agent or intermediary, through the use or pronouncement of specific words which indicate a clear intention to terminate the marriage; and includes the *Tafwid ul Talaq*;
- (xviii) **“this Act”** includes the regulations.

Comment received on clause 1:

Court:

3.5 The Institute of Islamic *Shari'ah* Studies suggests that the words “or any Muslim

specialist jurist committee established for the granting of *faskh* applications and hearing and deciding of *talaq*, *khul'* and other form of separation applications" be inserted after the words "Act 90 of 1929".

3.6 In view of its endorsement of the later proposal that the concept of Muslim Family Courts must be introduced, the **Muslim Judicial Council** proposes that the words "or a Muslim Family Court established in terms of this Act" be inserted after the words "High Court of South Africa".

3.7 **Jamiatul Ulama (Transvaal)** recommends that the definition should read "... means the Muslim Family Court or the High Court of South Africa consisting of a full *Shari'ah* bench or any Arbitration Tribunal established for the sole purpose of hearing Muslim marriage issues and related matters".

Dower:

3.8 The **Mowbray Mosque Congregation** suggests that "dower" should be replaced by "dowry", and that the substantive provisions found in some of the definitions be located in separate clauses in the draft Bill.

3.9 A joint submission, endorsed by the Black Lawyers Association (Western Cape), was received from the Gender Unit & General Practice Unit: Legal Aid Clinic (UWC); Shura Yabafazi (Consultation of Women); the National Association of Democratic Lawyers (NADEL: Western Cape) and the National Association of Democratic Lawyers (Human Rights Research and Advocacy Project). These respondents will, for the sake of convenience, hereafter be referred to as the **Gender Unit**. They submit that the dower contains something of patrimonial value, and its purpose is to ensure that the woman acquires a form of security for herself when entering the marriage union. It is suggested that the definition should be amended to read "... means the money or property which must be payable by the husband to the wife as an *ex lege* consequence of the marriage itself".

3.10 The **Muslim Judicial Council** proposes that the words "or anything of value, including benefits" be inserted after the word "property".

3.11 **Jamiatul Ulama (Transvaal)** submits that the issue of dower needs to be elaborated in the Bill. Though dower is not a condition for the validity of *nikah*, it is compulsory and the spouses may provide for same in their contracts if they so wish. At the Pretoria workshop, it

was suggested that the Arabic “mahr” should be put in brackets with regard to dower.

Existing civil marriage:

3.12 The **Women’s Legal Centre** considers the definition of “existing civil marriages” to be in conflict with clause 8(3) as it seems not to require a court application for parties to change their matrimonial property regime, but merely an application in the manner to be prescribed in regulations. They therefore propose that the second part of the definition dealing with choice be deleted. The **Muslim Youth Movement** submits that unless parties exercise their choice and follow the necessary procedure, the draft Bill does not affect the vesting of proprietary rights and the rights of third parties. In their view the implication is that a large number of women will continue suffering the consequences of being denied access to rights in property for which they may have contributed their time, labour and skills. **Mr Sulaiman** contends that the phrase “but without affecting vested proprietary rights (unaffected by such election)” in the definition of existing civil marriage contains a tautology. In his interpretation the provision provides that the rights not so affected, will not be affected.

Family Advocate:

3.13 The **Office of the Family Advocate** requests the incorporation of a definition of Family Advocate in clause 1.

Faskh:

3.14 **Darul Uloom Zakariyya** contends that the term “substantial” in paragraph (a) is too broad and that the principle is a period of four years, although the *Shari’ah* takes extraordinary circumstances into account. The respondent also submits that paragraph (i) needs to be rephrased, as the term “irretrievably broken down” is all encompassing. This may imply that a wife can apply for *faskh* even after 30 or 40 years on the grounds of mere dislike.

3.15 The **Young Men’s Muslim Association** and the **Islamic International Research Institute** who, incidentally, submitted responses that are verbatim the same, contend that the proposed definition is wholly erroneous and confirms their view that the concept will be totally abused and mismanaged by the secular courts.

3.16 The **Waterval Islamic Institute** contends that in the case of a missing husband,

faskh does not apply, but rather a “*Tafreeq*” or “*Shar’iy*” separation. The same goes for the instance where the husband treats his wife with cruelty and where the husband is a spouse in more than one Muslim marriage. The respondent also contends that the one year period stipulated in paragraph (c) is un-Islamic and that the words “from the start of the marriage” should be added to the beginning of paragraph (e).

3.17 **Mr M S Sulaiman** argues that if the word “and” in the phrase “and including any one or more...” is meant to imply that the list contains grounds not permitted by Islamic law, the prospect of the legislature legislating Islamic law becomes a reality. He is also concerned that some of the grounds listed could be regarded as foreign to the scheme of Islamic law in the manner that they are formulated in the draft Bill. **Mr Sulaiman** further contends that the schools of Islamic law differ as to what may be regarded as a “substantial period of time” in paragraph (a); that the term “marital obligations” in paragraph (g) is vague and needs clarification; that the phrase “reasonable period” in the same paragraph be amended to read “for an unreasonably long period”; and that paragraph (h) is incoherent as it stands. The conjunction “and” should be inserted between the words “marriage” and “he”.

3.18 The **Gender Unit** submits that there is gender inequality with regard to the differentiations applicable to a husband and wife for the purposes of dissolving a Muslim marriage, and that the definition of *faskh* should be omitted from the draft Bill. If it is decided to retain the definition, it should only contain the ground of ‘irretrievable breakdown of the marriage to the extent that the marriage relationship has reached such a state of disintegration that there is no reasonable prospect of the restoration of a normal marriage relationship between the parties’. The **Commission on Gender Equality** appears to support this proposal.

3.19 The **Islamic Careline** points out that the four Madhahib have slight differences in the eligibility of being granted a *faskh*, but current Islamic jurisprudence favours the Maliki Madhab. The respondent suggests that the words “for any reason” in paragraph (b) should be omitted, and submits that the phrase “for a reasonable period” in paragraph (g) is confusing in the light of the different Madhahib. Paragraph (g) also appears to be superfluous in view of the fact that all the other listed factors clearly indicate an irretrievable breakdown of the marriage.

3.20 The **United Ulama Council**, supported by **Darul-Ihsan Research and Education Centre**, holds that the definition of *faskh* should either be given in its entirety, or briefly, with the qualifying phrase “according to Islamic law”. It also proposes that distinction should be

made between permanent insanity or temporary mental illness as far as the ground “mentally ill” is concerned, and that the concept “irretrievably broken down” should be removed from the Bill as it is not consistent with the *Shari’ah* position. These proposals are supported by **Jamiatul Ulama (KwaZulu-Natal)** and **Jamiatul Ulama (Transvaal)**. The latter respondent also suggests that proper research should be done with regard to the type of *talaq* that will fall depending on the type of grounds used to ask for *faskh*, as it will not always be a *talaq ba’in* as stipulated in the Bill in clause 9(3). The respondent additionally refers to other grounds of *faskh* as set out in the other four schools of interpretation, namely there must be real necessity; the necessity must be persistent; and there must not be a possibility of *talfiq* when adopting *udul ‘an al-Maslak*.

3.21 Four institutions submitted petitions to which signatures were appended (the number of signatures are reflected in the Annexure setting out the list of respondents). The petitions, all with the same content, came from **Nurul Islaam Jamaat Khana; Colenso Mosque; Siraatul Haq Islamic School** and **Bergville**. The petitioners submit that the phrase “irretrievable breakdown” is vague and should be deleted and further that the entire clause on *faskh* should be redrafted to make it *Shari’ah* compliant. In a joint submission by **F Noormohamed, H Rawat and F Mall** the phrases “irretrievable breakdown” and “does not treat the wife justly” are criticised as being too vague and open to many interpretations. **Ms Z Bulbulia** argues that the phrase “irretrievable breakdown” should be omitted because if it remains an individual ground, it will be abused and the rate of divorces would increase significantly. **Madresah In’aamiyyah** indicates that case history has shown that the mentioned phrase is interpreted very broadly and in a manner which will certainly be open to abuse from a *Shari’ah* perspective. **Mr M I Patel** submits that the mentioned phrase, apart from being extremely subjective, has no basis in Islamic law. **Khalid Dhorat** argues that by incorporating “irretrievable breakdown” as a ground for *faskh*, the *stare decisis* doctrine will most probably apply.

3.22 **Imran Khamissa** holds the view that the conditions stated as grounds for *faskh* should be reformulated.

3.23 **Jameah Mahmoodiyah** suggests that the definition of *faskh* and paragraphs (a), (d) and (i) be rephrased as follows:

Faskh means a decree of dissolution of marriage granted by a court, upon the application of the wife, on any one or more of the following grounds, permitted by Islamic law, namely, where the -

(a) husband is missing and his whereabouts are not known, for a lengthy period

- of time;
- (d) insanity of the husband is so serious that the wife apprehends that he will either molest her physically or kill her;
- (i) differences and hatred between the spouses is so acute that they fear that they will not be able to uphold the limits prescribed by Allah Ta'ala.

3.24 The **Muslim Judicial Council** proposes that the definition of *faskh* and paragraphs (a), (b) and (e) be reformulated as follows:

Faskh means a decree of dissolution of marriage granted by a court upon the application by the wife or husband on any ground ...

- (a) husband is missing or his whereabouts are not known for a period of four years or more; (this proposal is also supported by **Masjidul Quds**)
- (b) husband fails to maintain his wife adequately for a period of one year or more;
- (e) ... in the case of impotency, the court shall grant the husband a period of one year in which to seek medical treatment. If he refuses, or the treatment is unsuccessful, the court may grant an order for dissolution.

Iddah:

3.25 The **Women's Legal Centre**, expressing concern about the constitutionality of *Iddah*, submits that if the concept is to be retained in the Bill, it is to be redefined to reflect that it is a period of reconciliation applying to both parties and that the notion of consent of both parties for the reconciliation is also included. It is also suggested that the provisions of section 4(3) of the Divorce Act regarding reconciliation be incorporated in the Bill rather than entrenching the *Iddah* period.

3.26 The **Gender Unit** holds the view that the *Iddah* should not be a mandatory requirement applicable to women only. In the respondent's view the historical reason for the *Iddah* which is to establish certainty about the paternity of an unborn child should the wife discover that she is pregnant during the *Iddah* period, is no longer applicable because current medical science allows parties to obtain clarity in respect of paternity through various paternity tests.

3.27 **Jameah Mahmoodiyah** suggests that the *Iddah* of a *widowed* woman, which is 130 days if she is not pregnant, and if she is pregnant, extends until the time of delivery, be added to the definition.

3.28 The **Muslim Judicial Council**, supported by **Jamiatul Ulama (Transvaal)** and **Masjidul Quds**, proposes that a paragraph be added to the effect that the *Iddah* of a widowed woman shall be four (lunar) months and ten days.

Irrevocable talaq:

3.29 The **Waterval Islamic Institute** submits that the words “which becomes irrevocable only upon the expiry of the *Iddah*, thereby terminating the marriage upon the expiry thereof” in subparagraph (a) should be deleted.

3.30 The **Institute of Islamic Shari’ah Studies** suggests that a *talaq* be pronounced and signed by a husband as far as subparagraph (a) is concerned, and contends that subparagraph (b) is difficult to understand, as any *talaq* which the issuer intends to be irrevocable, is such irrespective of whether it is the first or second *talaq*. The respondent submits that this is not only the Hanafi rule.

3.31 **Mr I Manjra** contends that the definitions of a revocable and irrevocable *talaq* is vague and confusing and does not conform to the procedures laid down in the *Qur’an* and the *Sunnah*. He also avers that the Commission has not paid due regard to the practice of pronouncing three *talaqs* simultaneously and the consequent problems and hardships arising from this. After setting out the position of three simultaneous *talaqs* in the light of the *Qur’an* and the *Sunnah*, the respondent refers to countries where Muslim Personal law has been implemented and steps taken to change the juristic rulings to conform with the *Qur’an* and the *Sunnah*, among which India, Pakistan and Egypt. **Mr Manjra** calls upon the Commission to change the position in South Africa as well.

3.32 The **Association of Muslim Lawyers** submits that the irrevocable *talaq* is not clearly defined, and should be more specific as to the form it should take and the time period between the *talaqs* should be noted.

3.33 The **Gender Unit** contends that as all forms of *talaq* addressed in the draft Bill are the sole preserve of a husband, and seeing that differentiation on the grounds of gender constitutes unfair discrimination, all definitions relating to *talaq* should be removed from the Bill. If the definitions are retained, the respondent suggests that, with regard to paragraph (a), clarity must be given regarding how many pronouncements must be given, the periods between pronouncements as well as at which stage the period of *Iddah* commences and expires. In respect of paragraph (c) it is contended that clarity must be given regarding the length of the periods between the pronouncements of the first and second *talaqs*, as well as the length of the *Iddah* during those periods.

3.34 The **Islamic Careline** welcomes the specific reference to the Hanafi School of

Interpretation, but holds the view that this differentiation is necessary in many other instances in the draft Bill.

3.35 **Masjidul Quds** poses the question whether the reference to *Talaq-e-ba'in* subjects the proposed Bill to interpretative rules that favour the Hanafi School of Islamic law.

Islamic marriage:

3.36 The **Islamic Forum Azaadville** holds the view that the definition of “marriage” must be spelt out and should include the contractual nature of the marriage and the fact that such contracts can only be entered into between a male and female. The **Muslim Assembly (Cape)** argues that “marriage” should refer to a marriage of a man to a woman and *vice versa*. The **Islamic Careline** suggests that the name of the draft Bill be changed to the Muslim Marriages Act as the term “Muslim” would relate to some Muslim practice instead of the whole of *Shari'ah* law as the term “Islamic” would denote. The respondent also believes that the definition of marriage requires further elaboration, namely that it is a contract between two parties, one being male and the other female.

3.37 **Ms Z Bulbulia** is of the opinion that the definition should be reconsidered taking into account that according to the classical jurist definition, marriage is a contract prescribed by the legislator, and it denotes the lawful entitlement of each of the parties thereto to enjoy the other in the lawful manner.

Khul'a:

3.38 The **Waterval Islamic Institute** suggests that the word “mutual” be inserted before the word “agreement”. **Mr M S Sulaiman** concedes that transliteration of Arabic terms can be a complex affair, but contends that the term “*Khul'a*” may deserve further consideration since the original Arabic term does not have the English letter “a” at the end, and should perhaps read “*Khul'un*”.

3.39 The **Gender Unit** submits that the definition should be omitted from the Bill as it is not similarly applicable to a husband, but if the definition is retained, it should be worded as follows: “... means the dissolution of the marriage bond, at the instance of the wife, on the ground of irretrievable breakdown of the marriage to the extent that the marriage relationship has reached such a state of disintegration that there is no reasonable prospect of the restoration of a normal marriage relationship between the parties”.

3.40 The **Islamic Careline** suggests that the definition should read “the dissolution of the marriage bond, at the instance of the wife in terms of a mutual agreement between the spouses according to Islamic law”.

3.41 The **United Ulama Council**, supported by **Darul-Ihsan Research and Education Centre** and **Jamiatul Ulama (KwaZulu-Natal)**, submits that the inclusion of monetary or material exchange needs to be considered in the definition.

3.42 In the joint submission by **F Noormohamed, H Rawat and F Mall** it is stated that the definition of *khul'a* in the Bill differs from the Islamic definition. *Khul'a* is divorce by mutual consent with compensation decided on by the two parties. It is submitted that the courts cannot fix the amount as this would deviate from the principle of *khul'a*. This view is endorsed by **Khalid Dhorat**.

3.43 **Ms Z Bulbulia** opines that the definition is not very clear to the layman, and should expressly state that *khul'a* is a dissolution of the marriage bond where the husband and wife mutually agree that the husband will divorce his wife if the wife returns the dower or other compensation.

3.44 **Masjidul Quds** states that the definition as given is incomplete.

Marriage officer:

3.45 **Darul Uloom Zakariyya** submits that, due to the intricate responsibilities of marriage officers, they should be qualified scholars from recognised Islamic institutes and that they should be proficient in the fields of *Qada* procedures, Arabic, *tafseer* and *usool-ul-tafseer*, *Hadith* and *usool-ul-hadith*, as well as *Fiqh* and *usool-ul-fiqh*. This view is shared by **Jamiatul Ulama (Transvaal)**. **Moulana Y A Musowwir Tive** argues that appointing marriage officers with Islamic knowledge being the only prerequisite is not enough and calls for them to be selected from the highly learned Ulama only. The **Islamic Careline** holds the view that the qualifications of marriage officers should include competency in the Arabic language; qualification in *Fiqh/tafseer*; adequate knowledge of the South African legal system as well as being practising Muslims.

3.46 The **Islamic Forum Azaadville** opines that marriage officers' duties, qualifications, powers, methods of appointment and their removal should be clearly spelt out. They should not be given arbitrary powers which would overrule those of the Islamic guardian unless

specifically allowed in Islamic jurisprudence.

3.47 Both the **Women's Legal Centre** and the **Commission on Gender Equality** express agreement with the definition as it currently stands, as it does not preclude the appointment of women as marriage officers. The latter respondent further recommends that marriage officers should be persons of good standing, have knowledge of the Islamic Marriage Act and its Regulations and who are also familiar with Islamic principles in respect of marriage.

3.48 The **Young Men's Muslim Association** and the **Islamic International Research Institute** argues that there is no need for marriage officers, as the mutual consent and agreement of the spouses, with the presence of Muslim witnesses, are sufficient in *Shari'ah*.

3.49 The **Gender Unit** suggests that the definition should be replaced with the following: "... means any person with knowledge of the Islamic Marriages Act and knowledge of the consequences of contracting an Islamic marriage on the terms agreed upon by the parties, appointed as marriage officer for purposes of this Act by the Minister or an officer acting under the Minister's written authorisation".

Minister:

3.50 The **Association of Muslim Lawyers** contends that as Islam does not allow consent to be obtained from a person who is not a Muslim, the paragraph should be amended by referring to a duly appointed Director-General of Muslim Affairs.

Muslim:

3.51 The **Jamiatul-Ulama KwaZulu/Natal** suggests that a definition of "Muslim" be included in the Bill, which could read as follows:

A Muslim is a person who believes in Allah's existence, His unity and all His characteristics; and who believes in His Messengers, all His revealed Books, and the Day of Judgment; and who is, further, convinced that the Holy Messenger Muhammad is the last Prophet so that after Him no other prophet of any kind can come; and who has faith in all the essentials of religion, i.e. in all those things whose communication by the Holy Messenger is essentially and undoubtedly known, and who affirms all those things by word of mouth.

Revocable Talaq:

3.52 The **Muslim Judicial Council** proposes that the following be added to the definition: “Every *Talaq* shall be revocable, except a third *Talaq*, that given before consummation, that for a consideration (*khul’a*), and that expressly pronounced as irrevocable”.

Tafwid ul Talaq:

3.53 The **Islamic Careline** submits that the definition should be specific to the contract of *Nikah* which the couple enter into preferably prior to the solemnization of the marriage.

3.54 **Jameah Mahmoodiyah** suggests that the phrase “or any other person” be inserted after the word “wife” where it appears for the first time and the phrase “or the appointed person” be inserted after the same word where it appears for the second time.

Talaq:

3.55 According to **Darul Uloom Zakariyya** the definition of *talaq* is incomplete and not inclusive of certain important aspects of *talaq*. Only if the husband pronounces a word or phrase, which has amongst many meanings the possibility of meaning *talaq*, will the husband be asked to disclose his intention, and the decision of *talaq* being issued or not will rest upon this intention provided that the situation does not indicate that *talaq* was intended - e.g. the husband was in a state of anger threatening to issue *talaq*, in which case *talaq* would be given even if the husband claims that he had not intended to give *talaq*.

3.56 The **Women’s Legal Centre** contends that the husband’s right to take his wife back before the expiration of the *Iddah*, is in violation of the right of freedom and security of the person. The revocable *talaq* violates the notion of women’s capacity and consent and their equal status to men, and treats women as property. They also criticise the involvement of an intermediary, and suggests that both spouses must be present for a *talaq* to take place. Moreover, the grounds for a *talaq* under Islamic law are not contained in the Bill, and the respondent suggests that they be defined. Ideally the same grounds should be included under the *faskh* and the *talaq*.

3.57 The **United Ulama Council**, supported by **Darul-Ihsan Research and Education Centre** and **Jamiatul Ulama (KwaZulu-Natal)**, holds the view that some reference to *Kinayah-Talaq* (implied or ambiguous divorce) is required.

3.58 **Ms Z Bulbulia** proposes the following definition: “*Talaq* means the dissolution of a valid marriage, forthwith or at a later stage, by a man, or his agent, or his wife, duly authorised by him to do so, using the word *Talaq* or a synonym or derivative thereof”. At the Cape Town workshop it was recommended that *Tafwid ul Talaq* should be mentioned in the definition of *Talaq*.

Short title:

3.59 The **Islamic Careline** recommends that the title be changed to “Muslim Marriages Act” as it relates only to certain areas of *Shari’ah* law. The same proposal was made by the **Jamiatul-Ulama KwaZulu/Natal** at the Durban workshop. The **Muslim Youth Movement** recommends that the short title be replaced by “The Recognition and Administration of Islamic Family Law Act .. of 20..”.

Evaluation of comment

3.60 The Commission has considered the comment received on the various definitions. There was general consensus that the title of the Act should be changed to the *Muslim Marriages Act* from its previous title of the *Islamic Marriages Act*. The previous definition of *Islamic marriage* has also been amended accordingly. Regarding the definition of *court*, it was decided to include the Divorce Court under the Administration Amendment Act so as to broaden access to justice. In respect of the definition of *dower*, it was decided to broaden the same to cover intangibles and benefits. With regard to the definition of *existing civil marriage*, the proposal by the Women’s Legal Centre regarding deletion of the second part of the definition was given effect to. In relation to the definition of *faskh*, many respondents expressed concern about the phrase *irretrievable breakdown* as a ground for dissolution of the marriage. This definition was replaced by a definition known as *shiqaq* (matrimonial discord) as recognised in Islamic law and which in itself has a broad meaning. In addition, the Commission has heeded the concern regarding the omission of the husband’s right to make an application for *faskh* on defined grounds, and this has been incorporated. As far as the definition of *iddah* is concerned, the same has been broadened to include *iddah* in relation to a widowed woman.

3.61 The definition of irrevocable *talaq* was suitably amended to reflect both the Hanafi and Shaf’i interpretations, and the definition now removes any anomalies in this regard. The definition of *Muslim marriage* was suitably qualified, as called for by some respondents, to ensure a clear distinction between a civil marriage and a Muslim marriage. Minor linguistic

amendments were made to the definitions of irrevocable *talaq* and *tafwid ul talaq*, and the definition of *talaq* has been amended in accordance with the wording suggested by one of the respondents. In addition, the spelling of the word “*khul’a*” has been changed to “*khula*”.

Clause 2: Application of this Act

3.62 The following clause on the application of the Act appeared in the draft Bill proposed in Discussion Paper 101:

Application of this Act

- 2.** The provisions of this Act -
- (a) shall apply to an Islamic marriage contracted before or after the commencement of this Act;
 - (b) shall apply to an existing civil marriage insofar as the spouses thereto have elected in the prescribed manner to cause the provisions of this Act to apply to the consequences of their marriage, and otherwise to the extent specified in section 14; and
 - (c) does not apply to a civil marriage solemnised under the Marriage Act, 1961 (Act No. 25 of 1961) before or after the commencement of this Act.

Comments received on clause 2:

3.63 The **Gender Unit** indicates that it supports the proposals contained in this clause.

3.64 The **Society of Advocates of KwaZulu-Natal** holds the view that clause 2(b), to the extent that it places an onus on the parties to an existing civil marriage to apply to adopt the provisions of the proposed Act, will cause considerable difficulties. The respondent avers that it will be preferable and more consistent with justice and equity that in such “existing registered civil marriages” the parties are presumed to intend the consequences of Islamic Marital laws to apply to their marriage. It is therefore recommended that existing registered civil marriages, as defined, should, by a deeming provision, fall within the ambit of the proposed Act but subject to the provision that appropriate regulations would be formulated to enable both spouses to an existing civil marriage to apply for the exclusion of the provisions of the proposed Act by an application to the High Court.

3.65 At the Pretoria workshop a concern was raised that it is not clear what would happen if parties do not elect that the Act should apply. In Durban a proposal was made that registration should not be compulsory, and that an option should be included in terms of which parties can decide whether to register or not. Not having this option may render the

Bill unconstitutional. According to **Mr Kazi**, a participant at the Durban workshop, the omission of this option causes great frustration among the Ulama who initially decided to give the whole process of developing a draft Bill a fair chance. The question as to what law will apply in respect of marriages that are concluded outside of the provisions of the draft Bill remains unresolved.

3.66 In Cape Town a proposal was made that a further choice should be allowed for an Islamic marriage to fall outside the provisions of the Bill.

Evaluation of comment

3.67 The Commission has carefully considered all the submissions made by Ulama bodies, the gender unit, individuals and organisations. Concern was expressed especially by the Ulama about a small but vocal minority who expressed the view that they would rather be dealt with by the law of 'unbelievers' than be subjected to the provisions of the contemplated legislation. The view expressed was that a complete code of Islamic law covering all aspects of life as well as procedures in accordance therewith, were the only acceptable route and that anything other than that was unacceptable. Ironically those who at the outset of this process were vociferous that a choice of legal systems was unacceptable are now calling for a choice to opt out of the provisions of the draft Bill and be dealt with by the law as it was before the contemplated legislation comes into operation. Many who participated in workshops and seminars thought that such a choice should be provided. There is a body of opinion which holds that such a choice should not be provided. After careful consideration the Commission has decided that such a choice should be provided. Structuring such an option provided a conceptual and technical challenge. It is also uncharted territory which still has to be traversed. A thorough study of clause 2 of the proposed draft Bill will show the complexities that arise from various permutations and a clash of marital regimes.

3.68 What is now proposed is that in respect of all marriages concluded before the commencement of the Act the default position will be that the Act applies with the option provided for husband and wife in either a monogamous or polygynous marriage to exclude the provisions of the Act from applying to them by jointly completing a prescribed form and submitting it to the relevant authorities within a window period of one year from the coming into operation of the Act. In a monogamous marriage this would mean that both husband and wife would have to agree to opt out of the provisions of the Act. In respect of a polygynous marriage a husband and all his wives could opt out by all completing the

prescribed form and lodging it or a husband and any one of his wives could agree to exclude the application of the Act. The Act will then apply in respect of his marriage to a wife or wives who have not agreed to opt out of the provisions of the Act. It must be understood that the Act can only be excluded by consensus between a husband and any of his wives. The premise is that persons may choose the legal regime to apply to their marriages. Because Muslim women have for ages been unable to assert their Islamic law rights, they should, in the event of a consensus not being able to be reached, be entitled to the protections afforded by the contemplated legislation.

3.69 Women's groups urged the Project Committee to ensure that women are not deprived of their Islamic law rights as set out in the draft Bill. Provision has been made for notice to be given to all interested parties whose rights may be affected. See clause 8(8) and clause 16(4).

Clause 3: Equal status and capacity of spouses

3.70 The following clause on the equal status and capacity of spouses appeared in the draft Bill proposed in Discussion Paper 101:

Equal status and capacity of spouses

3. A wife in an Islamic marriage is equal to her husband in human dignity and has, on the basis of equality, full status, capacity and financial independence, including the capacity to own and acquire assets and to dispose of them, to enter into contracts and to litigate.

Comments received on clause 3:

3.71 **Darul Uloom Zakariyya**, proposing that the clause should be deleted, contends that the way in which it will be interpreted in South African law will have a negative effect on Islamic law. Many issues, which Islam deems strictly impermissible, will be entertained in this clause. For instance, if the wife wishes to have an abortion or if either of the parties wishes to become sterile, the other spouse will have no say in the matter.

3.72 The **Islamic Forum Azaadville** opines that the question of "equality" has the potential for conflict unless recognition is given that different values and criteria between secularism and Islam exist with regard to application of the term. Since the application in Islam is based more on 'equilibrium' rather than the concept 'same', this clause will have to

be more specific.

3.73 The **Muslim Assembly (Cape)** submits that the *Mahr* and *Nafaqa* requirements as applied to women who through inheritance or own effort acquire a high degree of financial independence should be considered.

3.74 The **Community Law Centre**, abiding by its comments submitted upon the release of Issue Paper 15, specifically points out that it supports the inclusion in the draft Bill of a clause guaranteeing women's equality in the context of Muslim marriages.

3.75 The **Muslim Judicial Council** proposes that the first part of the provision be reformulated to read as follows: "A wife and a husband in an Islamic marriage are equal in human dignity and both have, on the basis of equality ...".

3.76 **Masjidul Quds**, posing the question whether the contents of clause 3 should not perhaps be encapsulated in a preamble to the Bill, states that a woman's dignity should not be limited in comparison to that of a man, but rather as a creation of Allah and as the mother of mankind, she possesses human dignity, which knows no limits.

Evaluation of comment

3.77 Clause 3 was duly amended, as proposed by one of the respondents, in order to emphasise the principle of Islamic law that the spouses are equal in that each enjoys equal status and full contractual capacity. What has been asserted, is based on *Qur'anic* principles of justice and equity which were established long before Western jurisprudence that followed. It should not be forgotten that more than 1 400 years ago, Muslim women were free to conclude any contract on agreed terms. They participated in political and commercial life and took part in battles.

Clause 4: Islamic marriages

3.78 The following clause on Islamic marriages appeared in the draft Bill proposed in Discussion Paper 101:

Islamic marriages

4. (1) An Islamic marriage entered into before the commencement of this Act and existing at the commencement of this Act is for all purposes recognised as a valid marriage.

(2) An Islamic marriage entered into after the commencement of this Act, which complies with the requirements of this Act, is for all purposes recognised as a valid marriage.

(3) If a husband is a spouse in more than one Islamic marriage, all Islamic marriages entered into by him before the commencement of this Act, are for all purposes recognised as valid marriages.

(4) If a husband is a spouse in more than one Islamic marriage, all such marriages entered into after the commencement of this Act, which comply with the provisions of this Act, are for all purposes recognised as valid marriages.

(5) If a husband is a spouse in an existing civil marriage, and in an Islamic marriage or marriages entered into before the commencement of this Act, such Islamic marriage or marriages are for all purposes recognised as valid marriages.

Comment received on clause 4:

3.79 **Darul Uloom Zakariyya** argues that this clause can be summarised as follows:

All Islamic marriages entered into either before or after the commencement of this Act, whether monogamous or polygynous, provided that they are correct by Islamic law, are for all purposes recognised as valid marriages.

3.80 **Mr M S Sulaiman** submits that it may well be queried whether, in principle, any particular reason or policy consideration exists why marriages, whether monogamous or not, that are terminated prior to the commencement of the Act should be declared invalid. Since numerous monogamous marriages can in the normal course of events be expected to be terminated shortly before the commencement of the Act, non-recognition of these marriages will have a clear and harmful impact on issues of legitimacy, custody, maintenance and inheritance arising from such marriages.

3.81 The **Association of Muslim Lawyers** suggests that a proviso should be added to subclause (1) reading: "Provided that the procedure laid down in section 6(1)(a) is followed."

3.82 The **Women's Legal Centre** supports the proposed scheme for the recognition of the validity of Muslim marriages in principle, and particularly clause 4(5). The respondent contends, however, that this formal recognition does little to ameliorate the financial position of women in Muslim marriages as such marriages are out of community of property.

3.83 The **Jamiatul-Ulama KwaZulu/Natal** submits that to compel each and every Muslim to surrender to the dictates of the Bill is not appropriate, that registration should be an optional matter, and that an option to register or not should be contained in the Bill.

3.84 The **Women's Legal Centre** opposes this view, stating that the proposition is legally untenable and has the impact of undermining the gains made by the draft Bill. They suggest the addition of the following subclause:

An Islamic marriage entered into that complies with the requirements of this Act shall be a valid marriage for the purposes of this Act.

Evaluation of comment

3.85 Clause 4 has been substantially reduced to what is now contained in clause 2(5). This was done for greater clarity and in order to bring home the following:

- (i) When the proposed legislation applies to a Muslim marriage, the provisions of the Act come into play. Clause 2(3) deals with the position where the provisions of the Act do not apply to a Muslim marriage - the existing law will then apply.
- (ii) Where a Muslim marriage falls under the Act and where the requirements of the Act have been complied with, it will for all purposes be recognised as a valid marriage.

Clause 2 regulates the manner in which an election to be bound by the provisions of the Act is to be exercised. To address concerns expressed by some respondents, clause 4 now regulates disputes in the case of Muslim marriages that were terminated prior to the commencement of the proposed legislation – thereby providing relief in that situation. It also regulates disputes between a husband in a polygynous marriage and one or more of his spouses by providing that all spouses to whom the husband is married must be given notice of such dispute.

Clause 5: Requirements for validity of Islamic marriages

3.86 The following clause on the requirements for the validity of Islamic marriages

appeared in the draft Bill proposed in Discussion Paper 101:

Requirements for validity of Islamic marriages

5. (1) For an Islamic marriage entered into after the commencement of this Act to be valid the prospective spouses-

- (a) must both have attained the age of 18 years, and
- (b) must both consent to be married to each other.

(2) No spouse in an Islamic marriage recognised in terms of this Act may, after the commencement of this Act, enter into a marriage under the Marriage Act, 1961 (Act No. 25 of 1961) during the subsistence of such Islamic marriage.

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

(4) If the consent of the parent or guardian as referred to in subsection (3) cannot be obtained, the provisions of section 25 of the Marriage Act, 1961, applies.

(5) Despite the prohibition in subsection (1)(a), the Minister or any person or body authorised in writing thereto by him or her, may grant written permission to a person under the age of 18 years to enter into an Islamic marriage if the Minister or the said person or body considers such marriage desirable and in the interests of the parties in question.

(6) Permission granted in terms of subsection (5) shall not relieve the parties to the proposed marriage from the obligation to comply with any other requirements prescribed by law.

(7) If a person under the age of 18 years has entered into an Islamic marriage without the written permission of the Minister or person or body authorised by him or her, the Minister or such person or body may, if he, she or it considers the marriage to be desirable and in the interests of the parties in question, and if the marriage was in every other respect in accordance with this Act, declare the marriage in writing to be, for all purposes, a valid Islamic marriage.

(8) Subject to the provisions of subsections (5) and (6), section 24A of the Marriage Act, 1961, applies to the Islamic marriage of a minor entered into without the consent of a parent, guardian, commissioner of child welfare or a judge, as the case may be.

(9) The prohibition of an Islamic marriage between persons on account of their relationship by blood or affinity or fosterage, or any other reason, is determined by Islamic law.

Comments received on clause 5:

3.87 **Darul Uloom Zakariyya** calls upon the Commission to lower the minimum age for marriage to 15 years, as it will provide a solution to the many cases of teenage pregnancies,

juvenile sexual harassment and many other vices that have become endemic in modern societies. The respondent also contends that an additional requirement for the validity of Muslim marriages, namely the necessity of the presence of two witnesses, should be included. The **Women's Cultural Group** also point to the fact that Muslims generally get married at a much younger age than other communities and there should be no reason why the age of consent under the Bill should be different and higher than that required by civil law.

3.88 **Moulana Y A Musowwir Tive** submits that the age of consent should not be confined to 18 years but other factors such as the ability to differentiate between good and bad, right and wrong, the attainment of puberty and parental consent should also be taken into consideration. The **Mowbray Mosque Congregation** concurs with this view and states that agreement between the parties involved should constitute consent. Maturity of the parties should also be a determining factor. This is echoed by the **Muslim Assembly (Cape)**.

3.89 A number of senior students of Islamic jurisprudence at the Zakariyya Islamic University (hereafter "**Zakariyya Islamic University**") urges the Commission, in a combined comment, to review the age restriction of 18 years. In their view the youth, irrespective of laws, will most certainly seek sexual outlets and should not be forced by the law to resort to unwholesome acts which not only destroy themselves, but the nation as a whole. Thus Islam promotes marriage as a valid alternative and cannot condone an age restriction. Regarding subclause (7), the respondents submit that the authorisation to the Minister to post-validate the marriage of a minor who has entered into a marriage requires clarification. In their view there is no mechanism to protect the adult husband from being charged with statutory rape. The **Mowbray Mosque Congregation** holds the view that the powers concerned should be vested in the court and not the Minister.

3.90 **Ms F H Amod**, supported by the views expressed in the joint submission by **Mss S Khan, A Randaree, F Ajam, F Rawat** and **Y Khan**, raises similar concerns regarding teenage pregnancies and the spread of AIDS, and recommends that the clause referring to the age of consent be deleted.

3.91 The **Waterval Islamic Institute** suggests that the age restriction be replaced by words to the following effect: "marriageable in Islam is the time of maturity which varies in relation to male and female". The respondent also proposes that subclauses (6) and (7) should make it clear that the permission referred to is not essential or necessary in Islam.

3.92 The **Society of Advocates of KwaZulu-Natal** proposes that the minimum age be adjusted to 17 years in the case of a bride as such threshold provides a measure of flexibility in the selection process that is sanctioned by the laws of Islam. Regarding subclause (5) the respondent submits that the Minister's delegation of power should be to a qualified Imam of not less than ten years standing or a judicial authority recognised as such.

3.93 The **United Ulama Council**, supported by **Darul-Ihsan Research and Education Centre, Jamiatul Ulama (KwaZulu-Natal)** and **Jamiatul Ulama (Transvaal)**, avers that by imposing the age of 18 years as the minimum age, the realisation of the Prophetic directives are denied and that the draft Bill should contemplate ways and means to reduce formalities in achieving this objective. Regarding permission of the parents as a requirement for validity of the marriage, the respondent refers to different requirements in the Hanafi and Shafi Schools of Interpretation and submits that subclause (3) be reformulated. **Jamiatul Ulama (Transvaal)** further submits that a clause be included in the draft Bill to the effect that should a couple wish to enter into a Muslim marriage but do not want to be regulated by the Bill, they should be free to do so without being penalised.

3.94 The petitioners, namely **Nurul Islaam Jamaat Khana; Colenso Mosque; Siraatul Haq Islamic School and Bergville** hold the view that the minimum age requirement should be omitted from the draft Bill. This view is endorsed in the joint submission by **F Noormohamed, H Rawat and F Mall**, as well as by **Madresah In'aamiyyah, Mr M I Patel** and **Fatima Asmal**. The latter respondent argues that at most the marriage of minors can be made subject to the consent of the parents.

3.95 The **Islamic Forum Azaadville** is concerned that this clause may outlaw the authority to marry non-South Africans, and although confident that this is not the intention, feels that amplification is required.

3.96 The **Women's Legal Centre** supports the provision as it currently stands, but suggests that the provisions of section 11(1) and (2) of the Marriage Act be incorporated: a marriage may be solemnized by a marriage officer only and unauthorised solemnization should be an offence.

3.97 The **Gender Unit** declares that consent to the marriage should be actual, informed and in writing; that special provision should be made for illiterate parties; that both parties be required to complete a prescribed 'consent form' reflecting their consent, the matrimonial

property regime and dower; that the marriage officer must inform the parties about what they are consenting and the consequences thereof; and that the marriage officer must be satisfied about the parties' consent and their understanding of the consequences. The respondent also suggests that subclause (9) should not contain the words "or any other reason" as it is too vague. It was also submitted that the age of either parties should be the same.

3.98 The **Young Men's Muslim Association** and the **Islamic International Research Institute** submit that the age restriction is not recognised in Islamic law; that the intervention of the Minister and his or her consent is totally unacceptable; and that the clause clearly indicates the right of a non-Muslim to override an Islamically valid *nikah*.

3.99 The **Association of Muslim Lawyers** suggests that an application by a minor for permission to enter into a marriage contract must be directed to the Director-General of Muslim Affairs, who must be a Muslim person and who has acquired, under certification, knowledge of Muslim Personal law. All references to the Minister in this clause must consequently be adapted to incorporate the suggestion.

3.100 **Mr M S Sulaiman** argues that the competency of the legislature to legislate for the validity of Muslim marriages is extremely questionable. He does not place in dispute the legislature's competency to recognise a Muslim marriage, or to recognise a Muslim marriage satisfying certain requirements as a valid marriage in *South African law*, without qualifying it as a valid *Muslim marriage*. The respondent also refers to the fact that the Islamic rules regarding minority and majority, particularly in the context of marriage, differ from what is set out in the draft Bill. Finally the respondent suggests that the introductory words in subclause (5) be amended to read "Notwithstanding the age requirement in subsection 5(1)(a) ..." as subclause (1)(a) does not contain a prohibition, but merely a requirement for validity. The **Muslim Assembly (Cape)** submits that subclause (4) should be deleted as it contradicts the provisions of subclause (1).

3.101 The **Muslim Assembly (Cape)** as well as the **Institute of Islamic Shari'ah Studies** submit that "minority" in subclause (3) should be defined.

3.102 The **Islamic Careline** submits that the validity of Muslim marriages need to include the express injunction of 'offer and acceptance' by the prospective spouses. The respondent also points out that there seems to be no mention of witnesses to the *Nikah* which is also an injunction for the validity of a Muslim marriage. In the joint submission by **F**

Noormohamed, H Rawat and F Mall concern is expressed about the omission of the requirement of witnesses, as such omission will result in the dilution and distortion of the true Islamic requirements and consequently result in Muslims deviating from the proper practice of Islam. This view is echoed by **Madresah In'aamiyyah**.

3.103 **Jameah Mahmoodiyah** suggests that clause 5(1)(a) should be deleted and replaced by the following:

- (1) For a Muslim marriage entered into after the commencement of this Act to be valid -
 - (a) the prospective spouses must mutually consent or their agents or *Shar'i* guardians must consent to their marrying each other in specified Islamic wordings; and
 - (b) this consent must be given in the presence of two males or one male and two females.
- (2) If either or both of the spouses are minors, then his or her *Shar'i* guardian must consent to the marriage.

3.104 The respondent also submits that subclauses (5), (7) and (8) should either be deleted or the words "person under the age of 18 years" must be replaced by the word "minor".

3.105 **Ms Z Bulbulia** considers it to be essential to additionally list the requirements of a valid marriage contract. These would include offer and acceptance, legal capacity, sanity, the presence of witnesses (either two males or a male and two females), eligibility and the contract form. **Jamiatul Ulama (Transvaal)** submits that the conditions for a valid *nikah* are legal capacity, eligibility, guardianship and proxy, witnesses and form.

3.106 The **Muslim Judicial Council** proposes that a new subclause be inserted after subclause (2), reading as follows: "A woman never previously married, may not enter into marriage unless with the express permission of her guardian, or in his absence or refusal, with the permission of the head of the marriage officers' organisation".

3.107 **Masjidul Quds** points out that there are differences among the various Schools of Interpretation regarding permission to get married, and suggests that an arbitration system with agreed terms of reference will resolve the problem appropriately in terms of the School of Interpretation chosen by the parties.

3.108 In Cape Town it was suggested that the proceedings should be translated in a language that is understood by legal guardians and witnesses.

3.109 **Sheikh A Sedick** considers “proxies” to be ambiguous, but if it refers to “Wali”, he opines that it should be specified and the conditions stipulated. The respondent also proposes that the word “two” before the word “witnesses” be omitted as it is an existing religious requirement.

3.110 The **Islamic Forum Azaadville** raises the issue that in reality it is the *Wakeel’s* (guardian’s) duty to perform the *Nikah* – ie the confirmation of the marriage contract (and not the Imam or Moulana). They contend that the draft Bill totally ignores the role of the *Wakeel*; the marriage officer appears to be a substitute for the *Wakeel*; the marriage officer’s duty and qualifications are not defined; and the appointment and removal of the marriage officer has not been clarified.

3.111 The **Islamic Careline** recommends that the minimum age for both spouses should be consistent with present South African statutes (clause 5(1)(d)), and that clause 5(9) should also preclude “marriage” or union of same sex partners. In Cape Town it was proposed that the ages should be the same – 18 years – for both genders in clause 5(1)(d) in view of constitutionality.

3.112 Mr H Sader suggests that the question of age could be resolved by the wording “the prospective groom must satisfy the Marriage Officer that he is competent to enter into the marriage”.

3.113 Judge Farlam pointed out that there is no sanction for a contravention of the prohibition in clause 5(2). This point was also made by the Muslim Youth Movement.

3.114 In Cape Town it was proposed that the phrase “marriage with another party” be inserted in clause 5(2).

Evaluation of comment

3.115 The Commission considered all the submissions in relation to the age of the parties and agreed that the age of the parties should be the same, namely 18 years. Consent may in any event in appropriate circumstances be obtained for persons under that age to marry.

3.116 In addition clause 5(1) was broadened to cover a marriage by way of proxy, and to expressly provide for the presence of witnesses at the time of conclusion of a Muslim

marriage, as required by Islamic law.

3.117 The concern expressed by certain respondents in relation to consent by the legal guardians according to the Shafi School of Interpretation was duly considered, and a reference to the *Wali* (legal guardian) has been included. Authority to consent to a marriage of people below the marriageable age can be delegated by the Minister and, in the Commission's view, the Minister can be prevailed upon to make such delegation to Muslim authorities. Regarding concerns about actual consent, the proposed provision provides that there should be consent, and Islamic law makes it obligatory for marriage officers to be satisfied in this respect.

Clause 6: Registration of Islamic marriages

3.118 The following clause on the registration of Islamic marriages appeared in the draft Bill proposed in Discussion Paper 101:

Registration of Islamic marriages

- 6.** (1) An Islamic marriage -
- (a) entered into before the commencement of this Act, 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
 - (b) entered into after the commencement of this Act, must be registered as prescribed at the time of the conclusion of the marriage or within such longer period as the Minister may from time to time prescribe by notice in the Gazette.
- (2) It shall be the duty of the parties to the marriages contemplated in paragraphs (a) and (b) of subsection (1) to cause such marriages to be registered.
- (3) No marriage officer shall register any 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 No. 71 of 1986);
 - (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).

- (4) The marriage officer must –
- (a) if satisfied that the spouses concluded a valid Islamic marriage, record the identity of the spouses, the date of the marriage, the Dower agreed to, whether payable immediately or deferred in full or part, and any other particulars prescribed, and must register the marriage in accordance with this Act and the regulations as prescribed;
 - (b) issue to the spouses a certificate of registration, bearing the prescribed particulars; and
 - (c) forthwith transmit the relevant records to a regional or district representative designated as such under section 21(1) of the Identification Act, 1986.

(5) An Islamic marriage shall be contracted in accordance with the formulae prescribed in Islamic law, including *Tazawwajtuha* and *Nakahtuha* (“I have married her”). Such a marriage shall be concluded by the parties or their proxies in the presence of a marriage officer. A marriage officer in so concluding an Islamic marriage shall, after the commencement of this Act, cause such marriage to be registered in accordance with the provisions of subsection (4).

(6) If for any reason an Islamic marriage has not been registered, any person who satisfies a marriage officer that he or she has a sufficient interest in the matter may apply to the marriage officer in the prescribed manner to enquire into the existence of the marriage.

(7) If the marriage officer is satisfied that a valid Islamic 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).

(8) If the marriage officer is not satisfied that a valid Islamic marriage was entered into by the spouses, he or she must refuse to register the marriage.

- (9) A court may, upon application made to that court, order -
- (a) the registration of any Islamic marriage; or
 - (b) the cancellation or rectification of any registration of a Islamic marriage effected by a marriage officer.

(10) A certificate of registration of an Islamic marriage issued under this section or any other law providing for the registration of Islamic marriages constitutes *prima facie* proof of the existence of the Islamic marriage and of the particulars contained in the certificate.

(11) Failure to register an Islamic marriage does not, by itself, affect the validity of that marriage.

Comments received on clause 6:

3.119 **Prof A Tayob** draws attention to the difference in time period allowed for the registration of the marriage in terms of subclause (1)(a) - (12 months) and that allowed for entering an ante-nuptial contract or other property regime in terms of clause 8(1)(a) - (six months). In his view there should be no time difference. The **Society of Advocates of**

KwaZulu-Natal argues that the 12 month period leaves a window for potential prejudice, particularly for the wife and children, and recommends that the period be reduced to six months. The **Commission on Gender Equality** on the other hand suggests that the period be extended to 24 months, since delays may be expected in the various Home Affairs departments.

3.120 **Darul-Ihsan Research and Education Centre**, referring to the duty of the parties to cause marriages to be registered, holds the view that such duty infringes on the individual's choice and constitutional rights to register or not to register the marriage. Regarding subclause (5) the respondent submits that no mention is made of witnesses and dower, which are basic elements of the marriage contract. These views are shared by **Jamiatul Ulama (KwaZulu-Natal)** and **Masjidul Quds**. The latter respondent also suggests that the marriage certificate should be made out in quadruplicate, a copy to be divided between each of the married spouses, one to the marriage registrar and one to serve as a record for the marriage officer.

3.121 **Jamiatul Ulama (Transvaal)** argues that a marriage officer should be a second choice when it comes to the registration of marriages, and that a well established recognised Islamic institution would better fit the profile.

3.122 **Moulana Y A Musowwir Tive** argues that the Ministry of Home Affairs should not find it problematic in registering a Muslim marriage as long as the basic conditions of marriage have been fulfilled, ie consent was given, the parties are of the required age or are mature enough for differentiating between right and wrong, and the marriage officers met the stated conditions and prerequisites.

3.123 The **Women's Legal Centre**, concerned about ignorance of the existence of the Act even after implementation, suggests that there should always be an opportunity for a marriage which was entered into prior to the Act to be registered and that lack of registration should never prejudice the parties to a marriage when they seek to dissolve the marriage and to assert their maintenance or other proprietary rights. The respondent also argues that only one party needs to register the marriage, as it will assist a party in those cases where there is a recalcitrant spouse. It is also pointed out that there may be a contradiction regarding the issue of consent, as clause 6(5) provides for proxies, which may be insufficient. The respondent suggests that both parties should always be present for a valid marriage to be concluded. Although expressing agreement with the flexibility included in clause 6(6), the **Women's Legal Centre** suggests that it is essential to provide that either of

the parties to a marriage may apply to register the marriage.

3.124 The **Society of Advocates of KwaZulu-Natal** submits that the reference to proxies in clause 6(5) should either be elaborated to conform to the general rules of *Shari'ah* on proxy or to add the words "or their proxies in conformity with the *Shari'ah*".

3.125 The **Association of Muslim Lawyers** points out that the onus of registering a marriage rests on the marriage officer in terms of subclause (5). It is suggested that failure to register a marriage should involve a penalty for the marriage officer and that such officer's authority to act as marriage officer be withdrawn. The respondent further recommends that a paragraph (d) be added to subclause (3), requiring each of the parties to provide the marriage officer with a medical certificate with regard to their HIV-status. The **Society of Advocates of KwaZulu-Natal** also submits that it is fit and proper that the interest of an unborn child be protected by a declaration of the spouses' HIV-status prior to the conclusion of the marriage.

3.126 The **Commission on Gender Equality** submits that subclause (3)(c) should be removed, as it is not clear why it is necessary.

3.127 The **Young Men's Muslim Association** and the **Islamic International Research Institute** state that the entire clause undermines the sacred bond of *nikah*, whose conclusion is outlined in clear *Shar'i* terms and that it grants the State to interfere in what Islam has validated. It opens the way for *Fitna* and interference by interested parties.

3.128 **Prof A Tayob**, on the other hand, commends the Commission for making a strong case for registering existing marriages, and at the same time allowing for the fact that not everybody would do so. In his view it may be particularly interesting to see how often those who are opposed to the Bill will nevertheless find it useful for the courts to recognise such marriages when disputes arise.

3.129 **Mr M S Sulaiman** submits that there is confusion regarding the presence of the marriage officer and the role of this officer in the conclusion of the marriage. In his view the confusion is created by an insufficient distinction being drawn between marriages in terms of Islamic law and in terms of the general South African law regarding marriages. He calls upon the Commission to attach more weight - or rather that weight be more clearly attached - to the Islamic law requirements in this regard. He also suggests that the role of the marriage officer be restricted to registration of the marriage, ensuring that all the necessary

requirements have been satisfied, and that the role of the marriage officer in actually concluding the marriage be limited to those circumstances in which such officer would in terms of Islamic law be entitled to do so. It may be prudent to require the presence of the marriage officer at the conclusion of the marriage, even though this would not be a requirement of Islamic law for its validity.

3.130 The **Gender Unit**'s submission in regard to the registration of Muslim marriages is reflected under the heading 'new proposals' in the second part of this document.

3.131 The **Islamic Careline** is particularly concerned about clandestine marriages which are entered into and is not sure how the draft Bill will address this problem. The respondent submits that a massive education and awareness campaign should be mobilised so that marital couples as well as young people can become acquainted with the responsibilities, obligations and privileges of a marital relationship. Programmes also need to be put in place where the abuse of spouses can be discussed and dealt with.

3.132 **Ms Z Bulbulia** submits that the registration of the marriage should include the particular *mazhab* of the parties to the marriage, as it will be relevant in the event of disputes arising between the parties.

3.133 The **Muslim Judicial Council** proposes that a new paragraph be added to subclause (3), reading:

- (d) A marriage officer or any other person who performs a marriage of a party, with the full knowledge that such party is a spouse in an existing marriage, and without the permission of the court, shall be liable to:
 - (i) a fine not exceeding R ...; or
 - (ii) have his registration as a marriage officer cancelled.

3.134 The same respondent also proposes that paragraph (a) of subclause (4) should be amended by inserting the words "gifts, in the form of jewellery, precious coins etc. whether given as dowry, gifts or on loan" after the words "deferred in full or part"; that the first two sentences of subclause (5) should be deleted and commence with the words "A marriage officer in so concluding a Muslim marriage shall, after the commencement of this Act, cause such marriage to be registered in accordance with the provisions of subsection (4); and that the words "marriage officer" in subclauses (7) and (8) should be replaced with the word "registrar".

3.135 In Durban it was suggested that the period of 12 months in clause 6(1) should be increased to two years. This suggestion is supported by the **Muslim Youth Movement** and the **Commission on Gender Equality**.

3.136 In Cape Town it was proposed that a penalty should be inserted for marriage officers who do not comply with the provisions of the Bill, while in Durban it was argued that failure of marriage officers to comply with the provisions of the Bill should merely result in their removal from a list of accredited marriage officers.

Evaluation of comment

3.137 The Commission could not accept the rationale of those respondents who, as a matter of principle, were opposed to registration of Muslim marriages. In the Commission's view registration of marriages would ensure certainty, operate as an evidential record, avoid disputes and abuse. The provision relating to the conclusion of a marriage through proxies has been deleted from clause 6 and incorporated in clause 5(1). Regarding the proposal in respect of the imposition of sanctions on a marriage officer where he knowingly registers a marriage, in contravention of the Bill, a sanction has been introduced in clause 6(8).

3.138 On whether the registration particulars should include the *mazhab* of the parties to the marriage, the Commission, after discussion, decided that it is preferable not to incorporate provisions in this regard as the choice of *mazhab* is not directly relevant at the time of registration. It is also considered that in Islamic law each party could choose to retain his or her *mazhab*. The issue could be raised by the parties at the time of dissolution of the marriage in the case of a dispute requiring adjudication by the court or through the newly proposed mechanism on voluntary arbitration in clause 14.

3.139 Moreover, the period for registration of marriages entered into before the commencement of the Act has been increased to two years in line with submissions by a number of respondents. Provision has also been made for a marriage officer to inform the parties about the contractual options open to them at the time of the conclusion of the marriage by referring to the standard forms set out in the regulations and by further informing them that they may structure a contract in whatever form they choose. This is in line with many submissions made.

Clause 7: Proof of age of parties to proposed marriage

3.140 The following clause on the proof of age of parties to the proposed marriage appeared in the draft Bill proposed in Discussion Paper 101:

Proof of age of parties to proposed marriage

7. 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 may refuse to solemnize a marriage between them unless he 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.

Comments received on clause 7:

3.141 The **Young Men’s Muslim Association** and the **Islamic International Research Institute** contend that this clause appears to necessitate *be-pardagee* (the need for a woman to expose her face to a *ghair-mahram*). Thus far, it is submitted, marriages have been concluded without the need for the bride to appear in person at the venue of solemnization.

3.142 The **Waterval Islamic Institute** suggests that the provision be expanded by adding the words “all this to be carried out in terms of Islamic law” at the end of the clause.

3.143 **Jameah Mahmoodiyah** submits that the phrase “of an age” should be replaced by “a minor” and the words “of some other person” by “his or her *Shar’i* guardian”.

3.144 The **Gender Unit** supports the Commission’s proposals contained in clause 7.

Evaluation of comment

3.145 The Commission has considered the comments received on clause 7, but decided to retain the provision in its present form - although a few stylistic adjustments were made. The need for a woman to expose her face is permitted in the case of genuine need, according to Islamic law. In respect of appearance before a marriage officer, this kind of interaction is permissible in terms of Islamic law.

Clause 8: Proprietary consequences of Islamic marriages and contractual capacity of spouses

3.146 The following clause on the proprietary consequence of Islamic marriages and contractual capacity of spouses appeared in the draft Bill proposed in Discussion Paper 101:

Proprietary consequences of Islamic marriages and contractual capacity of spouses

8. (1) An Islamic marriage entered into before or after the commencement of this Act shall be deemed to be a marriage out of community of property, unless the proprietary consequences governing the marriage are regulated, by mutual agreement of the spouses, in an ante-nuptial contract which shall be registered in the Deeds Registry –

- (a) in the case of a marriage entered into before the commencement of this Act, within six months from the date of commencement of this Act; and
- (b) in the case of a marriage entered into after the commencement of this Act, within six months from the date of execution of the contract or within such extended period as the court may on application allow.

(2) Notwithstanding any provision to the contrary contained in any other law, an ante-nuptial contract referred to in subsection (1) need not be attested by a notary.

(3) Spouses in an Islamic marriage entered into before or after the commencement of this Act may jointly apply to a court for leave to change the matrimonial property system, which applies to their marriage or marriages and the court may, if satisfied that –

- (a) there are sound reasons for the proposed change;
 - (b) sufficient written notice of the proposed change has been given to all creditors of the spouses for amounts exceeding R500 or such amount as may be determined by the Minister of Justice by notice in the Gazette; and
 - (c) no other person will be prejudiced by the proposed change,
- order that the matrimonial property system applicable to such marriage or marriages will no longer apply and authorise the parties to such marriage or marriages to enter into a written contract in terms of which the future matrimonial property system of their marriage or marriages will be regulated on conditions determined by the court.

(4) In the case of a husband who is a spouse in more than one Islamic marriage, all persons having a sufficient interest in the matter, and in particular the husband's existing spouse or spouses, must be joined in the proceedings.

(5) Where the husband is a spouse in an existing civil marriage, and in an Islamic marriage, all his existing spouse or spouses must be joined in such proceedings.

(6) A husband in an Islamic marriage who wishes to enter into a further Islamic marriage with another woman after the commencement of this Act must make an application to the court for permission to do so, and to approve a written contract which will regulate the future matrimonial property system of his marriages.

(7) When considering the application in terms of subsection (6), the court may -

- (a) grant permission on the basis of Islamic law if the court is satisfied that -
 - (i) the husband has sufficient financial means;
 - (ii) there is no reason to believe, if permission is granted, that the husband shall not act equitably towards his spouses;
 - (iii) there will be no prejudice to existing spouses;
- (b) in the case of an existing marriage which is in community of property or which is subject to the accrual system -
 - (i) terminate the matrimonial property system which is applicable to that marriage; and
 - (ii) order an immediate division of the joint estate concerned in equal shares, or on such other basis as the court may deem just;
 - (iii) order the immediate division of the accrual concerned in accordance with the provisions of chapter 1 of the Matrimonial Property Act, 1984 (Act No. 88 of 1984), or on such other basis as the court may deem just;
- (c) make such order in respect of the prospective estate of the spouses concerned as is mutually agreed, or, failing any agreement, the marriage shall be deemed to be out of community of property, unless the court for compelling reasons decides otherwise;
- (d) grant the order subject to any condition it may deem just, or refuse the application if in its opinion the interests of any of the parties involved would not be sufficiently safeguarded by means of the proposed contract.

(8) All persons having a sufficient interest in the matter, and in particular the applicant's existing spouse or spouses and his prospective spouse, must be joined in the proceedings instituted in terms of subsection (6).

(9) If a court grants an application contemplated in subsections (3) or (6), the registrar or clerk of the court, as the case may be, must furnish each spouse with an order of the court including a certified copy of such contract and must cause such order and a certified copy of such contract to be sent to each registrar of deeds of the area in which the court is situated.

(10) A husband who enters into a further Islamic marriage, whilst he is already married, without the permission of the court, in contravention of subsection (6) shall be guilty of an offence and liable on conviction to a fine not exceeding R50 000.

Comment received on clause 8:

3.147 **Darul Uloom Zakariyya** submits that subclause (1) should exclude the applicability of the accrual system as it goes against Islamic law.

3.148 **Ms Z Bulbulia** holds the view that it should be expressly stated that a Muslim marriage is a marriage out of community of property, out of profit and loss and excludes the accrual system. The parties to the marriage may, however, state in a separate contract whether a partnership agreement is intended. **Khalid Dhorat** also states that a Muslim marriage is not only out of community of property, but excludes the accrual system. The respondent is concerned that as our case law has already awarded a universal partnership in some instances, where 50% of the assets went to the wife, it in effect rendered it to be an in community of property regime, which is not permissible in the *Shari'ah*.

3.149 The **Muslim Youth Movement** argues that clause 8(1) does not recognise that in practice marital property accrues during the subsistence of the marriage that forms part of a joint marital contract. In their view an Islamic marriage that is deemed to be out of community of property excluding the accrual system is a synthetic imposition that takes away rights ordinarily acquired by custom and long standing practice in a marital context by legislative *fiat*. It is submitted that women will suffer the brunt of this imposition and continue to be prejudiced – even more so because of the onerous burden of having to prove their rights in property in an Islamic marital context. The **Commission on Gender Equality** echoes these observations and recommends that the default position for all marriages be in community of property.

3.150 The **Women's Legal Centre** submits that if the Bill provides for a proprietary system which is out of community of property, it also has to include the obligations of husbands as a proprietary consequence of such marriages, in order to afford women the protection that they have under Islamic law and to ameliorate the consequences for women of only entrenching “out of community of property” as the sole proprietorial consequence of Islamic marriages. The respondent proposes the addition of the following two subclauses to clause 8:

- (2) A wife in an Islamic marriage is entitled to be maintained by her husband according to his means and her reasonable needs during the subsistence of the marriage.
- (3) Unpaid maintenance which is due to a wife or maintenance paid by a wife to her husband accumulates as a debt in her favour and does not prescribe. The Prescription Act of 1969 does not apply to such a debt.

3.151 In Pretoria the six month period in clause 8(1)(b) was questioned and it was suggested that it should be three months.

3.152 The **Association of Muslim Lawyers**, referring to subclause (1)(a), submits that the

provision creates an anomaly. It provides for the registration of an ante-nuptial contract within a period of six months if the marriage was entered into before the commencement of the Act. A marriage before the commencement of the Act must be registered in terms of clause 6(1)(a). The contract can only be registered within the period of six months after the date of registration of the marriage, which period should in any event be reduced to three months. With regard to subclause (2), the respondent avers that the services of a notary public must be retained to maintain the standard demanded by the law and that the contract should be registered in the Deeds Registry within three months of the date of its execution. The **Association of Muslim Lawyers** further submits that subclause (3) should be amended to stipulate a time frame in which to make application to court for leave to change the matrimonial property system. An indefinite period should not be allowed. In any event, the respondent proposes that the application be made within two years of the date of registration of the marriage in terms of clause 6(1)(a). The respondent finally considers subclause (6) to be an onerous provision and against the spirit of Islam. In the respondent's view what could be provided for is that no spouse in an existing marriage may enter into a second marriage unless the first marriage has been registered. The parties to a second marriage will then have to make a declaration with regard to their marital status prior to the proposed second marriage, so as to enable the marriage officer to advise parties of the implications of the second marriage and its consequences. The appointment of a Muslim Tribunal should be considered, to whom the marriage officer may refer an application by the parties to enter into a second marriage.

3.153 The **Society of Advocates of KwaZulu-Natal** considers it to be preferable and closer to justice and equity that a presumption operates in favour of the party seeking to change the matrimonial regime from community of property to one excluding community of property if there is evidence that, in addition to the civil marriage, the parties had concluded a matrimonial contract in terms of the laws of Islam.

3.154 The **Women's Legal Centre** points out that clause 8(3) limits its application to existing marriages *in community of property*. They suggest that this qualifier should be deleted in order that persons in an existing marriage contracted according to any property system may apply to court to change their matrimonial property system – this will afford spouses in Islamic marriages the same rights as spouses in other types of marriages.

3.155 The **Institute of Islamic Shari'ah Studies** submits that subclause (6) should be redrafted to read as follows:

A husband in a Muslim marriage who wishes to enter into a further Muslim marriage with another Muslim woman must make an application to the relevant Muslim jurist committee herein who shall have to ascertain through factual information and tested documentation supplied by the applicant and prospective husband to see if he is entitled to another wife in terms of the Islamic law and issue a Document of Consent if he fulfills the conditions and if not, to refuse the application. If the application is consented to, such will be formally admitted by the required judicial process for administrative confirmation. If the application is refused, both the applicant, his existing wife or wives and the woman whom the applicant intended to marry, shall be so informed of the refusal and ground(s) thereof. Such a duly signed and dated notice must be sent by registered mail to the parties mentioned.

3.156 The **Muslim Judicial Council** proposes that subclause (6) be reformulated as follows:

A husband in a Muslim marriage who wishes to enter into a further Muslim marriage with another woman after the commencement of this Act must make an application to court to approve a written contract which will regulate the future matrimonial property system of his existing marriage.

3.157 The same respondent also recommends that paragraph (a) of subclause (7) should be deleted.

3.158 The **Women's Legal Centre**, supported by the **Commission on Gender Equality**, urges the Commission, on the grounds of the ignorance and illiteracy of many Muslim women, to reconsider the provision in order to allow the default position to be a marriage in community of property which may then be changed by mutual agreement. The respondent also points out that there are Islamic schools of thought who argue that MPL provides for a concept of alimony, the recognition of a partner's tangible and intangible contributions to the joint estate and division of the joint estate based on equity. In the alternative the respondent suggests that it is necessary to include a provision which provides for a court to divide the assets of the parties equitably upon dissolution of the marriage or change of the proprietary system where the existing system causes injustice or inequity, on application by one of the parties to the marriage. The respondent further submits that provision be made for only one party to apply to court change the matrimonial property system and to join the other party. In addition, it is suggested that provision be made for parties to enter into the accrual system and that the provisions of the Matrimonial Property Act be applicable in this regard.

3.159 The **Gender Unit** recommends that the envisaged matrimonial property regime should be changed from an out of community of property to either an automatic 'in community of property' or automatic 'out of community of property subject to accrual' regime in respect of monogamous marriages entered into before or after the commencement of the

Act, while simultaneously affording the parties the option to contract out of the automatic regime.

3.160 **Ms Nazeema du Toit**, although fully agreeing with the proposed legislation to recognise Muslim marriages, also disagrees with the proposal that the default position should be a marriage out of community of property. She states:

I have been married by Muslim rites since 1974. At the time of our marriage my husband was an architectural student. I was the sole bread winner during and after his graduation for several years. I brought my administrative skills to his practice, paid child maintenance for two children from his previous marriage, was responsible for rent, food, medical aid, insurance premiums, etc. He runs a successful architectural practice and owns two houses, the office premises and two plots. All the assets are in his name. I regard the above assumption of anc or the “accrual system” to be grossly unfair if my contribution in the marriage is taken into account. I have never been maintained or given an allowance. The financial arrangements have had to change since 1997 when I became ill and was hospitalised for 12 weeks and thereafter was unemployable. I work at his practice on a part-time basis and am paid a salary way below what I could have earned in the market place.

3.161 The views expressed by the **Islamic Careline** correspond with those of **Ms du Toit** above. The respondent also urges that provision should be made for rehabilitative maintenance as most Muslim wives have little or no work experience due to the fact that they prefer to remain homemakers during the course of their marriages. Such maintenance would allow women to become skilled in some activity so that they can then be able to maintain themselves after the *Iddah* period.

3.162 The **Waterval Islamic Institute** proposes that the mutual agreement referred to in subclause (1) must be individual and not marital. Regarding subclauses (4) and (5), the respondent submits that instead of the wives being joined in the proceedings, they be informed. The respondent also considers subclauses (7) to (10) to be un-Islamic and calls for their deletion.

3.163 Regarding subclauses (6) and (7)(a), **Darul Uloom Zakariyya** considers court permission for entering into more than one marriage to be un-Islamic and submits that the clauses be removed. **Moulana Y A Musowwir Tive**, arguing that Muslim Personal law should automatically comply with *Shari’ah* being its only constituent (and no other judicial system or secular law added to it), also points out that this clause is a violation of section 14 of the Constitution in that the person entering into another marriage without (secular) court permission will now be guilty of an offence. **Zakariyya Islamic University** also condemns the restrictions placed on polygynous marriages, stating that Islam does not require

permission to be obtained to contract further marriages. The **Women's Legal Centre** recommends that a further condition be added to subclause (7)(a), namely that the existing spouse has consented to the marriage. Regarding subclause (7)(c), the respondent suggests that it is preferable that a court will make an order that is just and equitable in the circumstances and that deeming all marriages to be out of community of property is not going to advance the equality for women.

3.164 **Prof A Tayob**, referring to subclause (7)(a)(iii) which provides that there should be no prejudice to existing spouses, submits that the clause is not wide enough. There should at least be an obligation on the part of the courts to expressly take the views of the existing wife into consideration (perhaps in a formally presented affidavit). The respondent also commends the Commission for what he calls the "safety-nets", such as the legal requirements for polygynous marriages, that have been built into the proposals. The **Society of Advocates of KwaZulu-Natal**, referring to the same subclause, holds that the requirement relating to no prejudice will cause considerable difficulties to the presiding officer in the exercise of a discretionary power, which power has to be exercised judicially. The respondent refers to legislation in Iraq and Syria which encompasses the fulfilment of two conditions, namely, that the husband is financially capable of supporting more than one wife and that there is a legitimate interest. In the respondent's view the finding of a legitimate interest will be more practical in the exercise of a judicial discretion than a finding that there will be no prejudice to existing spouses.

3.165 Although the **Mowbray Mosque Congregation** is of the opinion that polygyny should not be permitted at all, the respondent submits that financial considerations should not be considered a dominant factor in this regard as it will mean that only rich men will be permitted polygynous marriages. Moreover, where application is made for a further marriage, evidence of the applicant's ability to support more than one family financially and also supporting evidence that he is physically sound and capable of satisfying the physical needs of more than one woman must be produced.

3.166 The **Gender Unit** submits that the practice of polygyny should be made unlawful after the commencement of the Act, and that the parties who have entered into such marriages before the commencement of the Act should be required to conclude a written agreement, registered by a marriage officer and confirmed by the court, which addresses the division of property and sharing of profits. If, however, the practice is retained, the respondent suggests the following amendments to clause 8:

- * Subclause (10) should include a period of imprisonment in the event that the husband fails to pay a fine.
- * In respect of subclause (6), the written contract should incorporate a matrimonial property regime that sets out the following: each spouse to bear her or his own losses; the wives to be entitled to retain their own assets; and each wife to be entitled to share in the husband's profits.
- * In respect of subclause (7)(c), and in the event that the written contract does not reflect the above matrimonial property arrangement, the court should not deem the marriage to be out of community of property, but should make an order directing that the matrimonial property regime will be set out as follows: each spouse to bear her or his own losses; the wives to be entitled to retain their own assets; and each wife to be entitled to share in the husband's profits.
- * A husband must obtain the written consent of the existing wife/wives that she/they consent/s to him taking a subsequent wife. In considering an application by a husband to enter into a polygynous marriage, the court must have regard that such consent was obtained, and that the consent was given freely and voluntarily, without duress or undue influence. Failure to obtain written consent should constitute sufficient ground for the annulment of the subsequent polygynous marriage, should the husband enter into it without the permission of the court.
- * Should the existing wife or wives give their consent to the husband to enter into a subsequent marriage and she or they choose to remain in the existing Muslim marriage, the wife or wives should receive remuneration or compensation from the husband.
- * Should the existing wife or wives refuse to give their consent to the husband to enter into a subsequent marriage and she or they choose to dissolve their existing Muslim marriage, she or they would have the option of instituting divorce proceedings in accordance with the respondent's proposal regarding dissolution of the Muslim marriage set out under the discussion of clause 9 below. A new written contract must then be entered into between the husband and the remaining spouse/s and confirmed by a court.

3.167 From the **Islamic Forum Azaadville's** reading of the Bill, polygynous marriages are discouraged and the door for abolishing this practice will have been opened. In the respondent's view the moral obligation rests with the individual and not the State. These views are endorsed by **Ms F H Amod** and in the joint submission by **Mss S Khan, A Randaree, F Ajam, F Rawat** and **Y Khan**. The **Muslim Assembly (Cape)** would prefer the emphasis of the provisions regarding polygyny to be on ensuring reduction in adultery rather

than deterring polygynous marriages. The respondent is concerned that too strict a policy towards applicants for a second marriage would drive men to adultery. The respondent suggests that in the event of an application for a second marriage, a religious marriage be concluded without the requirement of secular registration; that such marriages be noted on the records of the husband, thus alerting unsuspecting marriage officers; and that co-operation with the Department of Social Development be secured so that the person seeking a second polygynous marriage should produce a court document stating whether he has dependants and/or a marriage with another woman which has not been recorded.

3.168 **Darul-Ihsan Research and Education Centre** avers that although the draft Bill has not outlawed the practice of polygyny summarily, such restrictions have been placed around this valid Islamic practice that makes its practical realisation virtually impossible or extremely difficult. This is tantamount to interference in Islamic law and an imposition of that which has not been imposed by the Supreme Law Maker Himself in the Holy *Qur'an*. Pointing to divergent schools of thought and pronouncements on the institution of polygyny, the respondent states that the position taken in the draft Bill resembles very closely the wording and arguments of Tanzil-ur-Rahman, who espoused support for state regulation of polygyny. It has to be borne in mind that his position on state regulation is posited in the context of a Muslim country such as Pakistan, with a Muslim judiciary, of whom it would be expected to respect and uphold the values of *Shari'ah*. The respondent continues that the draft Bill overplays the role of financial capacity, which in any event is a relative concept, and also perceives the absence of 'prejudice to existing spouses' as a highly subjective and nebulous requirement. It is also impossible, in the respondent's view, for a court to determine beforehand whether a husband will act inequitably towards his wives if permission for polygyny is granted. **Darul-Ihsan Research and Education Centre** proposes that instead of attempting to regulate polygyny on the basis laid out in the draft Bill, it would be more appropriate for the law to take its due process in the instance of abuse in a polygynous marriage. If the husband is guilty of inequality or abuse towards any of his spouses, appropriate sanction could be applied to him and relief accorded to the aggrieved spouse. The respondent further proposes that in order to ensure that spouses do not transgress or violate mutual duties and rights, the draft Bill should contemplate the imposition of some kind of assessment criteria in determining the knowledge level of spouses on basic matrimonial duties and rights. This could assume the form of a written examination, administered and regulated by *bona fide* Islamic educational institutes for prospective spouses before contracting marriage so as to minimise the prospects of abuse and infringement of rights. The respondent also criticises the imposition of what is considered to be an excessive and disproportionate fine which has no precedent in either the Customary Marriages Act or civil

law marriages.

3.169 The views set out by the previous respondent are endorsed by the **United Ulama Council**. This respondent additionally questions the highly subjective criteria of “sufficient financial means” and “prejudice to existing spouses”. The following reformulation of subclause (7)(a) is proposed:

When considering the application in terms of subsection (6), the court shall not withhold permission unless it is satisfied that the husband is not able to maintain equality between his spouses as prescribed by the Holy *Qur’an*.

3.170 **Jamiatul Ulama (KwaZulu-Natal)** is not convinced that there is any legal basis for the regulation of polygyny, and suggests that the issue requires further research and investigation. The respondent also holds that the proposed fine appears excessive and disproportionate, and should either be omitted or reconsidered.

3.171 **Jamiatul Ulama (Transvaal)**, agreeing with the views set out in the previous paragraphs, suggests that the consequences of a polygynous marriage should be regulated by contract.

3.172 **Mr M I Patel**, holding that the restriction of polygyny is not acceptable in *Shari’ah*, suggests that in order to curb abuse, provision should be made that if a person who has contracted a polygynous marriage is found guilty of not treating his spouses equally, he should be held liable for specified punitive measures. **Fatima Asmal** considers that the Bill makes polygynous marriages virtually impossible, in direct contrast to Islamic law.

3.173 In the joint submission by **F Noormohamed, H Rawat and F Mall** a concern, echoed by **Masjidul Quds**, is expressed regarding the requirement relating to the husband’s financial means. Besides being vague, the respondents submit that neither the *Qur’an* nor *Sunnah* stipulates financial means as a requirement for the acceptability of polygyny. The respondents recommend that the law should specify a requirement for compulsory counselling provided by the State for spouses and families of polygynous marriages.

3.174 The following institutions aver that the position regarding polygyny in the draft Bill is not the correct Islamic position; that it must be removed and that the penalty of R50 000 must also be eliminated: **Woodstock Moslem Congregation**; the **Careers Research and Information Centre**; **Masjidul Jumu’ah Westridge**; **Goldfields Muslim Jamaat**; **Goolhurst Islamic Educational Society**; **Islamic Da’wah Movement**; **Siddique Islamic**

Centre; Heidelberg Muslim Jamaat; Al-Jaamia Madrassa; Nylstroom Muslim Community and Welfare Society; Moulana M J Rahmatullah; Wellington Muslim Community; Homestead Park Islamic Institute; Sunni Ulama Council (Transvaal); Masjid-E-Noor; Baitul - Mahmood; Kempton Park Jamaat Khana; Masjid-E-Omar Farouk; Darul Quraan Lenasia; Soofie Masjid; Vanderbijl Civic Centre Ibaadat Khana; Crescent of Hope; Jaame Masjid; Saaberie Jumma Masjid and Madressa Trust; Ermelo Muslim Jamaat; Shaanul Islam Masjid and Madressah Trust and Masjidus Salaam. This view is also supported by the petitioners, namely **Nurul Islaam Jamaat Khana; Colenso Mosque; Siraatul Haq Islamic School and Bergville**, as well as by **Madresah In'aamiyyah**.

3.175 **Zakariyya Islamic University** foresees that, since many couples contracted civil marriages in community of property due to ignorance, they would now seek to remedy that. The respondent calls upon the Commission to adapt the Bill so that such couples are allowed to mutually agree to alterations to the matrimonial property system and division of their joint estate as they deem fit and to dispense with the requirements imposed under subclauses (3) and (7)(b).

3.176 According to **Darul Uloom Zakariyya** subclause (10) marks the destruction of the institution of polygyny, as it ignores the fact that at times it can be compulsory to take numerous wives. The respondent also disagrees with the proposed penalty, stating that if the justice system is attempting to protect the first wife, the money should not go to the Government. The **Women's Cultural Group** is concerned that the penalty imposed under this subsection, as well as the one contemplated in clause 9(2)(d), may impoverish the joint estate and suggest that flexibility should be given to the court to award some, or the whole, of the fine to the aggrieved party or dependents instead of making payments to the fiscus. The **Islamic Careline** also expresses concern about the penalty and the rationale for the proposed amount. The **Women's Legal Centre** and the **Commission on Gender Equality** support the penalty provision, but also suggest that all marriage officers should by law be required to enquire into the existence of prior Muslim marriages as part of the marriage ceremony. **Ms Z Bulbulia** submits that where a couple is able to reasonably justify the marriage in the absence of the court's permission, a fine should not be imposed but if it is to be imposed, should not exceed R10 000. If it was a marriage of convenience, however, a fine not exceeding R30 000 should be payable. **Masjidul Quds** holds that the fine is disproportionate to the offence and should not exceed R5 000. **Khalid Dhorat** considers the proposed fine to be exorbitant, especially when one considers the income of an average Muslim male, and feels that the proposed provisions regarding polygynous marriages are

unfair to the Muslim male because the second wife too would most probably induce him into such relationship. At the Pretoria workshop it was argued that he prescribed penalty regarding polygynous marriages is not a sufficient deterrent. In Durban the proposal was made that the penalty should be stipulated as “not exceeding an amount of R25 000”, and the possibility of having the penalty distributed amongst the wives instead of it going to the fiscus should be considered. The **Commission on Gender Equality** calls for a stricter fine, and imprisonment for a period not exceeding two years.

3.177 **Jameah Mahmoodiyah** suggests that the penalty provision be removed and replaced by a reasonable sentence of imprisonment.

3.178 The **Young Men’s Muslim Association** and the **Islamic International Research Institute** attack the entire clause on the grounds of too much interference in, especially, the wealth and property of the husband. Other criticisms, apart from those already raised by some respondents above, relate to the first wife’s consent to subsequent marriages which is Islamically unacceptable and “is laughable, to say the least”. According to the respondents the imposition of a penalty under this clause and clause 9(2)(d) is *Zulm* (oppression).

3.179 **Mr M S Sulaiman** cautions that the contract of universal partnership often referred to as a basis for arranging matrimonial property rights in Islamic law in a manner reminiscent of South African law matrimonial property regimes, is not universally recognised by the schools of Islamic law. This form of partnership is, furthermore, subject to significant qualifications by some of the schools of Islamic law that do recognise it. Regarding subclause (3), the respondent is concerned that the provision provides too much potential for an extended period of uncertainty after the court order, regarding the applicable property regime. It would be preferable, in his view, that the parties present to the court their contract for approval, along with their request for termination of the previous property regime, in a manner similar to the provisions of subclause (6).

3.180 **Mr Sulaiman** further suggests that subclause (4) be amended to read: “In the case of *an application in terms of subsection 8(3)* by a husband who is a spouse in more than one Muslim marriage, all persons having a sufficient interest in the *application*, ...”. He also queries the rationale for addressing the authorisation of polygynous marriages under a clause dealing with the proprietary consequences of Muslim marriages. Regarding subclause (7)(a)(iii) he submits that “prejudice” is too widely stated and should be suitably qualified or defined. The respondent finally suggests that subclause (9) be amended to read: “... must furnish each spouse with *a copy of the order of the court* ...”.

3.182 The **Institute of Islamic Shari'ah Studies** suggests that the words "... the court may deem just and which is not in conflict with the contractual marriage agreement of the parties or its spirit." be added to subclause (7)(b)(ii).

3.183 **Adv H K Saldulker** suggests that the following provision should be added:

No marriage officer shall register a further and subsequent marriage unless the husband provides the marriage officer with the order of the court granting the requisite approval in terms of section 8(7).

3.184 The **Muslim Youth Movement** submits that clause 8(10) should also provide for an offence in terms of a person who hinders, obstructs or unduly influences any person, including a spouse, in an Islamic marriage, in the exercise of his or her rights or powers or the performance of the duties conferred upon him or her under this legislation; unlawfully requires any person, including a spouse in an Islamic marriage, to refrain from exercising a right in terms of or under this legislation; or in any manner prevents any person from exercising such right.

Evaluation of comment

3.185 As is evident from the comments set out above, a substantial number of respondents were opposed to the proposed regulation of polygyny as provided for in clause 8(6). These respondents generally considered the proposed preconditions to be too stringent, and that it would effectively lead to closing the door on polygyny. Careful consideration was given to the comments in this regard. Having regard to the practical reality of many cases of abuse resulting in serious hardship to women, it was decided to retain subclause (6), but to reformulate subclause (7), by eliminating the objectionable preconditions, to accord with the formulation suggested by the **United Ulama Council** – which is consistent with Islamic law and which is supported by the legal opinion (*fatwa*) of a distinguished expert in Islamic law, Justice Mufti Muhammad Taqi Usmani. More stringent regulatory provisions are contained in the Muslim Personal law codes of other countries, eg Malaysia. In some Muslim countries the practice has been completely abolished.

3.186 Considerable criticism was also levelled at what was perceived to be an excessive penalty (of R50 000) for a contravention of the provisions of subclause (6). The penalty has, upon reconsideration, been lowered to a fine of R20 000, which effectively eliminates the concerns in this regard.

3.187 Regarding subclause (1), provision was made to specifically exclude the accrual system from a marriage out of community of property in order to accommodate the concerns expressed by some respondents. In addition, subclause (1)(a) was amended to ensure that the written agreement in question is one which is concluded at the time of conclusion of the Muslim marriage, thereby clarifying the matter.

3.188 Subclause (7)(d) was omitted because it was considered to be conferring too broad a discretion to the court, the provisions of paragraph (c) being sufficient. To cater for concerns expressed by Ms du Toit, an appropriate provision (clause 9(7)(b)) was included in accordance with the tenets of Muslim law. A discretion has been afforded to the court to do justice between dissenting parties. Justice is a recurring theme in the *Qur'an* and *Sunnah*.

3.189 Marriage officers have also been barred from facilitating and registering a second marriage unless provided with a court order (subclause (10)), and any person who obstructs or hinders or prevents any person from exercising his or her right in terms of the Act now faces a criminal sanction (subclause (12)).

Clause 9: Dissolution of Islamic marriages

3.190 The following clause on the dissolution of Islamic marriages appeared in the draft Bill proposed in Discussion Paper 101:

Dissolution of Islamic marriages

9. (1) Notwithstanding the provisions of section 3(a) of the Divorce Act, 1979, (Act No. 70 of 1979), or anything to the contrary contained in any law or the common law, an Islamic marriage may be dissolved on any ground permitted by Islamic Law. The provisions of this section shall also apply, with the changes required by the context, to an existing civil marriage insofar as the parties thereto have in the prescribed manner elected to cause the provisions of this Act to apply to the consequences of their marriage.

(2) In the case of *Talaq* the following shall apply:

(a) The husband shall be obliged to cause an irrevocable *Talaq* to be registered immediately, but in any event, by no later than seven days after its pronouncement, with a marriage officer, in the presence of the wife or her duly authorised representative and two competent witnesses.

- (b) If the presence of the wife or her duly authorised representative cannot be secured for any reason, then the marriage officer shall register the irrevocable *Talaq* only in the event that the husband satisfies the marriage officer that due notice in the prescribed form of the intended registration was served upon her by the sheriff or by substituted service.
- (c) The provisions of paragraphs (a) and (b) shall apply, with the changes required by the context, where the husband has delegated to the wife the right of pronouncing a *Talaq*, and the wife has pronounced an irrevocable *Talaq* (*Tafwid ul Talaq*).
- (d) Any spouse who knowingly and wilfully fails to register the irrevocable *Talaq* in accordance with this subsection shall be guilty of an offence and liable on conviction to a fine not exceeding R50 000.
- (e) If a spouse disputes the validity of the irrevocable *Talaq*, according to Islamic Law, the marriage officer shall not register the same, until the dispute is resolved, if the marriage officer is of the opinion that the dispute relating to the validity of the irrevocable *Talaq* is not frivolous or vexatious and has otherwise been fairly raised.
- (f) A spouse shall, within fourteen days, as from the date of the registration of the irrevocable *Talaq* institute legal proceedings in a competent court for a decree confirming the dissolution of the marriage by way of *Talaq*. The action, so instituted, shall be subject to the procedures prescribed from time to time by the applicable rules of court. This does not preclude a spouse from seeking the following relief -
 - (i) an application *pendente lite* for an interdict or for the interim custody of, or access to, a minor child of the marriage concerned or for the payment of maintenance; or
 - (ii) an application for a contribution towards the costs of such action or to institute such action, or make such application, *in forma pauperis*, or for the substituted service of process in, or the edictal citation of a party to, such action or such application.
- (g) An irrevocable *Talaq* taking effect as such prior to the commencement of this Act shall not be required to be registered in terms of the provisions of this Act.

(3) A court must grant a decree of divorce in the form of a *Faskh* on any ground which is recognised as valid for the dissolution of marriages under Islamic Law, including the grounds specified in the definition of *Faskh* in section 1. The wife shall institute action for a decree of divorce in the form of *Faskh* in a competent court, and the procedure applicable thereto shall be the procedure prescribed from time to time by rules of court, including appropriate relief *pendente lite*, referred to in subsection (2)(f). The granting of a *Faskh* by a court shall have the effect of an irrevocable *Talaq*.

(4) The spouses who have effected a *Khul'a* shall personally and jointly appear before a marriage officer and cause same to be registered in the presence of two competent witnesses. The marriage officer shall register the *Khul'a* as one irrevocable *Talaq*, in which event the provisions of subsection (2)(f) will apply with the changes required by the context.

(5) In the event of a dispute between the spouses with regard to the amount of compensation in the case of *Khul'a*, the court may fix such amount as it deems just and equitable having regard to all relevant factors.

(6) The Mediation in Certain Divorce Matters Act, 1987 (Act No. 24 of 1987) and sections 6(1) and (2) of the Divorce Act, 1979 (Act No. 70 of 1979), relating to safeguarding the welfare of any minor or dependent child of the marriage concerned, apply to the dissolution of an Islamic marriage under this Act.

(7) A court granting or confirming a decree for the dissolution of an Islamic marriage -

- (a) has the powers contemplated in sections 7(1), 7(7) and 7(8) of the Divorce Act, 1979, and section 24(1) of the Matrimonial Property Act, 1984 (Act No. 88 of 1984);
- (b) may, if it deems just and equitable, on application by one of the parties to the marriage, and in the absence of any agreement between them regarding the division of their assets, order that such assets be divided equitably between the parties, where-
 - (i) a party has in fact assisted, or has otherwise rendered services, in the operation or conduct of the family business or businesses during the subsistence of the marriage; or
 - (ii) the parties have contributed, during the subsistence of the marriage, to the maintenance or increase of the estate of each other, or any one of them, to the extent that it is not practically feasible or otherwise possible to accurately quantify the separate contributions of each party.
- (c) must, in the case of a husband who is a spouse in more than one Islamic marriage, take into consideration all relevant factors including the sequence of the marriages, any contract, agreement or order made in terms of section 8(3) and (7).
- (d) may order that any person who in the court's opinion has a sufficient Interest in the matter be joined in the proceedings;
- (e) may make an order with regard to the custody or guardianship of, or access to, any minor child of the marriage, having regard to the factors specified in section 11; and
- (f) must, when making an order for the payment of maintenance, take into account all relevant factors.

Comment received on clause 9:

3.191 **Moulana Y A Musowwir Tive** contends that the matters dealt with in this clause must be handed to competent Ulama only to determine the status of a Muslim couple's marriage situation and secular courts should have no power in dissolving a Muslim marriage at all.

3.192 The **Women's Legal Centre** and the **Commission on Gender Equality**, pointing to the provision in subclause (1) that a Muslim marriage may be dissolved on any ground permitted by Islamic law, submit that although *faskh* is defined, the grounds for a *talaq* are

not similarly defined and that it is uncertain what constitutes a valid ground for a *talaq*. Moreover, it is not clear what other grounds which are valid under Islamic law are not contained in the definition of *faskh*. This needs to be spelt out in the Bill. The **Commission on Gender Equality** also suggests an amendment to subclause (2)(b) so that it reads “if neither the wife nor her duly authorised representative as designated by her are not present, then the husband must satisfy the marriage officer that due notice of the registration of the *talaq* was served on the wife.”

3.193 The **Association of Muslim Lawyers** contends that the reference in subclause (1) to the Divorce Act should be omitted, and that a Muslim marriage may be dissolved on any ground permitted under Islamic law. The respondent, supported by **Darul-Ihsan Research and Education Centre** and by **Jamiatul Ulama (KwaZulu-Natal)**, also suggests that the period of seven days in subclause (2)(a) be changed to 21 days, and that the registration of a *talaq* must be lodged with the Registrar of the court to which application will be made for the dissolution of the marriage. Regarding subclause (2)(d), the respondent submits that if the *talaq* is not registered, it shall be of no force and effect and the spouse issuing that *talaq* will have to re-issue it. The respondent also calls for the deletion of subclause (7)(a), stating that the reference to the current Divorce and Matrimonial Property Acts should be omitted. The **United Ulama Council**, supported by **Darul-Ihsan Research and Education Centre**, holds that the power to decide the validity of the *talaq* should not vest with the marriage registrar but rather with a judicial authority, as the qualifications of a registrar are far too basic to pronounce a ruling on the validity or invalidity of a divorce according to Islamic law.

3.194 **Ms Z Bulbulia** proposes that a sympathetic period of 30 days be allowed during which the pronouncement of the irrevocable *Talaq* should be registered. **Masjidul Quds** and **Mr H Sader** also call for an extension of the proposed period of seven days.

3.195 **Jameah Mahmoodiyah** proposes that the following be added to subclause (2)(a): “... an irrevocable *Talaq* and revocable *Talaq* to be registered immediately ... and two competent witnesses. In the case of the revocable *Talaq*, if the husband makes *rujoo'* (ie takes his wife back), he shall be obliged to cause it to be registered immediately. A certificate will be issued stating the amount of *Talaqs* that were issued by the husband and how many *Talaqs* are left.”

3.196 The **Muslim Judicial Council** proposes that subclause (2)(a) should be amended by inserting the words “by no later than 21 court days after it has become irrevocable” after the word “event”. The same respondent also proposes the following changes to the rest of

clause 9:

Subclause (2)(f)(iii)

an application for maintenance for the *Iddah* period;

Subclause (2)(f)(iv)

an application for a conciliatory gift (*mut'ah*), where the husband has pronounced a Talaq without a just and reasonable cause.

Subclause (8)

- (1) Where it is clear to the court that a spouse does not wish to consent to divorce or it appears to the court that there is a reasonable possibility of a reconciliation between the parties, the court shall refer the matter for compulsory mediation to a mediation forum recognised by the court, or approved by the parties.
- (2) Such forum shall endeavour to effect reconciliation within a period of six months from the date of referral by the court, or such further period as may be allowed by the court.
- (3) If the mediation forum is unable to effect reconciliation, it shall issue a certificate to that effect and may append to the certificate such recommendations as it thinks fit regarding maintenance and custody of the minor children, if any, regarding division of property and other matters related to the marriage.

3.197 **Darul Uloom Zakariyya** submits that registration of a *talaq* is important for public record purposes only and that subclause (2)(d) is un-Islamic. The **Waterval Islamic Institute** also considers subclause (2)(d) to be un-Islamic and adds, regarding subclause (2)(f), that monetary capacity in such cases is an un-Islamic burden. **Jameah Mahmoodiyah** proposes that the monetary fine be deleted and that a reasonable sentence of imprisonment should be considered in its place. **Jamiatul Ulama (Transvaal)** submits that the proposed fine is exorbitant and should not exceed R500, while **Masjidul Quds** suggests the amount of R5 000. The **Women's Cultural Group** does not fully appreciate the requirement to register an irrevocable *talaq*, and avers that it has not been properly thought out. It is suggested that the marriage officer must reside within the area where the divorced wife (or husband in the case of a delegated *talaq*) resides, as it seems impractical for a spouse to have to seek out a marriage officer in the most distant parts of the country.

3.198 The **Institute of Islamic Shari'ah Studies** submits that subclause (2)(a) makes an irrevocable *talaq* compulsory for the husband, and that this is in conflict with the clauses dealing with a revocable *talaq*.

3.199 In Pretoria it was argued that the prescribed penalty in clause 9(2)(d) is not a sufficient deterrent, and the wording "any spouse" should be substituted by "husband" as pronouncement of *talaq* is the responsibility of the husband.

3.200 The **Waterval Islamic Institute** disagrees with the proposal that the granting of a *faskh* by a court shall have the effect of an irrevocable *talaq* in terms of subclause (3), as *faskh* does not constitute *talaq*. **Mr M S Sulaiman** is also concerned about this provision, as it is unclear what implications it may have for the fact that the occurrence of a *talaq* generally has an effect on the number of revocable *talaqs* that may still be exercised, while *faskh* may not have the same effect. Regarding subclause (2)(e), the latter respondent suggests that the provision be amended to read as follows:

If a spouse disputes the validity of the irrevocable *Talaq* according to Islamic law, the marriage officer shall not register it until the dispute is resolved, provided that the marriage officer is of the opinion that the dispute relating to the validity of the irrevocable *Talaq* has been fairly raised and is not frivolous or vexatious.

3.201 Referring to subclause (2)(f), **Mr Sulaiman** is uncertain as to the relevance of or need for a judicial order of confirmation. In his view it should be stated explicitly if the aim is to confirm the validity of the divorce *in terms of Islamic law* and to finalise the consequences of the dissolution of the marriage. As far as subclause (3) is concerned (read together with the definition of *faskh* in clause 1(vi)), he points out that the right to apply for *faskh* is not necessarily restricted to the wife, which may imply that a husband may, in appropriate circumstances, opt for the *faskh* procedure rather than the *talaq* procedure. **Mr Sulaiman** finally suggests that subclause (7) be amended to read: “A court *confirming, or granting a decree for*, the dissolution of ...”, and that subclause (7)(b) should read: “... may, if it deems *it* just and ...”.

3.202 The **Office of the Family Advocate** suggests that clause 9(2)(f)(i) should read: “The provisions of subsection (5) shall be applicable to an application *pendente lite* for an interdict or for the interim custody of, or access to, a minor child of the marriage concerned or for the payment of maintenance”.

3.203 The **Islamic Forum Azaadville** is concerned that while provision has been made for the registration of a *Talaq*, the consequences or validity of non-registration is not dealt with.

3.204 The **Society of Advocates of KwaZulu-Natal** refers to legislative provisions in Syria, Jordan, Morocco and Egypt providing for compensation to the wife if the husband repudiated her without just or reasonable cause and recommends that subclauses (2)(f) and (7) be amended to include this situation.

3.205 **Jameah Mahmoodiyah** submits that subclause (2)(f) should clearly indicate whether

the *talaq* is revocable, irrevocable or *faskh* and also the amount of times that the *talaq* was given to the wife by the husband. Regarding subclause (2)(g) the respondent suggests it be reformulated as follows: “An irrevocable *Talaq* or revocable *Talaq* taking effect as such prior to the commencement of this Act must be registered in terms of the provisions of this Act and a certificate will be issued stating the amount of *Talaqs* that were issued by the husband and how many *Talaqs* are left.”

3.206 Regarding subclause (5) **Darul Uloom Zakariyya**, supported by **Ms Z Bulbulia** and **Jamiatul Ulama (Transvaal)**, contends that the court is not entitled to fix the amount of *khul'a* as it is predetermined by mutual consent as the definition of *khul'a* demands. This may apparently seem to imprison the wife if the husband demands preposterous amounts but the Islamic law will provide an easier alternative if the marriage has valid grounds to be terminated, in the form of *faskh*. The **Waterval Islamic Institute** seems to support this contention. **Darul-Ihsan Research and Education Centre**, supported by **Jamiatul Ulama (KwaZulu-Natal)**, contends that the provision on *khul'a* is ambiguous. It is essentially an institution that requires mutual consent of the spouses as its core constituent, and the intervention of the court flies in the face of the very definition of *khul'a*. The respondent argues that if the marriage cannot be terminated through *khul'a*, the wife still has the option of bringing a *faskh* application against the husband to have the marriage annulled.

3.207 Regarding subclause (2)(g), the **United Ulama Council**, supported by **Darul-Ihsan Research and Education Centre**, submits that if the draft Bill wishes to regulate and record the instance and number of divorces issued, it would be appropriate to call for a registration of previous divorces issued for the purposes of record-keeping and regularisation. The respondent argues that the statistic form should be adequate to fulfil the requirement.

3.208 **Jamiatul Ulama (KwaZulu-Natal)** states, with reference to subclause (6), that the Family Advocate must be competent in the *Shari'ah* to compile a report for court purposes. If this is not considered, it would result in severe prejudice and the position of the *Shari'ah* being overlooked in the Family Advocate's recommendation.

3.209 The **Women's Legal Centre** argues that subclause (7) limits the cases where the court can amend the proprietary system to those where there is a joint business or where it is not feasible to quantify the separate contributions of each party. It is recommended that the Bill should provide a court with a general equitable jurisdiction to divide the assets equitably between the parties, particularly if the default matrimonial regime is out of community of property. Regarding subclause (7)(f), the respondent argues that the inclusion

of this subclause is confusing as maintenance is again dealt with under clause 12.

3.210 The **Waterval Islamic Institute** submits that Islamic law must be applied in the instances referred to in subclauses (7)(b) and (e).

3.211 The **United Ulama Council**, supported by **Darul-Ihsan Research and Education Centre** and **Jamiatul Ulama (KwaZulu-Natal)**, contends that subclause (7)(b)(i) is premised on a ruling of Shami, which is considered to be a weak view as it is narrated with the expression “*Qee/a*” which indicates towards weakness of a view. The respondent proposes that the verdicts of jurists need to be sought in this respect.

3.212 The **Young Men’s Muslim Association** and the **Islamic International Research Institute’s** aggressive rejection of the clause in its entirety is in principle based on their view that secular interference with Islamic principles, practices and procedure is objectionable and inconceivable. Although the respondents have also addressed further issues in subsequent clauses such as the age of majority, custody of and access to minor children, maintenance, assessors, the dissolution of existing civil marriages, regulations and the amendment of laws, their objections are similar, namely, that the proposals are Islamically unsound and unacceptable. Their conclusion is set out under the heading: “miscellaneous comments” below.

3.213 The **Gender Unit** does not support the distinction in the draft Bill between *talaq*, *faskh* or *khul’a*, as each party should be equally entitled to institute an action for divorce on the grounds of irretrievable breakdown of the marriage. If, however, the distinction is to be retained, the respondent suggests that in each instance the relevant party should be entitled to pronounce his or her intention to dissolve the marriage in writing, which written pronouncement should be followed by the plaintiff instituting an action for divorce in court within 14 days thereof. The only ground for dissolution of the marriage to be considered by the court should be irretrievable breakdown.

3.214 The **Women’s Legal Centre** points out that although clause 9 is headed “dissolution of marriages”, it only deals with dissolution upon divorce and not upon death. They suggest the inclusion of the following subclause in clause 9:

(7) Where a wife has contributed tangibly or intangibly, during the subsistence of a marriage, to the maintenance or increase of the estate of her husband, she may claim such contributions as a claim against his estate, which claim shall rank *pari pasu* with the claims of other creditors.

Evaluation of comment

3.215 From a stylistic perspective, the provision dealing with jurisdiction of a court for purposes of the draft Bill has been relocated from the definitions clause (under the definition of *court*) to clause 9(1).

3.216 Some respondents suggested that a revocable *talaq* should also be registered, but in the Commission's view, this would not be practical and will cause immense administrative problems. In any event, a revocable *talaq* does not terminate a marriage *per se*. The provisions relating to the registration of an irrevocable *talaq* would be both useful and introduce certainty, and also avoid disputes.

3.217 The proposed fine for failure to register an irrevocable *talaq* (R50 000) in terms of subclause (3)(d) has been lowered to R5 000 in accordance with the views of some respondents, and the period allowed for registration has been increased from seven to 30 days (subclause (3)(a)).

3.218 It was decided to provide, in subclause (3)(a), that an irrevocable *talaq* be registered with a marriage officer in the magisterial district closest to the wife's residence in order to further protect the rights of women, who are entitled to be present at the time of such registration. In subclause (3)(f) provision has been made for a copy of the registration of an irrevocable *talaq* to be annexed to a summons instituting an action for divorce. In relation to the provision on interim relief as envisaged by subclause (3)(f), it was decided to specifically provide for an application for maintenance during the *iddah* period in accordance with the suggestions of one of the respondents. The Gender Unit's concerns regarding *talaq*, *faskh* and *khula'* have been taken into account in the reformulation of the definitions.

3.219 The former subclause (5) which conferred upon the court the power to fix an amount of compensation only, in the case of a *khula'*, has been deleted in order to accommodate the concerns of certain respondents to the effect that *khula'* is a purely consensual contract, and that the intervention of the court is unnecessary.

3.220 In terms of subclause (7)(b) a court is now obliged, if it deems it just and equitable, to divide the assets equally between the spouses, and in subclause (8) provision has been made for a surviving spouse to lodge a claim against a deceased estate in respect of unpaid dower or otherwise in respect of any tangible contribution recognised by Islamic law. Also see par 3.188.

Clause 10: Age of majority

3.221 The following clause on the age of majority appeared in the draft Bill proposed in Discussion Paper 101:

Age of majority

10. For the purposes of this Act, the age of majority of any person is determined in accordance with the Age of Majority Act, 1972 (Act No. 57 of 1972).

Comment received on clause 10:

3.222 The **Waterval Islamic Institute** proposes that the words “in Islam” be added to this clause.

3.223 The **Association of Muslim Lawyers** submits that the clause should be deleted as it is the general law of the country that the age of majority is the age of 21 years.

3.224 The **Gender Unit** supports the proposal contained in clause 10.

Evaluation of comment

3.225 The provision on the age of majority is retained in accordance with the law of general application, namely the Age of Majority Act, and for the sake of consistency.

Clause 11: Custody of and access to minor children

3.226 The following clause on the custody of and access to minor children appeared in the draft Bill proposed in Discussion Paper 101:

Custody of and access to minor children

11. (1) In making an order for the custody of, or access to a minor child, the court shall at all times have regard to the welfare and best interests of the child as the paramount consideration.

(2) Unless the court directs otherwise having regard to the welfare and best interests of the child -

- (a) the custody of a male child until he reaches the age of nine years, and the custody of a female child until she attains puberty shall vest in the mother of that child;
- (b) the male child, when reaching the age of nine years, and the female child when attaining puberty, shall choose the parent with whom he or she wishes to be placed in custody;
- (c) the non-custodian parent shall enjoy reasonable access to the child at regular intervals, but at least once a week.

(3) Despite subsection (2), but subject to subsection (1), the court shall deprive a parent of custody, or, otherwise, shall not grant custody to that parent, if the court is at any time of the opinion that the custody of the child by that parent –

- (a) has exposed, or will expose, the child to circumstances which may seriously harm the physical, mental, moral, spiritual and religious well-being and development of the child;
- (b) has resulted, or will result, in the child being in a state of physical or mental neglect for any reason.

(4) In the absence of both parents, or, failing them, for any reason, but subject to subsection (1), the court must, in awarding or granting custody of minor children, award or grant custody to such person as the court deems appropriate, in all the circumstances.

(5) An order in regard to the custody or access to a child, made in terms of this Act, may at any time be rescinded or varied, or, in the case of access to a child, be suspended by a court if the court finds that there is sufficient reason therefore: Provided that if an enquiry is instituted by the Family Advocate in terms of section 4(1)(b) of the Mediation in Certain Divorce Matters Act, 1987 (Act No. 24 of 1987), the court shall consider the report and recommendations of the Family Advocate concerning the welfare of minor children, before making the relevant order for variation, rescission or suspension, as the case may be.

Comments received on clause 11:

3.227 The **Office of the Family Advocate** proposes that the words “and the provisions of the Mediation in Certain Divorce Matters Act 24 of 1987” should be inserted after the phrase “with due regard to Islamic law” in 11(1). The **Muslim Youth Movement** proposes that it should read “and the provisions of any other relevant law”.

3.228 **Zakariyya Islamic University** submits that Islamic law already provides for a custody system in the event of divorce, death or absence of parents and that there is no need to resort to court decisions as espoused by subclause (4). In the respondent’s view this custody system, called *Al-Hadaanah*, should replace subclause (4).

3.229 **Mr M S Sulaiman** cautions that there is, in Islamic law, a hierarchy of entitlements regarding who is entitled to custody in the absence of the parents or failing them, and that the draft Bill does not take this hierarchy into account.

3.230 The **Waterval Islamic Institute** suggests that the words “in terms of Islam” be added to subclauses (1) and (5), and that the words “in terms of Islamic law with religious well-being being paramount” be added to subclause (3). The suggestion regarding subclauses (1) and (5) is echoed by the **Institute of Islamic Shari’ah Studies**, who also considers that words to a similar effect should be incorporated in subclauses (2)(a) and (2)(c). The latter respondent further suggests that the following provisos should be added to subclauses (2)(b) and (4) respectively:

... provided that the parent chosen by the child or children satisfies the conditions for custodial guardianship especially those relating to the proper and correct Islamic upbringing of such a child or children with special regards to exercising proper discipline in all spheres of Muslim life.

and

... provided that such persons shall be Muslim persons and as far as possible follow such rules and order of preferences as contained in Islamic law sources.

3.231 The **Muslim Judicial Council** proposes the addition of a paragraph (d) to subclause (2), reading “a mother, in terms of Islamic law, shall lose her right to custody if she marries a man who is not in a prohibited degree to her female ward”. The respondent also recommends that the words “award or grant custody to such persons as designated by Islamic law” be added at the end of subclause (4).

3.232 The **Women’s Legal Centre**, disagreeing with the provisions relating to custody and the distinction between the custody of male and female children, suggests that provisions relating to custody and access are universal and must be applied to all children in South Africa. The respondent further suggests that a provision be incorporated providing for a custodial parent who is a respondent in an application by the other parent to amend or vary the custody or maintenance order of the court, to claim a contribution towards the costs of defending such an application where they do not have the means to do so.

3.233 The **Office of the Family Advocate** (Cape Town) submits that subclause (2)(a) lends itself to Constitutional challenge in respect of the equality clause and that it prioritises a mother’s right to custody above that of the father; that subclause (2)(b) not only places a difficult burden on a child who has to choose his or her custodial parent, but disputes in the arena of custody and access are also often utilised as vehicles of vendetta between warring parents; and that subclause (2)(c) presents a double barrel situation as reasonable access, the duration and nature of which is normally determined by the custodian parent, is

specified. In the respondent's view this infringes on the best interests principle. It is recommended that the provisions relating to custodial preference by the minor child or that custody should be awarded to the mother, be deleted and that the best interests principle should be applicable. It is also proposed that provision be made for reasonable access by the non-custodian parent without any conditions. The respondent refers to the decision in **McCall v McCall** 1994 (3) SA 201 in which the guidelines regarding the best interests principles has been set out. The **Office of the Family Advocate** finally points out that the draft Bill does not address the rights of guardianship of parents who are divorced in terms of Islamic law. It proposes that provision should be made for guardianship as described in the civil law Guardianship Act.

3.234 The **Association of Muslim Lawyers** submits that the award of custody of minor children should be determined in accordance with Islamic law which determination should be made by a Muslim Tribunal who must have regard to all the circumstances of the parties involved and in particular the interests of the children. With regard to subclause (2)(d), the respondent calls for clarity in that the onus to maintain needy parents needs to be better defined.

3.235 The **Gender Unit** recommends that subclauses (2) to (4) be omitted, and that the legislation should provide for both parents having inherent rights of guardianship, custody and access of the minor children, including children conceived before and after conclusion of the Muslim marriage, and subject to the court limiting those rights upon dissolution of the marriage by having regard to the paramount consideration of the best interests of the child. The **Commission on Gender Equality** opines that the universally recognised test of the best interest of the child should apply in all instances concerning the welfare of the child, and that the Guardianship Act should also be applicable.

3.236 **Jameah Mahmoodiyah** contends that the words "when reaching the age of nine years" should be omitted from subclause (2)(b) as the *Shari'ah* stipulates that the custody of the male child vests in the father from the age of nine years up to his attaining the age of puberty, and that the words " according to Islamic law" be added to subclause (4).

3.237 The **United Ulama Council**, supported by **Darul-Ihsan Research and Education Centre**, **Jamiatul Ulama (KwaZulu-Natal)** and **Mr M I Patel**, submits that the age of custody for boys and girls in the draft Bill does not conform with Islamic law on this issue which rules the ages for boys and girls as seven and nine respectively. The respondent proposes that all the other provisions, namely subclauses (3) and (4) need to be subjected to

Islamic regulation on *Hadanah* (custody) rather than the jurisdiction of the court.

3.238 In the joint submission by **F Noormohamed, H Rawat and F Mall** it is pointed out that South African law and Islamic law differ regarding the grounds for custody.

3.239 **Ms Z Bulbulia** is concerned that the situation may arise where it is in the best interest of a child to live with the mother while the mother is married to the child's *ghayr mahram*. According to the *Shari'ah*, the mother forfeits the right of custody over the child and certain other rules come into play. The respondent contends that the Bill does not provide for such a scenario and that the courts may grant custody orders in contravention of the *Shari'ah*.

3.240 **Jamiatul Ulama (Transvaal)** proposes that the term "best interests" be expanded to include Islamic underpinnings so as to eschew violation of the *Shari'ah*. **Masjidul Quds** argues that the best interests of a child should be taken into consideration from an Islamic perspective, and also calls for a definition of "puberty".

Evaluation of comment

3.241 The provisions of clause 11 were reconsidered in the light of section 28(2) of the Constitution which provides that a child's best interests are of paramount importance in every matter concerning the child. It was therefore decided to delete the original subclauses (2) and (3). The provisions as retained in substance provide for the application of the best interest principle, with due regard to Islamic law, in relation to access, custody and guardianship of minor children. In addressing the concerns of certain respondents, it should be pointed out that the best interest principle is consistent with Islamic law, and that the court is now obliged to consider the detailed rules of Islamic law of custody and access, in assessing what is in the best interests of minor children on a case by case basis. It is therefore unnecessary to state the detailed rules of Islamic law in the Bill itself. An important and necessary provision has been included in subclause (1), namely to involve the Family Advocate when access to or custody of a child is considered by the court.

Clause 12: Maintenance

3.242 The following clause on maintenance appeared in the draft Bill proposed in Discussion Paper 101:

Maintenance

12. (1) The provisions of the Maintenance Act, 1998 (Act No. 99 of 1998) shall apply, with the changes required by the context, in respect of the duty of any person to maintain any other person. Without derogating from the provisions of that Act, the following provisions shall apply:

(2) Notwithstanding the provisions of section 15 of the Maintenance Act, 1998, or, the common law, the maintenance court shall, in issuing a maintenance order, or otherwise in determining the amount to be paid as maintenance, take into consideration that –

- (a) the husband is obliged to maintain his wife during the subsistence of an Islamic marriage according to his means and her reasonable needs;
- (b) the father is obliged to maintain his male child until the age of majority, or, until he is able to become self-supporting, whichever is earlier, and he is obliged to maintain his female child until she is married;
- (c) in the case of a dissolution by divorce of an Islamic marriage -
 - (i) the husband is obliged to maintain the wife for the mandatory waiting period of *Iddah*;
 - (ii) where the wife has custody in terms of section 11, the husband is obliged to maintain the wife, including the provision of separate residence, for the period of such custody only;
 - (iii) the wife shall be separately entitled to maintenance for a breastfeeding period of two years calculated from date of birth of an infant;
 - (iv) the husband's duty to support a child born of such marriage includes the provision of food, clothing, separate accommodation, medical care and education.
- (d) a major child is obliged to maintain his or her needy parents.

(3) Any amount of maintenance so determined shall be such amount as the maintenance court may consider fair and just in all the circumstances of the case.

(4) A maintenance order made in terms of this Act may at any time be rescinded or varied or suspended by a court if the court finds that there is sufficient reason therefor.

Comment received on clause 12:

3.243 **Darul Uloom Zakariyya**, referring to the **Shah Banu** case in India in 1985, is concerned that this section places too much authority in the courts and that it can lead to abuse of Islamic law. The respondent recommends that a detailed section regarding those who must shoulder the financial burden according to Islamic law in terms of maintenance be included in the Bill. In the respondent's view there is no need for the ex-husband being ordered to maintain his ex-wife after dissolution of the marriage and completion of *Iddah* in which state there is no longer any form of relationship between the two.

3.244 The **Mowbray Mosque Congregation** is of the opinion that clause 12(2)(b) is in

contradiction to the principle of gender equality, and submits that clause 12(2)(d) requires further clarity with regard to -

- * which major child is obliged to care for the “needy parents”;
- * what constitutes a “needy parent”; and
- * the method of enforcement.

3.245 The **Women’s Legal Centre**, arguing that the maintenance obligations do not appear to conform with international norms and the Constitution, proposes that sections 6, 7(1) and (2), 8 and 10 of the Divorce Act be incorporated in the Bill by reference or by inclusion of similar provisions.

3.246 The **Waterval Islamic Institute** suggests that the words “in Islam” be added to subclause (2)(b).

3.247 **Mr M S Sulaiman**, referring to subclause (2), clarifies the Islamic position. He contends that the father is obliged to maintain the child if it is in need of support, even after the age of majority; that the ex-husband is not obliged to maintain the ex-wife purely on the basis that she enjoys custody; that the ex-wife is, in the context of subclause (2)(c)(iii), entitled to a fee (and not maintenance); and that the duty to maintain needy parents is conditional on the financial ability of the child to maintain, and not on whether the child has reached majority or not.

3.248 The **Institute of Islamic Shari’ah Studies** suggests that the following should be added to subclause (2)(c)(iii): “This shall only apply where actual breastfeeding is taking place or where most of the feeding is by natural breastfeeding of the actual mother.”. The **United Ulama Council**, supported by **Darul-Ihsan Research and Education Centre**, **Jamiatul Ulama (KwaZulu-Natal)** and **Jamiatul Ulama (Transvaal)**, avers that the provision that the wife shall be entitled to maintenance for a breastfeeding period of two years is incorrect, as the wife is not entitled to maintenance for breastfeeding, but rather, *ujrah* (entitlement). Generally it is understood that if the wife opts to breastfeed her child, she will be entitled to a remuneration based on a market-related entitlement rate as envisaged in Islamic law and this shall be limited to the period of breastfeeding, which shall not exceed two years. The respondent contends that the draft Bill fixes the period at two years, without consideration of this detail.

3.249 **Jameah Mahmoodiyah** suggests that the words “if she does not have her own

residence” be inserted after the word “residence” in subclause (2)(c)(ii), and that the words “excluding the mandatory period of *iddah* of a revocable *Talaq*” be added after the word “infant” in subclause (2)(c)(iii).

3.250 The **Gender Unit** recommends that subclause (2)(b) should be amended to place an obligation on the father to maintain both male and female children until they become self-supporting; that a father’s duty of support in respect of his children continues when the child reaches the age of majority and is still studying, or if not studying but is unable to find employment after having conducted a diligent search to find employment. The respondent also suggests that subclause (2)(c)(ii) should be amended to place an obligation on the husband to maintain his wife after divorce until her death or remarriage, and that subclause (2)(d) be deleted. The **United Ulama Council**, supported by **Darul-Ihsan Research and Education Centre** and **Jamiatul Ulama (KwaZulu-Natal)**, also suggests that subclause (2)(d) be removed as it appears totally incongruous and unrelated in the context of the draft Bill. It is suggested that it be replaced by a general rule covering all the obligations of maintenance laid out by Islamic law in a single statement.

3.251 **Ms Z Bulbulia** avers that it should also be stated that once the *Iddah* period is completed, the duty to maintain his wife rests with her father or her agnates as determined by Islamic law. She also proposes that the concept of rehabilitative maintenance should be introduced here, taking into account that the divorcee’s father or agnates may not be in an immediate position to provide such maintenance.

3.252 The **Commission on Gender Equality** is concerned about the differentiation between boy and girl children with regard to maintenance, as well as the fact that only the father is obliged to maintain his children.

3.253 **Ms R Toefy-Salie** considers it to be fair that unemployed divorced women who have custody of children should be maintained. Referring to the high costs of litigation, she calls for streamlined administrative measures to facilitate the determination of ex-husbands’ financial position as well as the imposition of penalties where former spouses make fraudulent representations regarding their financial position where it would be detrimental to the children who are to be maintained.

3.254 The **Muslim Assembly (Cape)** submits that “majority” in subclause (2)(b) should be defined, as well as “needy parents” in subclause (2)(d). Regarding subclause (2)(b), the respondent suggests that the words “or longer if the male child is disabled” should be added,

and that restrictions should be imposed, for example, “until the female child is capable, to a reasonable degree, of supporting herself”.

3.255 The **Society of Advocates of KwaZulu-Natal** refers to its earlier suggestion that provision be made for compensation for arbitrary repudiation and submits that it may appropriately be repeated in clause 12.

3.256 In the joint submission by **F Noormohamed, H Rawat and F Mall** it is recommended that, as there are differences between South African law and Islamic law on issues of maintenance, such issues should be resolved through arbitration.

3.257 Both the **United Ulama Council** and **Jamiatul Ulama (KwaZulu-Natal)** contend that the sweeping generalisation in terms of the courts’ powers to determine the amounts of maintenance could be prone to misinterpretation as Islamic law has its own values and viewpoints as to what may be considered fair and just. It is submitted that the court should be guided by a *fatwa* (legal edict) from case to case to be obtained from a qualified Muslim Judicial body. The determination of what is fair and just according to Islamic law should be delegated to a recognised Islamic Judicial Authority, rather than the court.

3.258 **Masjidul Quds** submits that a wife should not be allowed personal maintenance by virtue of custody, but adequate maintenance should be provided for the minor child. The respondent also poses the question whether disobedient children should be entitled to maintenance.

Evaluation of comment

3.259 The Commission has carefully considered the relevant inputs and concerns on maintenance. In the light of these submissions, relevant amendments to clause 12 were effected. In subclause (2)(b) the distinction between the maintenance obligations in respect of male and female children was removed, and a provision that the father is obliged to maintain his children until they become self-supporting was inserted. In subclause (2)(c)(ii), the reference to maintenance was deleted because the wife is strictly entitled under Islamic law to remuneration for her services in exercising custody. The clause was amended accordingly. In subclause (2)(c)(iii) a consequential amendment was made. In the light of the concerns of certain respondents, subclause (2)(d) was removed in its entirety. An important change is the addition of subclause (5) which provides that a claim for arrear maintenance is not subject to extinctive prescription.

Clause 13: Assessors

3.260 The following clause on assessors appeared in the draft Bill proposed in Discussion Paper 101:

Assessors

13. (1) If any dispute is referred to a court for adjudication, the following provisions shall apply -

- (a) the court shall be assisted by two Muslim assessors who shall have specialised knowledge of Islamic Law;
- (b) the assessors shall be appointed by the Minister by proclamation in the Gazette and shall hold office for five years from the date of the relevant proclamation: Provided that the appointment of any such assessor may at any time be terminated by the Minister for any valid reason;
- (c) any person so appointed shall be eligible for reappointment for such further period or periods as the Minister may think fit.

(2) The decision of the court on any question arising for decision before the court, shall be decided by the majority, and the court and the assessors shall give written reasons for their decision.

(3) Any decision of the court shall be subject to appeal in accordance with the applicable Rules of Court, save that the assessors shall participate in any application for leave to appeal, where such leave is necessary.

Comments received on clause 13:

3.261 In general **Darul Uloom Zakariyya** has reservations about the use of assessors, pointing to problems such as the following: if there is no majority then the judge, who may be a non-Muslim, will cast a decision which will be un-Islamic. Non-Muslim judges cannot pass Islamic laws. The respondent also contends that in view of the right to appeal the inclusion of two Muslim assessors is purely superficial, carries no weight and will inevitably cause a legitimacy crisis. **Darul Uloom Zakariyya** submits that arbitration, endorsed and supported by the *Qur'an*, is the proper and legitimate alternative to litigation. The views held by this respondent are endorsed by **Madrasah In'aamiyyah**.

3.262 **Jameah Mahmoodiyah** suggests that as only a Muslim judge may give judgement in these matters, the words "of the Muslim judge" should be inserted after the word "court" in subclause (1)(a); that the words "of Muslim judges and assessors" should be inserted after the word "majority" in subclause (2), and that the word "shall" in subclause (3) should be replaced by the word "must".

3.263 The **Muslim Judicial Council** proposes that the words “shall sit with a Muslim judge” be inserted after the word “court” in subclause (1)(a), and that the words “of Islamic law arising for decision, shall be decided by consensus between the assessors, who shall give written reasons for their decision” be inserted after the word “question” in subclause (2).

3.264 The **Islamic Forum Azaadville** argues that the same clarifications indicated by it under its comment on marriage officers above will need to be outlined.

3.265 The **Women’s Legal Centre** is concerned that the requirements relating to assessors will delay the implementation of the Bill due to the budgetary constraints faced by the Department of Justice and Constitutional Development. The respondent suggests that time frames should be set out in the Bill for the implementation process with a phased approach to the appointment of assessors. The absence of assessors should not prevent spouses who seek dissolution of a Muslim marriage from approaching the courts. Moreover, the appointment of assessors should only be required in cases where a divorce is contested or opposed.

3.266 **Mr M S Sulaiman** submits that the area of Islamic law in which knowledge by assessors is required, be qualified with reference to the area of Islamic law in which the functions of marriage officers are to be performed, namely the Islamic law of marriage and divorce. He also suggests that an objective standard be prescribed whereby the minimum standard of knowledge required could be identified and in light of which the distinction between “knowledge” and “specialised knowledge” could be properly made. The respondent also points out that, although perhaps innovative, assessors should be appointed in the event that an appeal is heard by the Supreme Court of Appeal as well.

3.267 The **Islamic Careline** feel strongly that assessors need to be suitably qualified in terms of both Muslim Family law as well as marital/divorce/family counselling.

3.268 The **Association of Muslim Lawyers** submits that it is not desirable that a non-Muslim judge presides when hearing applications for divorce by Muslim couples. In the respondent’s view there are sufficient practising Muslim advocates who should sit with the assessors.

3.269 The **Waterval Islamic Institute** suggests that the decision of the court referred to in subclause (2) should be a consensus and not a majority decision, whereas the **Institute of Islamic Shari’ah Studies** opines that the words “this clause is unalterable” should be

added. Regarding subclause (1)(b), the latter respondent suggests that it be redrafted to read as follows:

The Muslim assessors shall be appointed by the Minister by proclamation in the Gazette and such Muslim assessors shall be appointed from the Special Register of Muslim proven qualified jurists in Islamic law and especially Islamic Family and Personal law and such appointments shall be for five years from date of relevant proclamation.

3.270 The **Gender Unit** recommends that the requirement of specialised knowledge of Islamic law in subclause (1)(a) should be omitted and replaced with the following criteria for assessors:

- * A university level education that has included one or more courses in Islamic law;
- * an in depth knowledge of the provisions of the Act;
- * a proven track record of understanding and applying gender-sensitive approaches, particularly in the area of Muslim Personal law; and
- * a legal qualification as a recommendation.

3.271 The **United Ulama Council, Darul-Ihsan Research and Education Centre** and **Masjidul Quds** propose that the minimum requirements for assessors should include first-class knowledge of –

- * the Arabic language;
- * Science of *Qur'anic* Interpretation and its Principles;
- * Hadith text and sciences;
- * Islamic law and jurisprudence;
- * Science of Islamic legal verdicts with practical experience in this field under a *bona fide*, recognised Islamic judicial institute coupled with some training in the adjudication of disputes.

3.272 In the joint submission by **F Noormohamed, H Rawat and F Mall** as well as in the submissions by **Jamiatul Ulama (KwaZulu-Natal)** and **Ms Z Bulbulia**, similar requirements to those listed above are suggested. The latter respondents, including the **United Ulama Council** and **Jamiatul Ulama (Transvaal)**, also propose the appointment of a Muslim Advisory Council to assist the Minister in the appointment of assessors. **Masjidul Quds** submits that the assessors can be appointed by the Minister, on recommendation of the United Ulama Council.

3.273 The petitioners, namely **Nurul Islaam Jamaat Khana; Colenso Mosque; Siraatul Haq Islamic School and Bergville**, refer to the fact that the Bill makes no reference to the qualifications of and selection procedures for assessors.

3.274 The **Institute of Islamic Shari'ah Studies** also submits that the words "An appeal shall be on the administrative process followed by the court which issued the initial ruling and shall not deal with Islamic law per se" should be added to subclause (3). This suggestion would appear to address a similar concern expressed by the **Islamic Careline**. In similar vein both the **United Ulama Council** and **Darul-Ihsan Research and Education Centre** hold the view that it is crucial that due consideration be given to the institution of appropriate mechanisms whereby assessors also become involved at the level of appeal to ensure that the ultimate judgement on appeal is at all times *Shari'ah* compliant. **Jamiatul Ulama (KwaZulu-Natal)** also points out that no provision has been made for assessors at the appeal level, and raises the danger that if the Supreme Court of Appeal or the Constitutional Court were to give a decision contrary to the *Shari'ah*, the lower courts will be bound to follow suit, which will have the effect of altering the *Shari'ah*. **Jamiatul Ulama (Transvaal)** suggests that when cases are heard by the Supreme Court of Appeal, the judge should be assisted by three Muslim assessors, and that the matter be heard in accordance with *Shari'ah* imperatives. The ultimate judgement should then be pronounced by the Chief Assessor, and in the case of *faskh*, all three assessors must agree.

3.275 The concerns about non-Muslim judges supported by two Muslim assessors and the lack of assessors at the level of appeal are echoed by **Ms F H Amod**, in the joint submission by **Mss S Khan, A Randaree, F Ajam, F Rawat and Y Khan**, and by **Khalid Dhorat**. Their recommendation is that the assessors including the judge should be Muslims who are competent in Islamic law. **Khalid Dhorat** also objects against the possibility of non-Muslim judges being able to pronounce on Islamic issues, and points to the fact that all South African judges take an oath of upholding the Constitution as the supreme law of the land before assuming office.

3.276 The **Society of Advocates of KwaZulu-Natal** argue that without being tied to too much legal and technical formalities, the assessor must indeed be a "fit and proper person" with experience in Islam applied rather than just theoretical knowledge. As assessors, these persons will be required to determine both questions of law and fact. In the respondent's view their understanding of the *Shari'ah* should not be confined narrowly to consist only of a set of dogmatic rules divorced from everything of spiritual, social or political substance.

Evaluation of comment

3.277 The crucial concern of certain respondents was that a pronouncement of dissolution of a marriage (*faskh*) by a non-Muslim judge is not permissible in Islamic law. This was addressed by introducing a new subclause (1)(a)¹⁹ in clause 15 to provide that the Judge-President or other titular head of the relevant court must appoint a Muslim judge or acting judge to adjudicate disputes under the proposed legislation. Certain respondents also raised the question of appeal procedures. It was decided that all appeals should be heard by the Supreme Court of Appeal and that, to assist that court on issues of Islamic law, two accredited Muslim institutions should submit written comment to that court which should form part of the appeal record. The court in arriving at its decision, should have due regard to such comment. Accordingly, subclauses (4) and (5) were inserted to cover the situation.

3.278 Some respondents were concerned about the qualifications of assessors, and made proposals in this regard, to ensure that duly qualified persons would preside over cases. These proposals were duly considered, but the Commission decided that the criteria governing assessors should appropriately be prescribed regulations under clause 18 of the amended draft Bill.

3.279 After careful consideration, including a consideration of technical feasibility, a change was brought about in subclause (2) to ensure that assessors act in an advisory capacity and, where they differ from the presiding judicial officer, to record their reasons for doing so. Provision has also been made for legal aid to indigent litigants (subclause (6)).

Clause 14: Dissolution of existing civil marriage

3.280 The following clause on the dissolution of existing civil marriages appeared in the draft Bill proposed in Discussion Paper 101:

¹⁹ In view of the insertion of two new clauses, viz clauses 13 and 14 relating to mediation and arbitration, clause 13 now appears in the amended draft Bill as clause 15.

Dissolution of existing civil marriage

14. (1) In the event of a spouse to an existing civil marriage instituting a divorce action in terms of the Divorce Act, 1979 (Act No. 70 of 1979), after the commencement of this Act, the court shall not dissolve the civil marriage by the grant of a decree of divorce until the court is satisfied that the accompanying Islamic marriage has been dissolved.

(2) In the event of the husband refusing, for any reason, to pronounce an irrevocable *Talaq*, the wife to the accompanying Islamic marriage shall be entitled in the same proceedings to make an application for a decree of *Faskh* for the purposes of dissolving such Islamic marriage, in which event the provisions of this Act shall apply, with the changes required by the context.

(3) Where in addition to the existing civil marriage, the husband has concluded a further Islamic marriage or marriages registrable under this Act, the husband's existing spouse or spouses must be joined in the divorce action contemplated in subsection (1).

Comments received on clause 14:

3.281 The **Women's Legal Centre** is unclear as to the rationale for the provision that the court shall not dissolve a civil marriage until satisfied that the accompanying Muslim marriages have been dissolved. The question is posed whether the court would first have to confirm the dissolution of a Muslim marriage by way of a *talaq* and then grant the civil divorce.

3.282 The **Waterval Islamic Institute** submits that the words "when applicable" should be added to the third line of subclause (2), and that the spouse or spouses referred to in subclause (3) need not be joined but merely informed.

3.283 The **Association of Muslim Lawyers** contends that subclause (3)(c) must be further qualified by the addition of the words "for purposes of determining their proprietary rights in the estate of the husband".

3.284 The **Society of Advocates of KwaZulu-Natal** states that as the legislation currently stands, the court makes a finding that the marriage has irretrievably broken down and before granting a dissolution order requires the spouse concerned to remove the religious impediment if he has not already done so. The pronouncement of *talaq* would take place without a mediation procedure being followed in the manner regulated and properly envisaged in the *Qur'an*. The respondent submits that it is desirable that this inconsistency

be removed by an appropriate amendment and that the allegation is made in the plaintiff's particulars of claim that the procedure was followed and the Islamic dissolution had been effected.

3.285 The **Gender Unit** supports the proposals contained in clause 14.

Evaluation of comment

3.286 The rationale for the inclusion of this clause (now clause 16) was to cover the situation where an existing civil marriage is dissolved in terms of the Divorce Act, but the accompanying Muslim marriage (*nikah*) remains intact. It was therefore necessary to provide for the dissolution of the accompanying Muslim marriage, and this is achieved by the provisions contained in clause 16 of the amended draft Bill. Subclause (2) has been amended to provide separately for the dissolution of a Muslim marriage where the husband refuses to pronounce an irrevocable *talaq*. A new subclause (3) has been added to enable the matter to be referred back to the court for determination of the proprietary or other consequences of the marriage in terms of the Divorce Act.

Clause 15: Regulations

3.287 The following clause on regulations appeared in the draft Bill proposed in Discussion Paper 101:

Regulations

- 15.** (1) The Minister of Justice, in consultation with the Minister, may make regulations -
- (a) relating to -
- (i) the requirements to be complied with and the information to be furnished to a Marriage officer in respect of the registration and dissolution of an Islamic marriage;
 - (ii) the manner in which a Marriage officer must satisfy himself or herself as to the existence or the validity of a Islamic marriage;
 - (iii) the manner in which any person may participate in the proof of the existence or in the registration of any Islamic marriage;
 - (iv) the form and content of certificates, notices, affidavits and declarations required for the purposes of this Act;
 - (v) the custody, certification, implementation, rectification, reproduction and disposal of any document relating to the registration of Islamic marriages or of any document prescribed in terms of the regulations;

- (vi) any matter that is required or permitted to be prescribed in terms of this Act; and
- (vii) any other matter which is necessary or expedient to provide for the effective registration of Islamic marriages or the efficient administration of this Act; and
- (b) prescribing the fees payable in respect of the registration of an Islamic marriage and the issuing of any certificate in respect thereof.

(2) Any regulation made under subsection (1) which may result in financial expenditure for the State must be made in consultation with the Minister of Finance.

(3) Any regulation made under subsection (1) may provide that any person who contravenes a provision thereof or fails to comply therewith shall be guilty of an offence and on conviction be liable to a fine or to imprisonment for a period not exceeding one year.

Comments received on clause 15:

3.288 The **Waterval Islamic Institute** suggests that the introductory sentence in subclause (1) should read “The Minister of Justice, in consultation with the Minister, may make regulations *within the purview of Islamic law* -“.

3.289 The **Institute of Islamic Shari’ah Studies** suggests that the following words be substituted for the words currently appearing after the word “therewith” in subclause (3): “... shall be guilty of an offence and on conviction be liable to a fine or community service with Muslim community organisations of a charitable nature in the first instance. A second offence shall warrant a prison sentence”.

3.290 According to **Judge Farlam** it is evident from the provisions of clause 18(1)(a)(ii) that the marriage officer can be male or female. He suggested that this clause should be gender neutral, and that a substantive provision should be inserted in the Bill from which it is clear that the marriage officer can be of either gender. An additional suggestion was made in Cape Town that all marriage officers should be registered in consultation with an appropriate Islamic body.

3.291 **Adv H K Saldulker** points out that this clause does not mention regulations that may be made by the Minister in respect of assessors, and recommends that the following paragraph should be inserted in clause 18(1)(a):

(vii) the appointment, registration, code of conduct and death and incapacity of the assessors including the payment of allowances to assessors.

3.292 The **Gender Unit** supports the proposals contained in clause 15.

Evaluation of comment

3.293 The Commission has noted the suggestions reflected above, but is of the view that it is unnecessary to amend the clause (now clause 18 in terms of the amended draft Bill) as originally proposed, as it is sufficiently wide to accommodate the relevant concerns. In the main, the Minister makes regulations concerning the mechanics of the workings of an Act. What has been added is an additional power to the Minister to regulate the employment of assessors.

Clause 16: Amendment of laws

3.294 The following clause on amendment of laws appeared in the draft Bill proposed in Discussion Paper 101:

Amendment of laws

16. (1) Section 17 of the Deeds Registries Act, 1937 (Act No. 47 of 1937), is hereby amended by the substitution for paragraph (b) of subsection (2) of the following paragraph:

“(b) where the marriage concerned is governed by the law in force in the Republic or any part thereof, state whether the marriage was contracted in or out of community of property or whether the matrimonial property system is governed by customary law in terms of the Recognition of Customary Marriages Act, 1998 (Act No. 120 of 1998), or, is governed in terms of section 8 of the Islamic Marriages Act, 20.. .”

(2) Section 45*bis* of the Deeds Registries Act, 1937, is hereby amended -

(a) by the substitution for paragraph (b) of subsection (1) of the following paragraph:

“(b) forms or formed an asset in a joint estate, and a court has made an order, or has made an order and given an authorisation, under section 20 or 21(1) of the Matrimonial Property Act, 1984 (Act No. 88 of 1984), or under sections 8 or 9 of the Islamic Marriages Act, 20.. , or under section 7 of the Recognition of Customary Marriages Act, 1998 (Act No. 120 of 1998), as the case may be, in terms of which the property, lease or bond is awarded to one of the spouses;” and

(b) by the substitution for paragraph (b) of subsection (1A) of the following paragraph:

“(b) forms or formed an asset in a joint estate and a court has made an order, or has made an order and given an authorisation under section 20 or 21(1) of the Matrimonial Property Act, 1984 (Act No. 88 of 1984), or under section 7 of the Recognition of Customary Marriages Act, 1998 (Act No. 120 of 198), or under sections 8 or 9 of the Islamic Marriages Act, 20.. , as the case may be, in terms of which the property, lease or bond is awarded to both spouses in undivided shares;”.

(3) Section 1 of the Intestate Succession Act, 1987 (Act No. 81 of 1987) is hereby amended by the addition to subsection (4) of the following paragraph:

“(g) “spouse” shall include a spouse of an Islamic marriage recognised in terms of the Islamic Marriages Act, 20.. , and shall otherwise include the spouse of a deceased person in a union recognised as a marriage in accordance with the tenets of any religion: Provided that in the event of a deceased man being survived by more than one spouse, the following shall apply -

- (i) for the purposes of subsection (1)(c), such surviving spouse shall inherit the intestate estate in equal shares;
- (ii) for the purposes of subsection (1)(c), such surviving spouses shall each inherit a child’s share of the intestate estate or so much of the intestate estate in equal shares as does not exceed in value the amount so fixed as contemplated in this section.”

(4) Section 1 of the Maintenance of Surviving Spouses Act, 1990 (Act No. 27 of 1990) is hereby amended by the insertion after the definition of “survivor” of the following definition:

“Marriage” shall include an Islamic marriage recognised in terms of the Islamic Marriages Act, 20.. , and shall otherwise include a union recognised as a marriage in accordance with the tenets of any religion.”

Comments received on clause 16:

3.295 The **Women’s Legal Centre** welcomes the proposed amendments to the Intestate Succession Act and the Maintenance of Surviving Spouses Act.

3.296 In the **Association of Muslim Lawyers's** view section 45 of the Deeds Registries Act only applies to marriages in community of property. Accordingly the amendment to this section is superfluous as it cannot apply nor is it intended to cover marriages out of community of property.

3.297 Attorney **M S Nacerodien** expresses his surprise that clauses 16(3) and (4) have been included in the draft Bill, despite the fact that the implications of such provisions becoming applicable to Muslim marriages in South Africa would in fact create a situation whereby the *Shari'ah* would in fact not be complied with at all. Firstly, he argues, the intention of clause 16(3) presumes that there is a fundamental difference between testate and intestate succession in Islam. This is not correct, as there is only a difference as regards bequests. The proposed amendment provides that the surviving spouse will, in the absence of a will, inherit more than the 8th share allocated according to the *Shari'ah*. The respondent proposes that the Intestate Succession Act be amended by the addition to subsection (4) of the following paragraph:

- (g) Notwithstanding the provisions of this Act, where the surviving spouse(s) is/are a spouse(s) of a Muslim marriage recognised in terms of the Islamic Marriages Act, their inheritance shall be as follows:
 - (i) The Muslim male surviving spouse shall receive half of the intestate estate in the event of there being no children or one female child of the deceased, and a quarter in the event of there being children.
 - (ii) The Muslim female surviving spouse or spouses shall inherit an 8th share of the intestate estate. Multiple female spouses equally share the 8th share. This shall apply where the deceased leaves children. Where the deceased leaves no children or only one female child and no other heirs, the female surviving spouse shall receive a quarter of the intestate estate and joint spouses shall equally share a quarter.;

and that clause 16(4) be deleted and replaced with the following:

- (4) The Maintenance of Surviving Spouses Act shall not be applicable to survivors where the parties were married in a Muslim marriage. The survivor shall, however, be entitled to a claim for maintenance in so far as provided for under Islamic law.

3.298 The **Institute of Islamic Shari'ah Studies** avers that subclause (3) is completely repugnant and in conflict with the consequences of a Muslim marriage. The respondent suggests that paragraph (g) to be added to section 4 of the Intestate Succession Act should read as follows:

An estate of a deceased Muslim, whether he or she left a written Will or not and if such a deceased person was married in terms of Islamic law, then such a deceased estate of such a deceased person shall devolve compulsorily upon his or her Muslim heirs and in such shares as prescribed in the Islamic law of Succession. The Master of the High Court is obliged to consult with a proven qualified Muslim *Shari'ah* jurist therein and obtain a written and duly dated and signed certificate of distribution of such a deceased estate and execute its instructions.

3.299 The **Waterval Islamic Institute** also submits that inheritance details must be in terms of Islam.

3.300 **Mr M S Sulaiman** points out that subclause (3) does not address the Islamic law of inheritance at all, but alleviates some of the difficulties in the context of inheritance resulting from the non-recognition of Muslim marriages. He suggests that more substantive steps be taken to give recognition to the Islamic law of inheritance. This suggestion is echoed by **Mr M I Patel**, in the joint submission by **F Noormohamed, H Rawat and F Mall** and also by the **United Ulama Council**.

3.301 The **Muslim Assembly (Cape)** argues that in order to alleviate the hardships from situations where daughters make significant contributions to parental homes yet inherit less than sons, parents be educated to make use of bequests to daughters and that the contribution of daughters to parental homes be regarded as an expense against the estate of a deceased parent.

3.302 The **Association of Muslim Lawyers** explains that surviving spouses cannot inherit the estate of the deceased husband in equal shares. Each surviving spouse is entitled to an eighth share and if there are no children, surviving spouses are entitled to a quarter share. The respondent holds the view that Islamic laws of inheritance are complex and should be enacted separately.

3.303 The **Gender Unit** supports the proposals contained in clause 16, but also suggests that the Prescription Act 18 of 1943 should be amended to exclude all claims arising from the Islamic contract of marriage from the operation of prescription.

Evaluation of comment

3.304 The Commission has noted and agrees with the submission to the effect that the Islamic law of succession should apply, in the case of Muslim persons dying intestate. For the time being, the Commission decided to provide interim relief by broadening the definition

of “spouse” in the Intestate Succession Act, to ameliorate the plight of spouses in Muslim marriages. The Commission, however, agrees that there should be a proper but separate investigation into the recognition and application of the Islamic law of succession within the existing Constitutional framework, thereby providing substantive relief in this regard. Parties are free to leave a will in terms of which their estates will devolve according to Islamic law. From a stylistic perspective the former clause 16 has been removed from the body of the draft Bill and included as a Schedule (cf. the new clause 21).

Miscellaneous comment

3.305 A number of respondents submitted comment that falls beyond the scope of the draft Bill proposed in Discussion Paper 101. This includes criticisms, concerns, alternative proposals as well as negative and positive comment.

Comments received on arbitration

3.306 **Darul Uloom Zakariyya** reiterates its recommendation that those couples who wish to abide by *Shari’ah*, be allowed to have their disputes resolved by arbitration (*Tahkeem*), which is a trend in developed countries such as Pakistan, Australia and the USA, which have lawyers specialising in family arbitration. It is recommended that Muslim marriages and related matters be exempted from section 2 of the Arbitration Act, 1965, and thus be in line with present trends. The respondent avers that it is most likely that *Shari’ah* will be adulterated due to factors such as -

- * assessors of different schools of thought;
- * the Constitution overruling Islamic law;
- * State intervention in freedom of religion.

3.307 In similar vein **Zakariyya Islamic University** calls for Muslims’ right to have arbitration in matrimonial affairs and that all matters requiring court decisions in terms of the draft Bill be instead referred to Muslim arbitration, which will have, *inter alia*, the following benefits: alleviating the work burden on the courts; financial savings to the State and the community; community-building via internal dispute settlement; avoidance of duplication of work, and others.

3.308 The **Gender Unit** also proposes that the legislation should make provision for parties contemplating a separation or divorce to refer the dispute to an alternative dispute resolution

forum. In addition to this proposal the respondent recommends that alternative dispute resolution mechanisms should be voluntary for marriage partners and that an extra-judicial alternative dispute resolution forum should be registered and regulated by a body with governing rules.

3.309 The **United Ulama Council, Darul-Ihsan Research and Education Centre** and **Jamiatul Ulama (KwaZulu-Natal)**, submit that although the Discussion Paper made encouraging reference to mediation being an option that could be adopted by the Muslim community, such option need to be explored more deeply with a view to considering mandatory mediation and voluntary arbitration, before a dispute is referred to court, as an integral part of the Bill. In the respondents' view the inclusion of mandatory mediation would be a big step towards allaying fears of Muslims of possible interference by the courts in Islamic law. Pointing to the benefits of arbitration, the respondents add that further research and study is required to establish the viability of the option of arbitration in relation to constitutional requirements. The ideal situation would be one where the award of arbitration is converted into an order of court so as to give it legal binding effect. In such a scenario the court will play an important supervisory role by examining and then confirming the awards. The respondents propose that an appropriate clause be inserted in the draft Bill providing for voluntary arbitration, preferably by an accredited arbitration council, which provisions must override section 2 of the Arbitration Act, 1965, allowing for arbitration in Muslim matrimonial disputes. The latter proposal is supported by **Madrasah Taleemuddeen, Potgietersrus Muslim Association** and **Jamiatul Ulama (Transvaal)**. The latter respondent additionally argues that before an arbitration review is embarked upon, an in-built appeal mechanism should be provided for in the Arbitration Act. A panel consisting of Muftis and a Muslim judge from the High Court should be established to enable aggrieved parties to lodge an internal appeal, whereby the substantive side of Islamic law will be ascertained, and this panel should have the status of a *Qada* system. The views expressed in this paragraph are endorsed by **Khalid Dhorat**.

3.310 The **Commission on Gender Equality** opposes compulsory mediation, arguing that mediation by its very nature is voluntary. In their view issues such as domestic violence and emotional and physical abuse cannot be mediated, as there would be a power imbalance. The respondent submits that the nature of the dispute should determine the intervention process, and that it is unclear who will be responsible for the costs of the mediation. The **Muslim Youth Movement** endorses these views.

3.311 The **Association of Muslim Lawyers of Gauteng** proposes that parties be given

the right to arbitrate any disputes between them that occur under Muslim Personal law. In the respondent's view the court process envisaged in the draft Bill is problematic since there is a jurisprudential debate in Islamic law as to whether a non-Muslim judge can make decisions which would be binding under *Shari'ah* law; since the Supreme Court of Appeal does not sit with Muslim Assessors; and also because the Bill does not regulate the procedural law of evidence to be applied by the court. The respondent is further concerned that the Project Committee, in rejecting the proposal of arbitration, has not given proper consideration to foreign models that have adopted arbitration as an alternative dispute resolution mechanism in family law disputes. Referring to the fact that the case for arbitration in family law disputes is supported by the primary source of Islamic law, namely the *Qur'an*, the respondent points to the following advantages of arbitration:

- * Arbitrations are usually cheaper, more flexible, less complex and much speedier than litigation;
- * they are conducted in private;
- * the costs of arbitration are more predictable than those of litigation;
- * arbitration hearings can be as formal or informal as the parties wish;
- * arbitrators make themselves available to suit the convenience of disputants;
- * the arbitrator's award is final;
- * parties to an arbitration are entitled to provide the arbitrator with agreed terms of reference;
- * there is less of a possibility that judicial precedent would interfere with long and well established principles of Islamic law;
- * arbitration has the advantage of avoiding a legitimacy crisis which may be possible if the court makes a pronouncement which is not supported by the majority of scholars in a particular locality;
- * it reduces court congestion and saves money for the State;
- * it necessarily avoids anomalies created by the judicial process envisaged by Muslim Personal law consequent upon conflicts between the substantive law to be applied and the procedural laws governing the trial.

3.312 The respondent, referring to foreign provisions allowing for arbitration as an alternative dispute resolution mechanism to courts in family law disputes such as in Pakistan, Singapore, Australia, the United States and Canada, proposes the following: a clause should be inserted in the Bill allowing parties the right to refer any disputes, without restriction, concerning their rights under Muslim Personal law in terms of the Bill or contract to private arbitration. The Bill should also provide that where parties choose by way of

written terms of reference to refer any dispute to private arbitration, the outcome of the arbitration is final and binding, provided that the parties may appoint an appeal tribunal. A provision for review may be included, and the grounds of review should be those stated in section 33 of the Arbitration Act. Finally, the remaining provisions of the Arbitration Act ought to be applicable to arbitrations conducted under Muslim Personal law. The respondent concedes that the underlying rationale for the exclusion of matrimonial issues and matters relating to status from the ambit of the Arbitration Act is based on the High Court's jurisdiction as upper guardian of minor children, together with its jurisdiction over status matters, but points out that matters such as proprietary consequences and maintenance do not involve status matters.

3.313 The views expressed by the **Association of Muslim Lawyers of Gauteng** appear to be supported by the **United Ulama Council, Jamiatul Ulama (KwaZulu-Natal)** and **Madrasah In'aamiyyah**. The latter respondent adds that one of the clauses in the arbitration agreement could be that the two parties bind themselves to the award being made an order of the court. This implies that all awards should be submitted to the High Court which will convert the award to an order of the court which leaves the issue of status finally in the hands of the court. This proposal is endorsed by **Masjidul Quds**.

3.314 The **Muslim Youth Movement** submits that a clause on arbitration should also provide that no arbitration award affecting the status of parties should come into effect unless it is confirmed by the High Court. Further, issues which may arise in the Family Court should be referred by way of automatic review to the High Court, rather than on application.

3.315 The following institutions also propose that the draft Bill should provide for alternative dispute resolving mechanisms: the **Muslim Judicial Council, Woodstock Moslem Congregation**; the **Careers Research and Information Centre; Masjidul Jumu'ah Westridge; Goldfields Muslim Jamaat; Goolhurst Islamic Educational Society; Islamic Da'wah Movement; Siddique Islamic Centre; Heidelberg Muslim Jamaat; Al-Jaamia Madrassa; Nylstroom Muslim Community and Welfare Society; Moulana M J Rahmatullah; Wellington Muslim Community; Homestead Park Islamic Institute; Sunni Ulama Council (Transvaal); Masjid-E-Noor; Baitul - Mahmood; Kempton Park Jamaat Khana; Masjid-E-Omar Farouk; Darul Quraan Lenasia; Soofie Masjid; Vanderbijl Civic Centre Ibaadat Khana; Crescent of Hope; Jaame Masjid; Saaberie Jumma Masjid and Madressa Trust; Ermelo Muslim Jamaat; Shaanul Islam Masjid and Madressah Trust and Masjidus Salaam.**

3.316 The petitioners, namely **Nurul Islaam Jamaat Khana; Colenso Mosque; Siraatul Haq Islamic School** and **Bergville** likewise suggest that the draft Bill should provide for compulsory mediation and voluntary arbitration at the request of either or both of the parties. This is echoed by **Imran Khamissa** and the joint submission by **F Noormohamed, H Rawat and F Mall**.

3.317 **Ms Z Bulbulia** also endorses a move towards wider use of the arbitration process.

3.318 **Masjidul Quds** respectfully submits that the Project Committee has not carefully considered the option of arbitration and mediation. If this had been done, it would have been realised that the system of arbitration and mediation cannot be divorced from legislation pertaining to Muslim marriages and related matters. In the respondent words, “to separate the two will leave us with the bones and no meat to give the law the form and structure that we know it to be”.

Evaluation of comment (new clauses 13 and 14):

3.319 The Commission has heeded the suggestions made by a substantial number of respondents regarding compulsory mediation and voluntary arbitration, and has incorporated two clauses (13 and 14) in the proposed draft Bill to this effect. As far as compulsory mediation is concerned, a mechanism has been developed in terms of which a dispute should be referred to an accredited Mediation Council before litigation is resorted to. The Council should attempt to resolve the dispute within 30 days, and if a resolution has been achieved, it must be confirmed by a court. A court may only adjudicate a dispute if it remains unresolved or after the expiry of 30 days from the time of referral of the dispute to the Council. It is envisaged that this dispute resolution mechanism will cut costs and be efficient. In Islam, mediation of the kind proposed is strongly recommended. With regard to the comment about mediation always being voluntary, it is envisaged that mediation under the Labour Relations Act has compulsory force.

3.320 In respect of voluntary arbitration, it is recommended that the parties to a Muslim marriage may agree to refer a dispute to an Arbitrator to be resolved through arbitration in terms of the Arbitration Act. It is further recommended that no arbitration award affecting the rights of children or the status of any person shall be effective unless confirmed by the High Court. The provision is in line with thinking elsewhere in comparable jurisdictions.

Comments received on certain concerns

3.321 The **Women's Cultural Group**, although of the opinion that the relief envisioned by the Bill is urgently required and that the Bill is on the whole well drafted, is concerned about the Bill seeking to impose a regime that does not enjoy universal support from amongst the Muslim community. In their view the Bill seems to enjoy support from many eminent Muslim religious bodies, while at the same time there appears to be a great deal of opposition from important groupings within the Muslim community, who are of the view that the Bill needs to be drastically amended, whilst some even advocate that it be jettisoned. Against this background the respondent cautions that a speedy implementation of the Bill, in spite of any perceived imperfections and notwithstanding the opposition from certain quarters, would spell danger. There could be a host of constitutional challenges from persons who feel aggrieved for whatever reason. Another undesirable result could be that Muslims may simply defy the Act and not register their *nikahs*.

3.322 **Jamiatul Ulama (KwaZulu-Natal)** contends, with reference to the summary of responses in the Discussion Paper, that those who were supportive of the proposals in the Issue Paper appear to be the majority, but in reality they are not, as they represent themselves only or just a few people. The respondent states that the United Ulama Council of South Africa, who had alternative views, represents over 70% of Muslims in South Africa and that its views were hardly considered.

3.323 The **Islamic Forum Azaadville** holds the view that Muslim marriages should not be seen in isolation but proposals should be made with regard to all the other aspects of Muslim Personal law and such legislation must be put in place simultaneously. The respondent regards the proposed draft Bill almost as an experiment to see how it will work. It cautions that, as much as it welcomes the consideration given by the Law Commission to Muslims, the understanding of the total Islamic way of life and the spirit of its jurisprudence must be seen in its totality and not in segments. Any proposed legislation must take this into account. The respondent is also concerned that the proposals appear not to embody procedures and the process of resolving disputes as well as the necessary steps required before a marriage is dissolved.

3.324 The **Women's Forum** requests that much more consultation must take place before the proposed Bill becomes law. The consultation should be two-fold: education of the masses, most of whom are not even aware of what marriage by means of civil law means, and wider consultation amongst Muslims who have the interest of the masses at heart, and

who have the expertise in both the *Shari'ah* as well as the South African legal system. In similar vein **Mr I Fataar** is concerned that the proper consultation procedure was not followed especially with regard to the man in the street who does not understand all the legal jargon. He adds that there is an additional problem in that the Ulama have not succeeded in educating the general public about what the *Qur'anic* laws are regarding Muslim Personal law and all that it entails.

3.325 **Mr M A Moosagie** from the Academy of Islamic Research is of the view that the very flexible nature of Islamic law constitutes a problem which, if not adequately addressed, will have serious ramifications for the effective implementation of Muslim Personal law in South Africa. He avers that the Discussion Paper, although constantly referring to "Islamic law", neither provided a clear definition of this term, nor did it attempt to indicate what its referent is. The **United Ulama Council**, supported by **Darul-Ihsan Research and Education Centre**, states that since diverse interpretations of Islamic law prevail, problems in this respect could arise in the foreseeable future. A comprehensive definition of Islamic law, as well as who will be considered to be Muslims, would therefore be most appropriate in the draft Bill. This view is endorsed by **Jamiatul Ulama (KwaZulu-Natal)** and **Masjidul Quds**. **Mr Moosagie** argues that in a diverse community such as ours in South Africa, there are a number of pertinent issues that need to be addressed before a working definition of "Islamic law" could be adopted. He refers to the following problem areas:

- * Is the term to be confined to a specific *madhab* or extended to the famous four *madhabs*, or indeed, beyond the scope of the four, to the Shi'i or Zahiri schools, for example, or to modern rulings and legislation passed in the many Muslim countries around the world?
- * If it is decided to adopt a very wide and inclusive definition of Islamic law, there is the very real risk of not having sufficient expertise, adequately trained and equipped to determine the law based on this huge and ever increasing corpus of Muslim Personal law.
- * Who and by which process is the scope of Islamic law to be defined?
- * The problem with having to deal with the fact that in some cases Islamic law incorporates two diametrically opposing rules, either of which could be classified as equally authentic and relevant.

* The determination of authentic sources and references.

3.326 In **Mr Moosagie's** view it is futile to scrutinise the Discussion Paper in the absence of an adopted working definition of Islamic law. The same concerns are raised in the joint submission by **F Noormohamed, H Rawat and F Mall**.

3.327 In similar vein the petitioners, namely **Nurul Islaam Jamaat Khana; Colenso Mosque; Siraatul Haq Islamic School and Bergville** calls for a definition of *Shari'ah* to be included in the draft Bill.

3.328 **Jamiatul Ulama (Transvaal)** proposes the following definition of Islamic law: "A communication from Allah, the Exalted, related to the acts of the servants through a demand or option, or through a declaration".

3.329 **Mr M S Sulaiman** suggests that the Discussion Paper should be more widely publicised. He also calls for more time to be allowed for the deliberation thereof and the preparation of submissions. The respondent refers to the fact that since Islamic law today exists mostly as an "informal legal system", personal and individual preferences in the context of Islamic law are myriad. He holds the view that it is critical in developing a legislative framework for the recognition of Islamic law that approaches that can be regarded as esoteric and reflective of personal tendencies should give way to those approaches to Islamic law enjoying greater grassroots support when measured against international and local standards among Muslims themselves. Although **Mr Sulaiman** concedes that the Bill appears to have been drafted to cater for as wide a range of the Islamic schools of law as possible, it should be noted that the approach of specific schools is sometimes adopted. This may create a crisis of conscience for adherents of other schools, and could result in a form of 'undermining'. He also points to the danger that if it is perceived by Muslims that the proposed legislation does not comply with Islamic law, it is quite possible that they will resort to an informal system of enforcing and practising their personal, as has been the case under the previous political dispensation and even now. The new legislation may simply be ignored, and complied with - to the extent to which it cannot in some sense be undermined - for the sake of convenience and to escape legal censure.

3.330 The **Association of Muslim Lawyers**, pointing to the fact that a radical shift has been effected from the current position that civil marriages are automatically in community of property to one where Muslim marriages will be deemed to be out of community of property, submits that if the parties were married in community of property and now marry in terms of

the proposed Act, they would simultaneously have two property regimes applying. Surely they cannot enter into an ante-nuptial contract if they wish to remain married in community of property. If, the respondent continues, they wish to convert to a marriage out of community of property, it renders the conclusion of an ante-nuptial contract obsolete. Moreover, for those who do not wish to conclude an ante-nuptial contract in terms of a civil marriage, the proposed legislation would be convenient to obtain the consequences of a marriage out of community of property. The respondent is concerned that the anomaly will create all kinds of practical difficulties in both property and succession law. The respondent is also uncertain as to whether the Act can be invoked by persons of any other faith or whether it is reserved for Muslims only (which may perhaps then render the Act unconstitutional). The **Association of Muslim Lawyers** finally suggests that the Act be renamed to the “Islamic Marriages and Divorce Act” as it also contains provisions relating to divorce and the consequences thereof.

3.331 **Darul-Ihsan Research and Education Centre, Jamiatul Ulama (KwaZulu-Natal)** and the **United Ulama Council** are concerned that many other details relating to Muslim marriages, divorce, maintenance, custody and succession seem to have been omitted in the draft Bill. Although it is conceded that this omission may have been intentional, the respondents emphasise the importance of appointing highly qualified and competent persons to serve as assessors. They are further concerned that the issue of the law of evidence could pose a major problem. Since the issue of the law of evidence could influence the outcome of a judgement substantially, it needs to be addressed in detail in the draft Bill and perhaps expanded further in the form of Regulations to the Bill. The concern regarding the law of evidence is echoed by the petitioners, namely **Nurul Islaam Jamaat Khana; Colenso Mosque; Siraatul Haq Islamic School and Bergville**, as well as by **Imran Khamissa, Jamiatul Ulama (KwaZulu-Natal)** and in the joint submission by **F Noormohamed, H Rawat and F Mall. Ms Z Bulbulia** also expresses concern regarding the question as to which law of evidence should apply. **Madresah In'aamiyyah** avers that it is undeniable that the choice of the system of the law of evidence will have a profound bearing on the outcome of any case. Thus, in all probability, using a foreign system of law of evidence in even a proper *Shari'ah* court will produce an outcome which does not comply with the *Shari'ah*. **Jamiatul Ulama (Transvaal)** submits that the Islamic law of evidence should be applied throughout.

3.332 **Saders Attorneys**, commending the Commission on its willingness to investigate the complex issue of the recognition of Muslim marriages, express concern that a lack of understanding of Islamic law and the *Shari'ah* is an obstacle to a proper understanding of the issues. Keeping in mind the need to uphold the Constitution and the authority of the

courts, it is also important to recognise that an individual Muslim is bound in terms of his *Qur'anic* and divine law. The respondent cautions that it is necessary to strike a fine balance between the two if a just and proper Muslim Marriages Act is to be evolved. To this end the view is held that much more consultation is required, and that the Commission should embark not only on a comparative study but also travel to countries abroad to study their legal structures and legislation. The respondent lists a number of issues which need special attention and further debate, which includes voluntary arbitration, the role of assessors in dispute resolution, the taking of a second wife, the issue of *faskh* and *khul'a*, and the matrimonial property regime.

3.333 The petitioners, namely **Nurul Islaam Jamaat Khana; Colenso Mosque; Siraatul Haq Islamic School** and **Bergville**, hold the view that at least six months of extension should be given to study the Discussion Paper in greater detail.

3.334 **Jamiatul Ulama (KwaZulu-Natal)** refers to the immense problems encountered with the execution of Muslim Personal law in India and states that this raises justified apprehensions of a similar experience in South Africa not being remote and far-fetched. The respondent contends that the fears raised by the Indian experience and the concerns of the *Shari'ah* being subjected to the "whims of judges" prompted the consideration of alternative approaches to the execution of the draft Bill such as the inclusion of mandatory mediation before formal court proceedings and the option of arbitration.

3.335 The **Jamiatul Ulama (Transvaal)** rejects a scenario whereby two sets of paradoxical jurists argue vociferously for a particular standpoint. The respondent cautions that if the Project Committee wishes to modify any entrenched law set out by the *Qur'an* and *Sunnah*, or adduces any such law based on any conception besides that of the spirit of *Shari'ah*, it cannot be accepted.

3.336 **Ms F H Amod**, supported by the joint submission from **Mss S Khan, A Randaree, F Ajam, F Rawat** and **Y Khan**, is concerned about a presumption that the *Shari'ah* discriminates against women and that they require protection. In the respondents' words, "this is not correct and is unfounded. We follow our religion and do not view as discriminatory or oppressive. In fact, we test the laws of the religion by what we view as having been revealed to us by the Almighty. It is not fair nor desirable to suggest to recognise a religious system only to the extent that it is consistent with a constitution. This is an offence against the freedom of religion".

3.337 **Khalid Dhorat** warns that the Constitution has an entrenched Bill of Rights which has been extensively interpreted in a eurocentric way. The respondent states that case laws have already been created, and that we will be bound by the doctrine of *stare decisis*. “Some rights are non-revocable, whilst others have been given priority in the hierarchy of rights in the interest of balancing the process of conflicting rights in litigation. The equality clause, for example, has been interpreted in a way not in conformity to Islamic standards. The tendency is towards the recognition of marriages of people of the same sex in order to shun discrimination between people who have the same sexual orientation. Such interpretations may be extended to Islamic marriages too!”

Evaluation of comment

3.338 The Commission is at pains to point out that even though not perfect, the draft Bill is truly a collaborative effort involving a broad spectrum of Muslim views. It is apparent that there will not be total agreement by everyone on the contents of or necessity for the Bill. The Commission sincerely believes that the draft Bill provides an opportunity for the Muslim community to achieve a unity of purpose despite differences on some issues. The Commission’s project committee appointed in respect of this investigation, has devoted a lot of time and effort to ensure that fundamental concerns were addressed.

Comments received on alternative proposals

3.339 Referring to the empowering provision in article 166(e) of the Constitution, the **United Ulama Council**, **Darul-Ihsan Research and Education Centre**, **Jamiatul Ulama (KwaZulu-Natal)**, **Jamiatul Ulama (Transvaal)** and the **Muslim Judicial Council** propose the establishment of a Muslim Family court in the major centres of the country which could operate as a circuit court, thereby eliminating the costs for establishing separate courts in various districts or provinces. The respondents contend that this would overcome the issue of misinterpretation of Islamic law and would allow the free and unhindered realisation of Islamic values through the full implementation of Islamic law. If such a court is not to be established, the establishment of a Muslim bench in major centres should be considered where cases can be adjudicated according to Islamic law. The respondents suggest that this bench should comprise of a Muslim judge to be assisted by two qualified and competent assessors. The rationale behind the proposal is aimed at eliminating the impermissibility of a non-Muslim judge presiding over Muslim matrimonial disputes. **Jamiatul Ulama (Transvaal)** further submits that if the proposition of a *Qadhi* court is accepted, a person to be *Qadi* should have a minimum of three years experience in the issuing of *Fatawa* (legal

edicts), should have a sound knowledge of the mechanics of *Qada*, and his credentials should be approved by the leading Muslim councils of South Africa to judge his competency in this field. If, however, the proposition is not accepted, two other alternatives should be considered: firstly, the appointment of a full *Shar'iah* bench consisting, in part, of one Muslim judge and two Muslim assessors, or, secondly, a compulsory arbitration mechanism, the award of which is to be approved by a judge in chambers before becoming effective.

3.340 The following institutions also support the establishment of a Muslim Family Court, presided over by a knowledgeable Muslim judge and two competent Muslim assessors: **Woodstock Moslem Congregation; the Careers Research and Information Centre; Masjidul Jumu'ah Westridge; Goldfields Muslim Jamaat; Goolhurst Islamic Educational Society; Islamic Da'wah Movement; Siddique Islamic Centre; Heidelberg Muslim Jamaat; Al-Jaamia Madrassa; Nylstroom Muslim Community and Welfare Society; Moulana M J Rahmatullah; Wellington Muslim Community; Potgietersrus Muslim Association; Homestead Park Islamic Institute; Sunni Ulama Council (Transvaal); Masjid-E-Noor; Baitul- Mahmood; Kempton Park Jamaat Khana; Masjid-E-Omar Farouk; Darul Quraan Lenasia; Soofie Masjid; Vanderbijl Civic Centre Ibaadat Khana; Crescent of Hope; Jaame Masjid; Saaberie Jumma Masjid and Madressa Trust; Ermelo Muslim Jamaat; Shaanul Islam Masjid and Madressah Trust and Masjidus Salaam.** The mentioned institutions also hold the view that all provisions in the draft Bill must comply with the requirements of Islamic law, and that the Ulama should be an integral component of the process relating to the interpretation of Islamic law. **Imran Khamissa** considers it to be of fundamental importance that the judge presiding over matters of Muslim family law be a Muslim who is well acquainted with Islamic law and its related sciences.

3.341 The views expressed above are endorsed in the joint submission by **F Noormohamed, H Rawat and F Mall**, as well as by **Ms F H Amod** and in the joint submission by **Mss S Khan, A Randaree, F Ajam, F Rawat and Y Khan**. Another respondent, **Dr Abu-Bakr M Asmal**, points to the fact that in each province Muslims already have a religious body adjudicating numerous cases of Muslim Personal law with the consent of the parties involved.

3.342 The **Muslim Judicial Council** proposes that the following new clauses be inserted in the draft Bill:

Clause 1(xix):

"nafaqah" - the provision of maintenance shall include food, clothing,

accommodation, medical expenses and all essentials of human life according to custom.

Marriage officers

- (a) Marriage officers shall be appointed upon application to the Minister, with the written certification by a judicial body that the applicant complies with the Islamic requirements of knowledge and moral integrity, for such an office;
- (b) The marriage officers of each province shall be organised in a group with a head known as the chief marriage officer of that province;
- (c) The chief marriage officer or representative shall act as the guardian of any party to a marriage who does not have a guardian.

3.343 The **United Ulama Council** also contends that the *Shari'ah* position as far as apostasy and same-sex marriage need to be dealt with, and that concepts such as custody (Hadanah), maintenance (*Nafaqah*) and majority (*Bulugh*) should be defined.

3.344 **Adv H K Saldulker** is of the view that the draft Bill should contain a provision regarding costs, similar to the Divorce Act, 1979, which contains the following provision:

Costs in a divorce action

The court shall not be bound to make an order of costs in favour of the successful party, but the court may, having regard to the means of the parties and their relevant conduct, make such an order as it considers just, and the court may order that the costs of the proceedings be apportioned between the parties.

3.345 **Prof J I Neels**, lecturer in International Private Law at the Rand Afrikaans University, submitted a detailed comment (in Afrikaans) regarding the proposed draft Bill from an International Private Law perspective. A few of his recommendations are the following:

- Express provision should be made for the recognition of Islamic marriages concluded abroad.
- The draft Bill should give guidance in the case where persons are domiciled in South Africa but their marriage is concluded, according to Islamic law, in a country where such marriage is not recognised. A provision will also be required to the effect that the proprietary consequences of such a marriage will be regulated by the proposed draft Bill.

3.346 **Jamiatul Ulama (Transvaal)** proposes that since a Muslim marriage is sacred in that it is a form of worship as well as a contract, the Bill should contain a prototype of a *nikah* contract to provide guidance on issues that need clarification, thus avoiding future litigation. The respondent also suggests that married couples should be given a moratorium of two

years in order to fulfil the requirements pertaining to proprietary consequences.

Evaluation of comment:

3.347 The Commission has previously referred to our country's limited resources, which are being drawn upon as social needs are being addressed. The aspirations and needs of constituent parts of its diverse population have to be realised as far as is practically possible. The project committee appointed in respect of this investigation has consulted widely. It has consulted with the United Ulama Council and with many others. The committee has publicised the process it was engaged in for a period of more than two years. The committee's Chairperson met with the Chief Qadi of India and exchanged ideas with members of the *Shari'ah* Institute of Pakistan at a workshop in KwaZulu/Natal. He also met with Mufti Taqi Usmani, an authority on Islamic law. National workshops were conducted and were part of a process to ensure proper and wide consultation and debate. Clauses 19 (on costs in a divorce action) and 20 (on the recognition of foreign marriages) were added as a result of the submissions referred to in paragraphs 3.344 and 3.345 above.

Negative comment

3.348 A number of respondents appears to reject the proposals in Discussion Paper 101 in their entirety and calls upon the Commission to "allow us to practice our religion without interference from anybody" (**Miftahuddin Islamic Institute**); "to allow the Muslim community to conduct their marriages in accordance to the Islamic *Shari'ah*" (**Madrasah Taaliemul Banaat**); "the draft should remain a draft, in fact, shelved for good" (the **Islaamic Research Organisation**); "the present Bill stifles freedom of religion and contradicts it" (**Fatima Asmal**); and "the Discussion Paper should be shredded and recycled for use as toilet paper" (**Mr A K Kadwa**). In a highly critical submission the **Institute of Islamic Shari'ah Studies** considers the Commission's efforts to be, *inter alia*, "a failure", "disappointing" and "calculated interference and regimentation of community life". The latter respondent not only criticises several aspects of the draft Bill, as indicated above, but also many of the statements made and conclusions drawn as reflected in Chapter 5 of Discussion Paper 101. **Madrasah Taleemuddeen**, an institution of higher Islamic education, considers the Discussion Paper to be a disappointment, permeated by many fundamental flaws. The respondent avers that there is no real need to have a detailed Bill in place if the route of arbitration is followed. It also holds that the very process of gaining recognition of Muslim Personal law has been flawed from the inception and that it has not been in agreement with the process.

3.349 In view of the aggressive stance taken by the **Young Men's Muslim Association** and the **Islamic International Research Institute** in their respective (but wordily similar) submissions, their conclusion is quoted:

The proposed Act in its entirety will be unworkable and unacceptable to Muslims. There is too much of interference in Islamic matters and there is a clear emphasis placed on secular courts deciding over and consenting to issues which are ordained and stipulated in the *Shari'ah*.

It is extremely clear that wherever a conflict arises between Islamic Law and secular law, the former will be discounted in favour of the latter which has made clear that everything will be subject to its Constitution.

The secular courts will now be in the position to 'decide' whether the Islamic perspectives and laws are rational and acceptable according to its fallible understanding.

There is no real need for State recognition of Islamic marriages. However, since there is a clamour for this amongst some circles, the ONLY feasible and acceptable way is for the State to accept as binding the Islamic Law in ALL aspects. Islam is a TOTAL way of life. The issue of marriages (*Nikah*) is extensively covered in the *Kitaabs of Fiqh*. There is absolutely no need for *kuffaar* intervention. The suggestion of *kuffaar* intervention and recognition implies a vote of no-confidence in the *Shari'ah*.

The imposition of Islamic Law is only enforceable in an Islamic country.

There is the overwhelming possibility of alien ideologies gaining momentum in propagating their views amongst the Muslim masses via the agency of the secular *kuffaar* courts. The various *Mathaahib* are at great risk of being contaminated by 'Salafism' and other *kufr* sects.

We have suitably qualified Muftis and Ulama who are able enough to issue *Shar'i* rulings in the various disputes. Their rulings can be accepted provided they are based on sound Islamic principles.

Whilst there is a permissibility for making use of *kuffaar* courts in protecting one's rights, the passing of this Act will signify the beginning of the end of Islamic sanity amongst the Muslim masses. An attempt is being made to secularise Islamic Law. An active effort is being made to force secularism down the throat of Muslims. The Islamic Law will be changed and altered to make way for alien laws and regulations.

May Allah Ta'ala save His Deen from this mass contamination. Aameen.

3.350 In a highly critical submission **Dr Abu-Bakr M Asmal** remarks as follows:

The project committee has sufficiently demonstrated its incompetence or its lack of concern for the *Shari'ah* and the values of the South African Muslim community. Clearly it has ignored the concerns of the specialists in Islamic law. By preferring a modernised, progressive, reformed 'Islam', it seems to have chosen a secular, liberal paradigm over Islam itself. The Draft Bill conforms more to President Bush's vision of life and religion than with the Almighty's prescription for a holistic way of life.

Positive comment

3.351 Contrary to the opinions expressed above, **Prof A Tayob** (Professor of Religious Studies, University of Cape Town), also commending the Commission and project committee for excellent work on promoting debate and discussion on an important issue in South African public life, has the following views on the debate on non-recognition and contamination:

The Discussion Paper has taken the time to reflect on the consequence of non-recognition of Islamic marriages, vis-a-vis the risk of contamination. I want to support the position of the committee, but add in fact that Islamic law has never been free of so-called contamination. By its very nature, Islamic law has always been in conversation with caliphal decrees, customs, and urgent societal needs. The talk of a pure uncontaminated Islamic law as reflected in some responses to the first draft fails to take into consideration the dynamism and responsiveness of the Islamic legal tradition to its broader environment. In fact, such sentiments only reflect the views of small ideological groupings who rarely work with Islamic law as practised by people in the towns and cities of the country.

Similarly, one should reject the notion that *Shari'ah* courts are necessarily the ideal way for Muslim Personal law as reflected in some of the responses, and apparently accepted by the committee. The present proposal is, in my view, ideal as it will bring Islamic law more directly in the public debate where a mutual conversation can take place between it and other equally dynamic notions of justice, equity and fairness. *Shari'ah* courts for the exclusive preserve of Muslim Personal law have the potential of depriving both themselves and other courts from a fruitful relationship, and mutual reciprocal influence. A *Shari'ah* court could and has sometimes become the symbol of a separate community of believers isolated from the wider world with which Muslims themselves are inextricably linked.

3.352 Notwithstanding his concerns and suggestions for improvement pointed out elsewhere in this document, **Mr M S Sulaiman**, in a comprehensive, analytical and thorough submission remarks that the proposed draft Bill is evidence of a careful balancing act by the project committee, and that it is to be commended that the proposals, in most cases, give careful consideration to the requirements of Islamic law. This is reiterated by the **Office of the Family Advocate** (Cape Town) who states that the Commission's efforts at affording recognition to Muslim marriages is commendable and can best be described as "tightrope walking" - an attempt to create a balance between the spirit of Muslim Personal law and the spirit of the Constitution.

3.353 The **Islamic Careline**, a voluntary counselling service, commends the Commission on the work done and believes that the Discussion Paper was an absolute necessity for the appropriate implementation of *Shari'ah* regarding Muslim Personal law.

3.354 The **Society of Advocates of KwaZulu-Natal** compliments the Commission on presenting a fairly balanced Bill, stating that contentious issues have been dealt with a degree of sensitivity, sound logic and argument. Regarding contamination of Muslim Personal law within the context of a dominant system of secular law, the respondent holds the view that as the proposed legislation is to be interpreted with the objectives that are consistent with Islamic law, the fear that MPL would be subsumed by a dominant system is misplaced.

3.355 The **Commission on Gender Equality** commends the Commission on the work that it has done. In their view the draft Bill will go a long way towards alleviating the problems that existed as a result of non-recognition of Muslim marriages and will assist many women who have been suffering as a result of the manner in which Islamic law has been practised.

3.356 The joint submission by **F Noormohamed, H Rawat and F Mall** acknowledges that a great deal of effort has been put in to ensure compatibility and consistency between the proposed draft Bill and Islamic law.

Recommendation

3.357 The Commission considered representations calling for a comprehensive overview of the Islamic law of succession. In the Commission's view, the issues that were raised in respect of succession are complex and manifold - to the extent that they cannot be dealt with satisfactorily within the scope of the current investigation. However, provision was made to amend the Intestate Succession Act 81 of 1987 by broadening the definition of a "spouse" to cover the spouse/s of a Muslim marriage (see the Schedule to the proposed draft Bill). A corresponding amendment was made to the Maintenance of Surviving Spouses Act 27 of 1990. This would alleviate the hardships endured by Muslim spouses who in the past have not enjoyed such recognition. Of course this does not prevent any Muslim person from ensuring, by making a will, that his or her estate will devolve in terms of Islamic law.

3.358 The mood at the three workshops conducted in October 2002 was good. Enthusiasm was high and there was a genuine appreciation that all views were considered. In the Commission's view, the vast majority of participants countrywide were in favour of the draft Bill. Earlier reservations on the part of some have given way to enthusiastic support

3.359 Further to the discussion in paragraphs 3.67 to 3.69 regarding clause 2 (application of the Act) and paragraphs 3.137 to 3.139 regarding clause 6 (registration of Muslim

marriages), the Commission wishes to draw attention to and amplify the practical realities resulting from those proposals. The basis of the proposals is that the Act – that is the proposed draft Bill – will apply in respect of future marriages (ie marriages concluded after commencement of the Act), where the parties elect to be bound by the Act. This may be referred to as an opting in scenario, where the parties are able to choose upfront which marital regime should apply to them. In respect of existing marriages the Act will apply automatically, unless the parties jointly elect, within 12 months after commencement of the Act, not to be bound by it – in other words an opting out scenario. Clause 2(3) provides that parties who have exercised an option not to be bound by the provisions of the draft Bill, will be governed by the law as it was before the Act came into operation.

3.360 It may be said that there is an apparent inconsistency between the opting in scenario, for future marriages, and the opting out one, for existing marriages. In the first instance, there is no default system namely that the Act applies unless parties opt out. In the second instance, a default system applies, namely that the Act applies unless the parties opt out. The Commission considered that it is logical and consistent that parties who chose in the past to marry by Muslim rites, should have their values in terms of the provisions of the Act enforced and applied. However, those who voice the view that they would rather have the law as it was before the Act came into operation apply to them, than what they consider to be a distorted form of Islamic law in the form of the draft Bill, should be afforded an opportunity to opt out of the provisions of the Act and consequently have the provisions of clause 2(3) apply to them. As stated earlier, women's groups, because of the proprietary and other benefits flowing from the draft Bill, urged the Commission, firstly not to allow for choice, but submitted that if the Commission was inclined to afford a choice, the provision should be as is presently contained in clause 2(2).

3.361 It should be pointed out that the scenarios sketched differ from the regime introduced by the Matrimonial Property Act 88 of 1984. Section 2 of that Act provides that every marriage which is entered into after the commencement of the Act (future marriages), is subject to the accrual system – except in so far as that system is excluded by the provisions of an antenuptial contract. Section 21 of that Act provides for an *opting in* period for existing marriages. Again, the Commission's rationale for recommending an opting out scenario in respect of existing Muslim marriages, which requires a positive act by the parties, is aimed at the protection of women in such marriages, has been called for by Muslim women themselves, keeps pace with Government's commitment of enhancing the position of vulnerable groups and gives effect to the constitutional requirement of equality. It is accepted that requiring a positive act to do something, in this case, opting out, is more cumbersome

than not being required to do anything. Thus it is envisaged that the serious disadvantages suffered by Muslim women whose marriages are not recognised as amply demonstrated by recent court decisions,²⁰ will be contained.

3.362 Clause 6 requires the registration of both future and existing marriages, but also states that the failure to register existing marriages will not invalidate such marriages. This effectively means that registration is strictly speaking not required and that parties who fail to register existing marriages without an election to opt out of the provisions of the Act, will still enjoy the protections afforded by the Act. The rationale is that there are sections of the Muslim community who because of illiteracy, lack of means or infirmity are unable to comply with the prescribed formalities. It was felt that these persons should not be deprived of the benefits of the Act. Registration, however, will promote legal certainty and is encouraged.

3.363 To summarise the effect of the proposed Bill:

- (a) The Bill seeks to offer an elective option to persons who have either already contracted Muslim marriages, or wish to do so.
- (b) The purpose of the option is to present an opportunity for persons in the Muslim faith who wish to have a matrimonial regime which balances an allegiance to their personal law with a matrimonial framework within the protection of a post-constitutional statute.
- (c) The policy approach is to allow those already married under Islamic law to opt out of the new regime if they wish; those henceforth marrying under Islamic law may however opt in.
- (d) If parties in either category decline or omit to register their Muslim marriage, it is not rendered invalid. The option afforded by the Bill will simply not be taken up.

3.364 There will be critics of this approach on either side: those who would wish to make the Bill compulsory, and those who oppose even the elective chance offered. The Commission however notes that the consultative process of the project committee has been one of the most difficult, extensive and strenuous in the history of the Commission. An attempt at legislation which does not seek to balance matters in a way which offers a unique post-constitutional option to follow a personal law within a statutory framework in a manner compliant with the Bill of Rights, but which does not force this course, is, in the Commission's view, the only course.

²⁰ Cf *Amod v Multilateral Motor Vehicle Accidents Fund* 1999 (4) SA 1319 (SCA) and *Daniels v Campbell NO and Others* Case No 1646/01 (CPD), judgement delivered on 24 June 2003.

3.365 The Commission recommends the enactment of the draft Bill as contained in **Annexure A** to this Report. The Bill is based on the proposals made in Discussion Paper 101, but has been amended in the light of the comments received on that Paper as well as inputs made at the workshops referred to. In order to facilitate a distinction between the Bill as originally proposed and the amended version, the draft Bill as proposed in Discussion Paper 101 has been included in this Report as **Annexure B**.

MUSLIM MARRIAGES ACT .. OF 20..

To make provision for the recognition of Muslim marriages; to specify the requirements for a valid Muslim marriage; to regulate the registration of Muslim marriages; to recognise the status and capacity of spouses in Muslim marriages; to regulate the proprietary consequences of Muslim marriages; to regulate the termination of Muslim marriages and the consequences thereof; to provide for the making of regulations; and to provide for matters connected therewith.

Definitions and interpretation of the Act

1. In *this Act*, unless the context otherwise indicates-
- (i) “**court**” means a High Court of South Africa, or a family court established under any law, and includes a divorce court established under section 10 of the Administration Amendment Act, 1929 (Act 9 of 1929), and constituted as set out in section 15;
 - (ii) “**Deeds Registries Act**” means the Deeds Registries Act, 1947 (Act 47 of 1937);
 - (iii) “**deferred dower**” means the dower or part thereof which is payable on an agreed future date but which in any event becomes due and payable upon dissolution of the marriage by divorce or death;
 - (iv) “**dispute**” means a dispute or an alleged dispute relating to the interpretation or application of any provision of *this Act* or any applicable law;
 - (v) “**Divorce Act**” means the Divorce Act, 1979 (Act 70 of 1979);
 - (vi) “**dower**” (*mahr*) means the money, property or anything of value, including benefits which must be payable by the husband to the wife as an *ex lege* consequence of the marriage itself in order to establish a family and lay the foundations for affection and companionship;
 - (vii) “**existing civil marriage**” means an existing marriage contracted according to Islamic law which has also been registered and solemnized in terms of the *Marriage Act* prior to the commencement of *this Act* ;
 - (viii) “**facilitating a marriage**” as contemplated in section 6(9) means applying the marriage formula in a ceremony (*nikah*);
 - (ix) “**Family Advocate**” means any Family Advocate appointed under section 2(1) of the Mediation in Certain Divorce Matters Act, 1987 (Act 24 of 1987);

- (x) **“Faskh”** means a decree of dissolution of marriage granted by a *court*, upon the application of a husband or wife, on any ground or basis permitted by Islamic law, including in the case of a wife, any one or more of the following grounds, namely where the -
- (a) husband is missing, or his whereabouts are not known, for a substantial period of time (*Mafqūd al-Khabar*);
 - (b) husband fails to maintain his wife (*‘Adam al-Infāq*);
 - (c) husband has been sentenced to imprisonment for a period of three years or more, provided that the wife is entitled to apply for a decree of dissolution within a period of one year as from the date of sentencing;
 - (d) husband is mentally ill, or in a state of continued unconsciousness as contemplated by section 5 of the *Divorce Act*, which provisions shall apply, with the changes required by the context (*Junūn*);
 - (e) husband suffers from impotence or a serious disease which renders cohabitation intolerable (*‘Ayb*);
 - (f) husband treats his wife with cruelty in any form, which renders cohabitation intolerable (*Dharar*);
 - (g) husband has failed, without valid reason, to perform his marital obligations for an unreasonable period (*Dharar*);
 - (h) husband is a spouse in more than one Muslim marriage, and fails to treat his wife justly in accordance with the injunctions of the *Qur’an* and *Sunnah* (*Dharar*);
 - (i) husband commits harm against his wife, as recognised by Islamic law (*Dharar*); or
 - (j) discord between the spouses has undermined the objects of marriage, including the foundational values of mutual love, affection, companionship and understanding, with the result that dissolution is an option in the circumstances (*Shiqāq*);
- (xi) **“’Iddah”** means the mandatory waiting period, arising from the dissolution of the marriage by *Talāq*, *Faskh* or death during which period she may not remarry. The *’Iddah* of a divorced woman who -
- (a) menstruates, is three such menstrual cycles;
 - (b) does not menstruate for any reason, is three months;
 - (c) is pregnant, extends until the time of delivery.
- The *’Iddah* of a widowed woman –
- (a) if she is not pregnant, is 130 days;
 - (b) if she is pregnant, extends until the time of delivery.

- (xii) **“irrevocable Talāq”** (*Talāq Bā-in*) refers -
 - (a) to a first or second *revocable Talāq* pronounced by a husband which becomes irrevocable upon the expiry of the *'Iddah*;
 - (b) to a *Talāq* expressly pronounced as irrevocable at the time of pronouncement; and
 - (c) to the pronouncement of a third *Talāq*;
- (xiii) **“Khula’ ”** means the dissolution of the marriage bond at the instance of the wife, in terms of an agreement for the transfer of property or other permissible consideration between the spouses according to Islamic law;
- (xiv) **“Marriage Act”** means the Marriage Act, 1961 (Act 25 of 1961);
- (xv) **“marriage officer”** means any Muslim person with knowledge of Islamic law appointed as marriage officer for purposes of *this Act* by the *Minister* or an officer acting under the *Minister’s* written authorisation;
- (xvi) **“Minister”** means the Minister of Home Affairs;
- (xvii) **“Muslim”** means a person who believes in the oneness of Allah and who believes in the Holy Messenger Muhammad as the final prophet and who has faith in all the essentials of Islam;
- (xviii) **“Muslim marriage”** means a marriage between a man and a woman contracted in accordance with Islamic law only;
- (xix) **“prescribed”** means prescribed by regulation made under section 18;
- (xx) **“prompt dower”** means the dower or part thereof which is payable at the time of conclusion of the marriage or immediately thereafter upon demand by the wife;
- (xxi) **“Registrar of Deeds”** means the Registrar of Deeds appointed in terms of section 2 of the *Deeds Registries Act*;
- (xxii) **“revocable Talāq”** means a *Talāq Raj’i* which does not terminate the marriage before the completion of the *'Iddah*, and which entitles the parties to reconcile before the expiry of the *'Iddah* only;
- (xxiii) **“Tafwīd al-Talāq”** means the delegation by the husband of his right of *Talāq* to the wife or any other person, either at the time of conclusion of the marriage or during the subsistence of the marriage, so that the wife or the appointed person may terminate the marriage by pronouncing a *Talāq* strictly in accordance with the terms of such delegation;
- (xxiv) **“Talāq”** means the dissolution of a *Muslim marriage*, forthwith or at a later stage, by a husband, or his wife or agent, duly authorised by him or her to do so, using the word *Talāq* or a synonym or derivative thereof in any language, and includes the pronouncement of a *Talāq* pursuant to a *Tafwīd al-Talāq*; and
- (xxv) **“this Act”** includes the regulations.

Application of *this Act*²¹

2. (1) The provisions of *this Act* shall apply to a *Muslim marriage* contracted after the commencement of *this Act* where the parties thereto elect in the *prescribed* manner to be bound by the provisions of *this Act*.

(2) The provisions of *this Act* shall apply to a *Muslim marriage* contracted before the commencement of *this Act*: Provided that the parties shall be entitled, within a period of 12 months or such longer period as may be *prescribed*, as from the date of such commencement, jointly to elect in the *prescribed* manner not to be bound by the provisions of *this Act*, in which event the provisions of *this Act* shall not apply to such marriage.

(3) The law applying to a *Muslim marriage* in respect of which the parties have elected not to be bound by the provisions of *this Act*, shall be the law as it was before *this Act* came into operation.

(4) The provisions of *this Act* –

- (a) apply to an *existing civil marriage* insofar as the spouses thereto have elected in the *prescribed* manner to cause the provisions of *this Act* to apply, excluding sections 5, 6, 7 and 10: Provided that vested proprietary rights arising from a marriage in community of property or a marriage subject to the accrual system, or in terms of an antenuptial contract, shall remain unaffected;
- (b) do not apply to a civil marriage solemnised under the *Marriage Act* after the commencement of *this Act*; and
- (c) do not apply to a customary marriage registered under the Recognition of Customary Marriages Act, 1998 (Act 120 of 1998).

(5) A *Muslim marriage* to which *this Act* applies and in respect of which all the requirements of *this Act* have been complied with, shall for all purposes be recognised as a valid marriage.

Equal status and capacity of spouses

3. A wife and a husband in a *Muslim marriage* are equal in human dignity and both have, on the basis of equality, full status, capacity and financial independence,

²¹ See the discussion in paragraphs 3.359 – 3.364.

including the capacity to own and acquire assets and to dispose of them, to enter into contracts and to litigate.

Disputes

4. (1) Any *dispute* arising from a *Muslim marriage* which was entered into but terminated before the commencement of *this Act*, shall be dealt with in terms of the provisions of *this Act*: Provided that the parties may by agreement in the *prescribed* manner elect to have the *dispute* dealt with outside the provisions of *this Act*.

(2) (a) Where a *dispute* arises between a husband in a polygynous marriage, and one or more of his spouses, which *dispute* is pending in a *court* of competent jurisdiction, and irrespective of whether the *dispute* is in relation to a marriage governed by the provisions of *this Act* or not, all spouses to whom the husband is married must be given notice of such *dispute*.

(b) In making an order pursuant to the provisions of paragraph (a), the *court* must take into account the rights of all affected parties.

Requirements for validity of *Muslim marriages*

5. (1) For a *Muslim marriage* entered into after the commencement of *this Act* to be valid -

- (a) the prospective spouses must both consent to be married to each other;
- (b) the *marriage officer* must ascertain from a proxy, if any, whether the parties to the prospective marriage have consented thereto;
- (c) witnesses must be present as required by Islamic law at the time of conclusion of the marriage;
- (d) the prospective bride and groom must, subject to subsections (4) and (6), have attained the age of 18 years; and
- (e) there must be compliance with the provisions of this section and sections 6 and 7.

(2) No spouse in a *Muslim marriage* to whom *this Act* applies may subsequently enter into a marriage under the *Marriage Act* or any other law during the subsistence of such *Muslim marriage*.

(3) In the event of a marriage having been entered into in contravention of the provisions of subsection (2), such purported marriage shall be deemed to be null and void.

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

(5) If the consent of a parent or guardian as referred to in subsection (4) cannot be obtained, the provisions of section 25 of the *Marriage Act* apply.

(6) The *Minister* or any *Muslim* person or *Muslim* body authorised in writing thereto by him or her, may grant written permission to a person under the requisite age to enter into a *Muslim marriage* if the *Minister* or the said person or body considers such marriage desirable and in the interests of the parties in question.

(7) Permission granted in terms of subsection (6) shall not relieve the parties to the proposed marriage from the obligation to comply with any other requirements *prescribed* by law.

(8) If a person under the requisite age has entered into a *Muslim marriage* without the written permission of the *Minister* or person or body authorised by him or her, the *Minister* or such person or body may, if he, she or it considers the marriage to be desirable and in the interests of the parties in question, and if the marriage was in every other respect in accordance with *this Act*, declare the marriage in writing to be for all purposes a valid *Muslim marriage*.

(9) Subject to the provisions of subsections (6) and (7), section 24A of the *Marriage Act* applies to the *Muslim marriage* of a minor entered into without the consent of a parent, guardian, commissioner of child welfare or a judge, as the case may be.

(10) The prohibition of a *Muslim marriage* between persons on account of their relationship by blood or affinity or fosterage, or any other reason, is determined by Islamic law.

Registration of *Muslim marriages*²²

6. (1) A *Muslim marriage* -

- (a) entered into before the commencement of *this Act*, unless the parties have elected not to be bound by the provisions of *this Act* as contemplated in section 2(2), must be registered in the *prescribed* manner within a period of two years after that commencement or within such longer period as the *Minister* may from time to time prescribe by notice in the *Gazette*; or
- (b) entered into after the commencement of *this Act*, where the parties have elected to be bound by the provisions of *this Act* as contemplated in section 2(1), must be registered as *prescribed* at the time of the conclusion of the marriage or within such longer period as the *Minister* may from time to time prescribe by notice in the *Gazette*.

(2) No *marriage officer* shall register any 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, 1997 (Act 68 of 1997), or his or her birth certificate issued under the provisions of the Birth and Deaths Registration Act, 1992 (Act 51 of 1992) ;
- (b) each of such parties furnishes to the *marriage officer* proof of application for either an identity document or a birth certificate referred to in paragraph (a) together with the *prescribed* affidavit sworn to before an authorised officer of the Department of Home Affairs;
- (c) one of such parties produces his or her identity document or a birth certificate referred to in paragraph (a) or furnishes proof of his or her application for any of these documents to the *marriage officer* and the other furnishes to the *marriage officer* the affidavit referred to in paragraph (b);
- (d) one of such parties, who is a foreign national, furnishes the *marriage officer* with proof of his or her lawful sojourn in the Republic together with his or her original passport or travel document and a *prescribed* affidavit sworn to before an officer of the Department of Home Affairs; or in cases of refugees, an original copy of his or her Refugee Identity Document issued in terms of the provisions of the Refugees Act, 1998 (Act 130 of 1998); or
- (e) each of such parties, who is a widow or widower, as the case may be, furnishes the marriage officer with a copy of his or her deceased spouse's death certificate issued

²² See the discussion in paragraphs 3.359 – 3.364.

under the provisions of the Birth and Deaths Registration Act, 1992, or any other law applicable to a particular foreign national.

(3) The *marriage officer* must –

- (a) inform the parties that they are entitled to conclude a contract of their own choice regulating their marital regime, or that they may conclude a standard contract and must present to them examples of such a contract, as *prescribed*, in order for the parties to make an informed choice;
- (b) ensure that the spouses understand the registration procedures;
- (c) if satisfied that the spouses concluded a valid *Muslim marriage*, record the identity of the spouses, the date of the marriage, the *dower* agreed to, whether payable immediately or deferred in full or part, and any other particulars *prescribed*, and must register the marriage in accordance with *this Act* and the regulations as *prescribed*;
- (d) issue to the spouses a certificate of registration, bearing the *prescribed* particulars; and
- (e) forthwith transmit the relevant records to the nearest office of the Department of Home Affairs.

(4) A *Muslim marriage* shall be contracted in accordance with the formulae prescribed in Islamic law, including *zawwajtuka* and *ankahtuka* (“I marry you (to)...”).

(5) If the *marriage officer* is not satisfied that a valid *Muslim marriage* was entered into by the spouses, he or she must refuse to register the marriage.

(6) A *court* may, upon the application of any of the spouses made to that *court*, order -

- (a) the registration of any *Muslim marriage*; or
- (b) the cancellation or rectification of any registration of a *Muslim marriage* effected by a *marriage officer*.

(7) A certificate of registration of a *Muslim marriage* issued under this section or any other law providing for the registration of *Muslim marriages* constitutes *prima facie* proof of the existence of the *Muslim marriage* and of the particulars contained in the certificate.

(8) Any *marriage officer* who knowingly registers 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 R5 000.

(9) (a) Any person facilitating the conclusion of a *Muslim marriage*, irrespective of whether such person is a *marriage officer*, must inform the prospective spouses that they have a choice whether or not to be bound by the provisions of *this Act*.

(b) If the parties to a proposed marriage elect to be bound by the provisions of *this Act* as contemplated in section 2(1), the person *facilitating the marriage* referred to in paragraph (a) must direct such parties to a *marriage officer* for purposes of registering the *Muslim marriage* so *facilitated*.

(c) The person *facilitating the marriage* referred to in paragraph (a) who fails to comply with the provisions of paragraph (b), is guilty of an offence and liable upon conviction to a fine not exceeding R5 000.

(10) Failure to register a *Muslim marriage* as contemplated in subsection (1)(a) does not affect the validity of such marriage.

Proof of age of parties to proposed marriage

7. If parties appear before a *marriage officer* for the purpose of contracting a *Muslim 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 *Muslim marriage* without the consent or permission of some other person, the *marriage officer* may refuse to register 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.

Proprietary consequences of *Muslim marriages* and contractual capacity of spouses

8. (1) A *Muslim marriage* to which this Act applies shall be deemed to be a marriage out of community of property excluding the accrual system, unless the proprietary consequences governing the marriage are regulated, by mutual agreement of the spouses, in an antenuptial contract which shall be registered in the Deeds Registry –

(a) in the case of a marriage entered into before the commencement of *this Act*, and if at the time of conclusion thereof a written agreement regulating the proprietary

consequences of the marriage existed between the spouses, within twelve months from the date of commencement of *this Act*; and

(b) in the case of a marriage entered into after the commencement of *this Act*, within three months from the date of execution of the contract

or within such extended period as the *court* may on application allow.

(2) Subject to subsection (1), the provisions of the *Deeds Registries Act* shall apply, with the changes required by the context, to the registration of an antenuptial contract contemplated in that subsection.

(3) Spouses in a *Muslim marriage* to which this Act applies may jointly apply to a *court* for leave to change the matrimonial property system, which applies to their marriage or marriages and the *court* may, if satisfied that -

(a) there are sound reasons for the proposed change;

(b) sufficient written notice of the proposed change has been given to all creditors of the spouses for amounts exceeding R500 or such amount as may be determined by the Minister of Justice by notice in the *Gazette*; and

(c) no other person will be prejudiced by the proposed change, order that the matrimonial property system applicable to such marriage or marriages will no longer apply and authorise the parties to such marriage or marriages to enter into a written contract in terms of which the future matrimonial property system of their marriage or marriages will be regulated on conditions determined by the *court*.

(4) In the case of a husband who is a spouse in more than one *Muslim marriage*, all persons having a sufficient interest in the matter, and in particular the husband's existing spouses, must be joined in the proceedings.

(5) Where the husband is a spouse in an *existing civil marriage*, and in a *Muslim marriage*, all his existing spouses must be joined in such proceedings.

(6) A husband in a *Muslim marriage*, to which *this Act* applies, who wishes to enter into a further *Muslim marriage* with another woman after the commencement of *this Act* must make an application to the *court* for the requisite approval in terms of subsection (7), and to approve a written contract which will regulate the future matrimonial property system of his marriages.

(7) When considering the application in terms of subsection (6), the *court*-

- (a) must grant approval if it is satisfied that the husband is able to maintain equality between his spouses as is prescribed by the Holy *Qur'an*;
- (b) may, in the case of an existing marriage which is in community of property or which is subject to the accrual system or other contractual arrangement -
 - (i) terminate the matrimonial property system which is applicable to that marriage; and
 - (ii) order an immediate division of the joint estate concerned in equal shares, or on such other basis as the *court* may deem just;
 - (iii) order the immediate division of the accrual concerned in accordance with the provisions of chapter 1 of the Matrimonial Property Act, 1984 (Act 88 of 1984), or on such other basis as the *court* may deem just;
- (c) make such order in respect of the prospective estate of the spouses concerned as is mutually agreed, or, failing any agreement, the marriage shall be deemed to be out of community of property, unless the *court* for compelling reasons decides otherwise.

(8) All persons having a sufficient interest in the matter, and in particular the applicant's existing spouse or spouses and his prospective spouse, must be joined in the proceedings instituted in terms of subsection (6).

(9) If a *court* grants an application contemplated in subsections (3) or (6), the registrar or clerk of the *court*, as the case may be, must furnish each spouse with an order of the *court* including a certified copy of such contract and must cause such order and a certified copy of such contract to be sent to each *Registrar of Deeds* of the area in which the *court* is situated for the purposes of recordal in terms of section 3(1)(w) of the *Deeds Registries Act*.

(10) No *marriage officer* shall register a second or subsequent *Muslim marriage*, unless the husband provides the *marriage officer* with the order of the *court* granting the requisite approval in terms of subsection (7).

(11) A husband who enters into a further *Muslim marriage*, whilst he is already married, without the permission of the *court*, in contravention of subsection (6) shall be guilty of an offence and liable on conviction to a fine not exceeding R20 000.

(12) Any person who intentionally prevents another from exercising any right conferred under *this Act*, shall be guilty of an offence and liable upon conviction to a fine or to imprisonment for a period not exceeding one year.

Termination of *Muslim marriages*

9. (1) The provisions of section 2 of the *Divorce Act* shall apply, with the changes required by the context, in respect of the jurisdiction of a *court* for the purposes of *this Act*.

(2) Notwithstanding the provisions of section 3(a) of the *Divorce Act* or anything to the contrary contained in any law or the common law, a *Muslim marriage* may be dissolved by a *court* on any ground permitted by Islamic law. The provisions of this section shall also apply, with the changes required by the context, to an *existing civil marriage* insofar as the parties thereto have in the *prescribed* manner elected to cause the provisions of *this Act* to apply to the consequences of their marriage.

(3) In the case of *Talāq* the following shall apply:

- (a) The husband shall be obliged to cause an *irrevocable Talāq* to be registered immediately, but in any event, by no later than 30 days after its pronouncement, with a *marriage officer* in the magisterial district closest to his wife's residence, in the presence of such wife or her duly authorised representative and two competent witnesses.
- (b) If the presence of the wife or her duly authorised representative cannot be secured for any reason, then the *marriage officer* shall register the *irrevocable Talāq* only in the event that the husband satisfies the *marriage officer* that due notice in the *prescribed* form of the intended registration was served upon her by the sheriff or by substituted service.
- (c) The provisions of paragraphs (a) and (b) shall apply, with the changes required by the context, where the husband has delegated to the wife the right of pronouncing a *Talāq*, and the wife has pronounced an *irrevocable Talāq (Tafwid al-Talāq)*.
- (d) Any husband who knowingly and wilfully fails to register the *irrevocable Talāq* in accordance with this subsection shall be guilty of an offence and liable on conviction to a fine not exceeding R5 000.
- (e) If a spouse disputes the validity of the *irrevocable Talāq*, according to Islamic Law, the *marriage officer* shall not register the same, until the *dispute* is resolved, by arbitration in terms of section 14 or the *court* or pursuant to a written settlement between the spouses.
- (f) A spouse shall, within 14 days as from the date of the registration of the *irrevocable Talāq*, institute legal proceedings in a competent *court* for a decree confirming the dissolution of the marriage by way of *Talāq*. The action so instituted shall be subject

to the procedures *prescribed* from time to time by the applicable rules of *court*. A copy of the certificate of registration of the *irrevocable Talāq* shall be annexed to the summons initiating such action. This does not preclude a spouse from seeking the following *interim* relief -

- (i) an application *pendente lite* for an interdict or for the interim custody of, or access to, a minor child of the marriage concerned or for the payment of maintenance;
 - (ii) an application for a contribution towards the costs of such action or to institute such action, or make such application, *in forma pauperis*, or for the substituted service of process in, or the edictal citation of a party to, such action or such application; or
 - (iii) an application for maintenance during the *'iddah* period.
- (g) An *irrevocable Talāq* taking effect as such prior to the commencement of *this Act* shall not be required to be registered in terms of the provisions of *this Act*.

(4) A *court* must grant a decree of divorce in the form of a *Faskh* on any ground which is recognised as valid for the dissolution of marriages under Islamic law, including the grounds specified in the definition of *Faskh* in section 1. The wife shall institute action for a decree of divorce in the form of *Faskh* in a competent *court*, and the procedure applicable thereto shall be the procedure *prescribed* from time to time by rules of *court*, including appropriate relief *pendente lite*, referred to in subsection (3)(f). The granting of a *Faskh* by a *court*, including a *Faskh* granted upon application of the husband, shall have the effect of terminating the marriage.

(5) The spouses who have effected a *Khula'* shall personally and jointly appear before a *marriage officer* and cause same to be registered in the presence of two competent witnesses. The *marriage officer* shall register the *Khula'* as one *irrevocable Talāq*, in which event the provisions of subsection (3)(f) will apply with such changes as may be required by the context.

(6) The Mediation in Certain Divorce Matters Act, 1987 (Act 24 of 1987) and sections 6(1) and (2) of the *Divorce Act* relating to safeguarding the welfare of any minor or dependent child of the marriage concerned, apply to the dissolution of a *Muslim marriage* under *this Act*.

(7) A *court* granting or confirming a decree for the dissolution of a *Muslim marriage* -

- (a) has the powers contemplated in sections 7(1), 7(7) and 7(8) of the *Divorce Act* and section 24(1) of the Matrimonial Property Act, 1984 (Act 88 of 1984);
- (b) must, if it deems it just and equitable, in the absence of any agreement between the parties to the marriage regarding the division of their assets, order that such assets be divided equitably between the parties, where-
 - (i) a party has in fact assisted, or has otherwise rendered services, in the operation or conduct of the family business or businesses during the subsistence of the marriage; or
 - (ii) the parties have actually contributed, during the subsistence of the marriage, to the maintenance or increase of the estate of each other, or any one of them, to the extent that it is not practically feasible or otherwise possible to accurately quantify the separate contributions of each party;
- (c) must, in the case of a husband who is a spouse in more than one *Muslim marriage*, take into consideration all relevant factors including the sequence of the marriages, any contract, agreement or order made in terms of section 8(3) and (7);
- (d) may order that any person who in the *court's* opinion has a sufficient interest in the matter be joined in the proceedings;
- (e) may make an order with regard to the custody or guardianship of, or access to, any minor child of the marriage, having regard to the provisions of section 11;
- (f) must, when making an order for the payment of maintenance, including past maintenance, take into account all relevant factors; and
- (g) may make an order for a conciliatory gift (*mut'ah al-Talāq*) in defined circumstances permitted by Islamic law.

(8) Upon termination of the marriage by death, the surviving spouse shall be entitled to lodge a claim against the deceased estate in respect of unpaid *dower*, or otherwise in respect of any tangible contribution recognised by Islamic law.

Age of majority

10. For the purposes of *this Act*, the age of majority of any person is determined in accordance with the Age of Majority Act, 1972 (Act 57 of 1972).

Custody of and access to minor children

11. (1) In making an order for the custody of, or access to a minor child, or in making a decision on guardianship, the *court* shall, with due regard to Islamic law and the

report and recommendations of the *Family Advocate*, consider the welfare and best interests of the child.

(2) Subject to subsection (1), the non-custodian parent shall enjoy reasonable access to a child.

(3) In the absence of both parents, or, failing them, for any reason, but subject to subsection (1), the *court* shall, with due regard to Islamic law, in awarding or granting custody (*al-hadānah*) or guardianship (*al-walāyah*) of minor children, award or grant custody or guardianship to such person as the *court* deems appropriate, in all the circumstances.

(4) An order in regard to the custody, guardianship or access to a child, made in terms of *this Act*, may at any time be rescinded or varied, or, in the case of access to a child, be suspended by a *court* if the *court* finds that there is sufficient reason therefore: Provided that if an enquiry is instituted by the *Family Advocate* in terms of section 4(1)(b) of the Mediation in Certain Divorce Matters Act, 1987, the *court* shall consider the report and recommendations of the *Family Advocate* concerning the welfare of minor children, before making the relevant order for variation, rescission or suspension, as the case may be.

Maintenance

12. (1) The provisions of the Maintenance Act, 1998 (Act 99 of 1998) shall apply, with the changes required by the context, in respect of the duty of any person to maintain any other person. Without derogating from the provisions of that Act, the provisions of subsections (2) to (4) shall apply.

(2) Notwithstanding the provisions of section 15 of the Maintenance Act, 1998, or, the common law, the maintenance court shall, in issuing a maintenance order, or otherwise in determining the amount to be paid as maintenance, take into consideration that-

- (a) the husband is obliged to maintain his wife during the subsistence of a *Muslim marriage* according to his means and her reasonable needs;
- (b) the father is obliged to maintain his children until they become self-supporting;
- (c) in the case of a dissolution by divorce of a *Muslim marriage* -
 - (i) the husband is obliged to maintain the wife for the mandatory waiting period of *'Iddah*;

- (ii) where the wife has custody in terms of section 11, the husband is obliged to remunerate the wife, including providing a separate residence if the wife does not own a residence, for the period of such custody only;
- (iii) the wife shall be separately entitled to be remunerated (*ujrah al-hadānah*) in relation to a breastfeeding period of two years calculated from date of birth of an infant;
- (iv) the husband's duty to support a child born of such marriage includes the provision of food, clothing, separate accommodation, medical care and education.

(3) Any amount of maintenance so determined shall be such amount as the maintenance court may consider fair and just in all the circumstances of the case.

(4) A maintenance order made in terms of *this Act* may at any time be rescinded or varied or suspended by a *court* if the *court* finds that there is sufficient reason therefor.

(5) Unpaid arrear maintenance which is due and payable to a wife shall not be capable of being extinguished by prescription, notwithstanding the provisions of the Prescription Act, 1969 (Act 68 of 1969) or any other law.

Compulsory mediation

13. (1) In the event of a *dispute* arising during the subsistence of a *Muslim marriage* or otherwise arising from such a marriage, any party to such marriage shall refer such *dispute*, at any time, whether before or after the institution of legal proceedings contemplated in section 9(2)(f) but prior to the adjudication thereof by a *court*, to a Mediation Council, accredited as *prescribed*.

(2) The Mediation Council shall attempt to resolve a *dispute* through mediation within 30 days from the date of the referral thereof. The parties may each be represented at such mediation by a representative of their choice.

(3) The Mediation Council, upon resolution of the *dispute*, shall submit the mediation agreement to a *court* within 30 days from resolution and such *court* shall, if satisfied that the interests of any minor children are duly protected, confirm the mediation agreement.

(4) If the Mediation Council has certified that a *dispute* remains unresolved or if a *dispute* remains unresolved after the expiry of 30 days from the date of referral thereof, such *dispute* may be adjudicated by a *court* in terms of section 15.

Arbitration (*Tahkīm*)

14. (1) Notwithstanding anything to the contrary contained in the Arbitration Act, 1965 (Act 42 of 1965), or any other law, the parties to a *Muslim marriage* may agree to refer a *dispute* arising during the subsistence of such marriage or otherwise arising from such marriage to an arbitrator, to be resolved through arbitration.

(2) Subject to subsection (4), the provisions of the Arbitration Act, 1965, shall apply to an arbitration conducted in terms of this section.

(3) The arbitrator shall ensure that -

- (a) the consent of the parties to a *Muslim marriage* to have a *dispute* resolved through arbitration constitutes informed consent; and
- (b) any other parties who may have an interest in the outcome of the arbitration are notified of such arbitration.

(4) No arbitration award affecting the welfare of minor children or the status of any person shall come into effect unless it is confirmed by the High Court upon application to such *court* and upon notice to all parties who have an interest in the outcome of the arbitration.

(5) In considering an application for the confirmation of an arbitration award, the *court* must be satisfied that the award is in the best interests of all minor children and to this end the *court* may -

- (a) confirm the award;
- (b) declare the whole or any part of the award to be void;
- (c) substitute the award for another award which the *court* deems fit;
- (d) vary the award on appropriate terms; or
- (e) remit the matter to the Arbitrator with appropriate directions.

(6) Nothing in subsection (5) shall be construed as limiting the *court's* jurisdiction under any law to review an arbitration award insofar as it relates to a property dispute which does not affect the rights or interests of minor children.

Courts and assessors

15. (1) If any *dispute* is referred to a *court* for adjudication, the following provisions shall apply –

- (a) the Judge President or other head of the *court* which has jurisdiction, shall appoint a *Muslim* judge from that *court* to hear such *dispute*, and if there is no *Muslim* judge, the Minister for Justice and Constitutional Development shall appoint a duly admitted practicing *Muslim* advocate or attorney of at least 10 years' standing as acting presiding officer: Provided that in urgent matters and in cases of an application under Rule 43 of the High Court Rules, the matter may be determined by a non-*Muslim* judge sitting without assessors;
- (b) the *court* shall be assisted by two *Muslim* assessors who shall have specialised knowledge of Islamic law;
- (c) the assessors shall be appointed by the Minister for Justice and Constitutional Development by proclamation in the *Gazette* and shall hold office for five years from the date of the relevant proclamation: Provided that the appointment of any such assessor may at any time be terminated by the Minister for any valid reason;
- (d) any person so appointed shall be eligible for reappointment for such further period or periods as the Minister may think fit.

(2) Assessors appointed in terms of this section shall act in an advisory capacity. In the event of the presiding judge not following the advice of an assessor, such assessor shall state his or her views in writing which, in the event of an appeal, shall be lodged with the Registrar of the Supreme Court of Appeal as part of the record for consideration by that court.

(3) Any decision of the *court* shall be subject to appeal to the Supreme Court of Appeal in accordance with the applicable Rules of Court, save that the appellant shall not be obliged to furnish security for the cost of the appeal.

(4) In the event of an appeal to the Supreme Court of Appeal, such decision shall be submitted to two *Muslim* institutions, accredited as *prescribed*, for written comment on questions of law only to be lodged with the Registrar of the Supreme Court of Appeal within a period of sixty days as from the date that the notice of appeal is delivered.

(5) The Supreme Court of Appeal, in determining an appeal referred to in subsection (4), shall have due regard to the written comment contemplated in that subsection.

(6) The Minister for Justice and Constitutional Development, in consultation with the Legal Aid Board established in terms of section 2 of the Legal Aid Act, 1969 (Act 22 of 1969), shall make appropriate provision for the rendering of legal aid to indigent persons.

Dissolution of *existing civil marriage*

16. (1) In the event of a spouse to an *existing civil marriage* instituting a divorce action in terms of the *Divorce Act* after the commencement of *this Act*, the *court* shall not dissolve the civil marriage by the grant of a decree of divorce until the *court* is satisfied that the accompanying *Muslim marriage* has been dissolved.

(2) In the event of the husband refusing, for any reason, to pronounce an *irrevocable Talāq*, the wife to the accompanying *Muslim marriage* shall be entitled to make an application for a decree of *Faskh* in terms of *this Act* for that purpose only, in which event the provisions of *this Act* shall apply, with the changes required by the context.

(3) The matter may, in circumstances contemplated in subsection (2), be referred back to the *court* for determining the proprietary or other consequences of the marriage in terms of the *Divorce Act* and related matrimonial legislation.

(4) Where in addition to the *existing civil marriage*, the husband has concluded a further *Muslim marriage* or marriages registrable under *this Act*, the husband's existing spouse or spouses must be joined in the divorce action contemplated in subsection (1).

(5) The provisions of subsection (1) shall apply, with such changes as may be required by the context, to spouses in an *existing civil marriage* who have elected to adopt the provisions of *this Act* as contemplated in section 2.

Unopposed proceedings

17. (1) In the event of proceedings being instituted under *this Act* for the confirmation or grant of a decree of dissolution of a *Muslim marriage* or other relief, and such proceedings are not opposed, or in the event of the parties having concluded a settlement agreement, the matter shall be heard by a *Muslim* judge sitting without assessors.

(2) A decree of dissolution of a *Muslim marriage* shall not be granted or confirmed under *this Act* unless the presiding judge is satisfied that the best interests of any minor children born from such marriage have been taken into account.

Regulations

18. (1) The Minister for Justice and Constitutional Development, after consultation with the *Minister*, may make regulations -

- (a) relating to -
 - (i) the requirements to be complied with and the information to be furnished to a *marriage officer* in respect of the registration and dissolution of a *Muslim marriage*;
 - (ii) the manner in which a *marriage officer* must satisfy himself or herself as to the existence or the validity of a *Muslim marriage*;
 - (iii) the manner in which any person may participate in the proof of the existence or in the registration of any *Muslim marriage*;
 - (iv) the form and content of certificates, notices, affidavits and declarations required for the purposes of *this Act*;
 - (v) the custody, certification, implementation, rectification, reproduction and disposal of any document relating to the registration of *Muslim marriages* or of any document *prescribed* in terms of the regulations;
 - (vi) any matter that is required or permitted to be *prescribed* in terms of *this Act*;
 - (vii) the appointment, registration, code of conduct and death and incapacity of the assessors including the payment of allowances to assessors;
 - (viii) any other matter which is necessary or expedient to provide for the effective registration of *Muslim marriages* or the efficient administration of *this Act*; and
- (b) prescribing the fees payable in respect of the registration of a *Muslim marriage* and the issuing of any certificate in respect thereof.

(2) Any regulation made under subsection (1) which may result in financial expenditure for the State must be made in consultation with the Minister of Finance.

(3) Any regulation made under subsection (1) may provide that any person who contravenes a provision thereof or fails to comply therewith shall be guilty of an offence and on conviction be liable to a fine or to imprisonment for a period not exceeding one year.

Costs in a divorce action

19. The *court* shall not be bound to make an order of costs in favour of the successful party in a divorce action, but the *court* may, having regard to the means of the parties and their relevant conduct, make such an order as it considers just, and the *court* may order that the costs of the proceedings be apportioned between the parties.

Recognition of foreign *Muslim marriages*

20. In the event of a *dispute* relating to whether or not a *Muslim marriage* celebrated in a foreign country is recognised as a valid *Muslim marriage* under *this Act*, such *dispute* shall be determined by the *court* having regard to all relevant factors, including the principles of conflict of laws.

Amendment of laws

21. The Acts specified in the Schedule are hereby amended to the extent set out in the third column of the Schedule.

Short title and commencement

22. *This Act* is called the Muslim Marriages Act, 20.. , and comes into operation on a date fixed by the President by proclamation in the *Gazette*.

Schedule

Note: [] Words in **bold** type in square brackets indicate omissions from existing enactments.

_____ Words underlined with a solid line indicate insertions in existing enactments.

LAWS AMENDED BY SECTION 21

No. and year of law	Short title	Extent of repeal or amendment
Act 47 of 1937	Deeds Registries Act	<p>1. The amendment of section 17—</p> <p>(a) by the substitution for paragraph (b) of subsection (2) of the following paragraph:</p> <p style="padding-left: 40px;">(b) where the marriage concerned is governed by the law in force in the Republic or any part thereof, state whether the marriage was contracted in or out of community of property or whether the matrimonial property system is governed by customary law in terms of the Recognition of Customary Marriages Act, 1998, <u>or is governed in terms of section .. of the Muslim Marriages Act, 20..;</u></p> <p>(b) by the substitution for subsection (4) of the following subsection:</p> <p style="padding-left: 40px;">(4) Where immovable property, a real right in immovable property, a bond or a notarial bond-</p> <p style="padding-left: 80px;">(a) is registered in the name of a person who has married since the registration took place;</p> <p style="padding-left: 80px;">(b) is registered in the name of a person who on the date of registration was married out of community of property or whose marriage was on that date governed by the law of another country, and whose marriage was subsequently dissolved by death or divorce;</p> <p style="padding-left: 80px;">(c) forms an asset in a joint estate and was registered in the name of the husband only; or</p> <p style="padding-left: 80px;">(d) is registered in the name of a person who on the date of the registration was a party to a marriage governed by the Recognition of Customary Marriages Act, 1998 (Act No. 120 of 1998) <u>or a marriage governed by the Muslim Marriages Act, 20..,</u></p> <p>the registrar shall on the written application by the person concerned and on the submission of the deed in question and of proof of the relevant facts, endorse the change in status or make a note to the</p>

No. and year of law	Short title	Extent of repeal or amendment
Act 47 of 1937	Deeds Registries Act	<p>effect that the said person is a party to a marriage in community of property, as the case may be: Provided that where there are two or more mutually dependent deeds, all such deeds must be submitted for endorsement: Provided further that in the case of an order of court envisaged in section 7(9) of the Recognition of Customary Marriages Act, 1998 (Act 120 of 1998) or in section .. of the Muslim Marriages Act, 20.., the registrar shall, on submission of the relevant deed and court order and without the necessity for a written application, make the endorsement or note.</p> <p>2. The amendment of section 45<i>bis</i> –</p> <p>(a) by the substitution for paragraph (b) of subsection (1) of the following paragraph:</p> <p>(b) forms or formed an asset in a joint estate, and a court has made an order, or has made an order and given an authorisation, under section 20 or 21(1) of the Matrimonial Property Act, 1984 (Act 88 of 1984), [or] under section 7 of the Recognition of Customary Marriages Act, 1998, or under sections .. or .. of the Muslim Marriages Act, 20.., as the case may be, in terms of which the property, lease or bond is awarded to one of the spouses,</p> <p>(b) by the substitution for paragraph (b) of subsection (1A) of the following paragraph:</p> <p>(b) forms or formed an asset in a joint estate and a court has made an order, or has made an order and given an authorization under section 20 or 21(1) of the Matrimonial Property Act, 1984 (Act 88 of 1984), [or] under section 7 of the Recognition of Customary Marriages Act, 1998, or under sections .. or .. of the Muslim Marriages Act, 20.., as the case may be, in terms of which the property, lease or bond is awarded to both spouses in undivided shares,</p>
Act 81 of 1987	Intestate Succession Act	<p>3. The amendment of section 1 by the insertion after paragraph (f) of subsection (4) of the following paragraph:</p> <p>(g) “spouse” shall include a spouse of a Muslim marriage recognised in terms of the Muslim Marriages Act, 20.., and shall otherwise include the spouse of a deceased person in a union recognised as a marriage in accordance with the tenets of any religion: Provided that in the event of a deceased man being survived by more than one spouse, the following shall apply -</p> <p>(i) for the purposes of subsection (1)(a), such surviving spouse or spouses shall inherit the intestate estate in equal shares;</p> <p>(ii) for the purposes of subsection (1)(c), such</p>

No. and year of law	Short title	Extent of repeal or amendment
Act 81 of 1987	Intestate Succession Act	<p><u>surviving spouse or spouses shall each inherit a child's share of the intestate estate or so much of the intestate estate in equal shares as does not exceed in value the amount so fixed as contemplated in this section.</u></p>
Act 27 of 1990	Maintenance of Surviving Spouses Act	<p>4. The amendment of section 1 by the insertion after the definition of "executor" of the following definition:</p> <p><u>"Marriage" shall include a Muslim marriage recognised in terms of the Muslim Marriages Act, 20... and shall otherwise include a union recognised as a marriage in accordance with the tenets of any religion.</u></p>

DRAFT BILL AS PROPOSED IN DISCUSSION PAPER 101

ISLAMIC MARRIAGES ACT .. OF 20..

To make provision for the recognition of Islamic marriages; to specify the requirements for a valid Islamic marriage; to regulate the registration of Islamic marriages; to recognise the status and capacity of spouses in Islamic marriages; to regulate the proprietary consequences of Islamic marriages; to regulate the dissolution of Islamic marriages and the consequences thereof; to provide for the making of regulations; and to provide for matters connected therewith.

Definitions

1. In this Act, unless the context otherwise indicates-
- (i) **“court”** means a High Court of South Africa, or a Family Court established under any law, and for purposes of section 9, a Divorce Court established in terms of section 10 of the Administration Amendment Act, 1929 (Act No. 9 of 1929). The provisions of section 2 of the Divorce Act, 1979 (Act No. 70 of 1979), shall, with the necessary changes, apply in respect of the jurisdiction of a court for the purposes of this Act;
 - (ii) **“deferred dower”** means the dower or part thereof which is payable on an agreed future date but which, in any event, becomes due and payable upon dissolution of the marriage by divorce or death;
 - (iii) **“dispute,”** for the purposes of section 13, means a dispute or an alleged dispute relating to the interpretation or application of any provision of this Act or any applicable law;
 - (iv) **“dower”** means the money or property which must be payable by the husband to the wife as an *ex lege* consequence of the marriage itself in order to establish a family, and lay the foundations for affection and companionship;
 - (v) **“existing civil marriage”** means an existing marriage contracted according to Islamic Law which has also been registered and solemnized in terms of the Marriage Act, 1961 (Act No. 25 of 1961), prior to the commencement of this Act, and in relation to which the parties may elect in the prescribed manner at any time after the date of commencement of this Act, to cause the provisions of this Act to apply to their marriage, in which event the provisions of this Act apply from the date of such

election, but without affecting vested proprietary rights (unaffected by such election) and the rights of third parties including creditors;

- (vi) **“Faskh”** means a decree of dissolution of marriage granted by a court, upon the application of the wife, on any ground or basis permitted by Islamic Law, and including any one or more of the following grounds, namely, where the -
- (a) husband is missing, or his whereabouts are not known, for a substantial period of time;
 - (b) husband fails for any reason to maintain his wife;
 - (c) husband has been sentenced to imprisonment for a period of three years or more, provided that the wife is entitled to apply for a decree of dissolution within a period of one year as from the date of sentencing;
 - (d) husband is mentally ill, or in a state of continued unconsciousness as contemplated by section 5 of the Divorce Act, 1979 (Act No. 70 of 1979) which provisions shall apply, with the changes required by the context;
 - (e) husband suffers from a serious disease, including impotency, which renders cohabitation intolerable;
 - (f) husband treats his wife with cruelty in any form, which renders cohabitation intolerable;
 - (g) husband has failed, without valid reason, to perform his marital obligations for a reasonable period;
 - (h) husband is a spouse in more than one Islamic marriage, he fails to treat his wife justly in accordance with the injunctions of the *Qur'an*; or
 - (i) marriage has irretrievably broken down, despite reasonable attempts at reconciliation;
- (vii) **“Iddah”** means the mandatory waiting period for the wife, arising from the dissolution of the marriage by divorce or death during which period she may not remarry. The *Iddah* of a divorced woman who -
- (a) menstruates is three such menstrual cycles;
 - (b) does not menstruate for any reason, is three months;
 - (c) is pregnant, extends until the time of delivery;
- (viii) **“irrevocable Talaq”** means -
- (a) a *Talaq* pronounced by a husband which becomes irrevocable only upon the expiry of the *Iddah*, thereby terminating the marriage upon the expiry thereof;
 - (b) according to the Hanafi School of Interpretation, a *Talaq* expressed to be irrevocable (*Bai'n*) at the time of pronouncement, thereby terminating the marriage immediately;
 - (c) the pronouncement of a third *Talaq*;

- (ix) **“Islamic marriage”** means a marriage contracted in accordance with Islamic law only, but excludes an existing civil marriage, or a civil marriage solemnized under the Marriage Act, 1961 (Act No. 25 of 1961), before or after the date of commencement of this Act;
- (x) **“*Khul’a*”** means the dissolution of the marriage bond, at the instance of the wife, in terms of an agreement between the spouses according to Islamic Law;
- (xi) **“marriage officer”** means any Muslim person with knowledge of Islamic Law appointed as marriage officer for purposes of this Act by the Minister or an officer acting under the Minister's written authorisation;
- (xii) **“Minister”** means the Minister of Home Affairs;
- (xiii) **“prescribed”** means prescribed by regulation made under section 15;
- (xiv) **“prompt dower”** means the dower or part thereof which is payable at the time of conclusion of the marriage or immediately thereafter upon demand by the wife;
- (xv) **“revocable *Talaq*”** means a *Talaq* (“*Raj’i*”) which does not terminate the marriage before the completion of the *Iddah*, and which confers upon the husband the right to take back his wife before the expiry of the *Iddah* only;
- (xvi) **“*Tafwid ul Talaq*”** means the delegation by the husband of his right of *Talaq* to the wife, either at the time of conclusion of the marriage or during the subsistence of the marriage, so that the wife may terminate the marriage by pronouncing a *Talaq* strictly in accordance with the terms of such delegation;
- (xvii) **“*Talaq*”** means the termination of the marriage according to Islamic Law, by the husband or his agent or intermediary, through the use or pronouncement of specific words which indicate a clear intention to terminate the marriage; and includes the *Tafwid ul Talaq*;
- (xviii) **“this Act”** includes the regulations.

Application of this Act

- 2. The provisions of this Act -
 - (a) shall apply to an Islamic marriage contracted before or after the commencement of this Act;
 - (b) shall apply to an existing civil marriage insofar as the spouses thereto have elected in the prescribed manner to cause the provisions of this Act to apply to the consequences of their marriage, and otherwise to the extent specified in section 14; and
 - (c) does not apply to a civil marriage solemnised under the Marriage Act, 1961 (Act No. 25 of 1961) before or after the commencement of this Act.

Equal status and capacity of spouses

3. A wife in an Islamic marriage is equal to her husband in human dignity and has, on the basis of equality, full status, capacity and financial independence, including the capacity to own and acquire assets and to dispose of them, to enter into contracts and to litigate.

Islamic marriages

4. (1) An Islamic marriage entered into before the commencement of this Act and existing at the commencement of this Act is for all purposes recognised as a valid marriage.

(2) An Islamic marriage entered into after the commencement of this Act, which complies with the requirements of this Act, is for all purposes recognised as a valid marriage.

(3) If a husband is a spouse in more than one Islamic marriage, all Islamic marriages entered into by him before the commencement of this Act, are for all purposes recognised as valid marriages.

(4) If a husband is a spouse in more than one Islamic marriage, all such marriages entered into after the commencement of this Act, which comply with the provisions of this Act, are for all purposes recognised as valid marriages.

(5) If a husband is a spouse in an existing civil marriage, and in an Islamic marriage or marriages entered into before the commencement of this Act, such Islamic marriage or marriages are for all purposes recognised as valid marriages.

Requirements for validity of Islamic marriages

5. (1) For an Islamic marriage entered into after the commencement of this Act to be valid the prospective spouses-

- (a) must both have attained the age of 18 years, and
- (b) must both consent to be married to each other.

(2) No spouse in an Islamic marriage recognised in terms of this Act may, after the commencement of this Act, enter into a marriage under the Marriage Act, 1961 (Act No. 25 of 1961) during the subsistence of such Islamic marriage.

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

(4) If the consent of the parent or guardian as referred to in subsection (3) cannot be obtained, the provisions of section 25 of the Marriage Act, 1961, applies.

(5) Despite the prohibition in subsection (1)(a), the Minister or any person or body authorised in writing thereto by him or her, may grant written permission to a person under the age of 18 years to enter into an Islamic marriage if the Minister or the said person or body considers such marriage desirable and in the interests of the parties in question.

(6) Permission granted in terms of subsection (5) shall not relieve the parties to the proposed marriage from the obligation to comply with any other requirements prescribed by law.

(7) If a person under the age of 18 years has entered into an Islamic marriage without the written permission of the Minister or person or body authorised by him or her, the Minister or such person or body may, if he, she or it considers the marriage to be desirable and in the interests of the parties in question, and if the marriage was in every other respect in accordance with this Act, declare the marriage in writing to be, for all purposes, a valid Islamic marriage.

(8) Subject to the provisions of subsections (5) and (6), section 24A of the Marriage Act, 1961, applies to the Islamic marriage of a minor entered into without the consent of a parent, guardian, commissioner of child welfare or a judge, as the case may be.

(9) The prohibition of an Islamic marriage between persons on account of their relationship by blood or affinity or fosterage, or any other reason, is determined by Islamic law.

Registration of Islamic marriages

6. (1) An Islamic marriage -

- (a) entered into before the commencement of this Act, 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
- (b) entered into after the commencement of this Act, must be registered as prescribed at the time of the conclusion of the marriage or within such longer period as the Minister may from time to time prescribe by notice in the Gazette.

(2) It shall be the duty of the parties to the marriages contemplated in paragraphs (a) and (b) of subsection (1) to cause such marriages to be registered.

(3) No marriage officer shall register any 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 No. 71 of 1986);
- (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).

(4) The marriage officer must –

- (a) if satisfied that the spouses concluded a valid Islamic marriage, record the identity of the spouses, the date of the marriage, the Dower agreed to, whether payable immediately or deferred in full or part, and any other particulars prescribed, and must register the marriage in accordance with this Act and the regulations as prescribed;
- (b) issue to the spouses a certificate of registration, bearing the prescribed particulars; and
- (c) forthwith transmit the relevant records to a regional or district representative designated as such under section 21(1) of the Identification Act, 1986.

(5) An Islamic marriage shall be contracted in accordance with the formulae prescribed in Islamic law, including *Tazawwajtuha* and *Nakahtuha* (“I have married her”). Such a marriage shall be concluded by the parties or their proxies in the presence of a marriage officer. A marriage officer in so concluding an Islamic marriage shall, after the

commencement of this Act, cause such marriage to be registered in accordance with the provisions of subsection (4).

(6) If for any reason an Islamic marriage has not been registered, any person who satisfies a marriage officer that he or she has a sufficient interest in the matter may apply to the marriage officer in the prescribed manner to enquire into the existence of the marriage.

(7) If the marriage officer is satisfied that a valid Islamic 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).

(8) If the marriage officer is not satisfied that a valid Islamic marriage was entered into by the spouses, he or she must refuse to register the marriage.

(9) A court may, upon application made to that court, order -

- (a) the registration of any Islamic marriage; or
- (b) the cancellation or rectification of any registration of a Islamic marriage effected by a marriage officer.

(10) A certificate of registration of an Islamic marriage issued under this section or any other law providing for the registration of Islamic marriages constitutes *prima facie* proof of the existence of the Islamic marriage and of the particulars contained in the certificate.

(11) Failure to register an Islamic marriage does not, by itself, affect the validity of that marriage.

Proof of age of parties to proposed marriage

7. 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 may refuse to solemnize a marriage between them unless he 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.

Proprietary consequences of Islamic marriages and contractual capacity of spouses

8. (1) An Islamic marriage entered into before or after the commencement of this Act shall be deemed to be a marriage out of community of property, unless the proprietary consequences governing the marriage are regulated, by mutual agreement of the spouses, in an ante-nuptial contract which shall be registered in the Deeds Registry –

- (a) in the case of a marriage entered into before the commencement of this Act, within six months from the date of commencement of this Act; and
- (b) in the case of a marriage entered into after the commencement of this Act, within six months from the date of execution of the contract

or within such extended period as the court may on application allow.

(2) Notwithstanding any provision to the contrary contained in any other law, an ante-nuptial contract referred to in subsection (1) need not be attested by a notary.

(3) Spouses in an Islamic marriage entered into before or after the commencement of this Act may jointly apply to a court for leave to change the matrimonial property system, which applies to their marriage or marriages and the court may, if satisfied that -

- (a) there are sound reasons for the proposed change;
- (b) sufficient written notice of the proposed change has been given to all creditors of the spouses for amounts exceeding R500 or such amount as may be determined by the Minister of Justice by notice in the Gazette; and
- (c) no other person will be prejudiced by the proposed change,

order that the matrimonial property system applicable to such marriage or marriages will no longer apply and authorise the parties to such marriage or marriages to enter into a written contract in terms of which the future matrimonial property system of their marriage or marriages will be regulated on conditions determined by the court.

(4) In the case of a husband who is a spouse in more than one Islamic marriage, all persons having a sufficient interest in the matter, and in particular the husband's existing spouse or spouses, must be joined in the proceedings.

(5) Where the husband is a spouse in an existing civil marriage, and in an Islamic marriage, all his existing spouse or spouses must be joined in such proceedings.

(6) A husband in an Islamic marriage who wishes to enter into a further Islamic marriage with another woman after the commencement of this Act must make an application to the court for permission to do so, and to approve a written contract which will regulate the future matrimonial property system of his marriages.

(7) When considering the application in terms of subsection (6), the court may -

- (a) grant permission on the basis of Islamic law if the court is satisfied that -
 - (i) the husband has sufficient financial means;
 - (ii) there is no reason to believe, if permission is granted, that the husband shall not act equitably towards his spouses;
 - (iii) there will be no prejudice to existing spouses;
- (b) in the case of an existing marriage which is in community of property or which is subject to the accrual system -
 - (i) terminate the matrimonial property system which is applicable to that marriage; and
 - (iv) order an immediate division of the joint estate concerned in equal shares, or on such other basis as the court may deem just;
 - (v) order the immediate division of the accrual concerned in accordance with the provisions of chapter 1 of the Matrimonial Property Act, 1984 (Act No. 88 of 1984), or on such other basis as the court may deem just;
- (c) make such order in respect of the prospective estate of the spouses concerned as is mutually agreed, or, failing any agreement, the marriage shall be deemed to be out of community of property, unless the court for compelling reasons decides otherwise;
- (d) grant the order subject to any condition it may deem just, or refuse the application if in its opinion the interests of any of the parties involved would not be sufficiently safeguarded by means of the proposed contract.

(8) All persons having a sufficient interest in the matter, and in particular the applicant's existing spouse or spouses and his prospective spouse, must be joined in the proceedings instituted in terms of subsection (6).

(9) If a court grants an application contemplated in subsections (3) or (6), the registrar or clerk of the court, as the case may be, must furnish each spouse with an order of the court including a certified copy of such contract and must cause such order and a certified copy of such contract to be sent to each registrar of deeds of the area in which the court is situated.

(10) A husband who enters into a further Islamic marriage, whilst he is already married, without the permission of the court, in contravention of subsection (6) shall be guilty of an offence and liable on conviction to a fine not exceeding R50 000.

Dissolution of Islamic marriages

9. (1) Notwithstanding the provisions of section 3(a) of the Divorce Act, 1979, (Act No. 70 of 1979), or anything to the contrary contained in any law or the common law, an Islamic marriage may be dissolved on any ground permitted by Islamic Law. The provisions of this section shall also apply, with the changes required by the context, to an existing civil marriage insofar as the parties thereto have in the prescribed manner elected to cause the provisions of this Act to apply to the consequences of their marriage.

(2) In the case of *Talaq* the following shall apply:

- (a) The husband shall be obliged to cause an irrevocable *Talaq* to be registered immediately, but in any event, by no later than seven days after its pronouncement, with a marriage officer, in the presence of the wife or her duly authorised representative and two competent witnesses.
- (b) If the presence of the wife or her duly authorised representative cannot be secured for any reason, then the marriage officer shall register the irrevocable *Talaq* only in the event that the husband satisfies the marriage officer that due notice in the prescribed form of the intended registration was served upon her by the sheriff or by substituted service.
- (c) The provisions of paragraphs (a) and (b) shall apply, with the changes required by the context, where the husband has delegated to the wife the right of pronouncing a *Talaq*, and the wife has pronounced an irrevocable *Talaq* (*Tafwid ul Talaq*).
- (d) Any spouse who knowingly and wilfully fails to register the irrevocable *Talaq* in accordance with this subsection shall be guilty of an offence and liable on conviction to a fine not exceeding R50 000.
- (e) If a spouse disputes the validity of the irrevocable *Talaq*, according to Islamic Law, the marriage officer shall not register the same, until the dispute is resolved, if the marriage officer is of the opinion that the dispute relating to the validity of the irrevocable *Talaq* is not frivolous or vexatious and has otherwise been fairly raised.
- (f) A spouse shall, within fourteen days, as from the date of the registration of the irrevocable *Talaq* institute legal proceedings in a competent court for a decree confirming the dissolution of the marriage by way of *Talaq*. The action, so instituted,

shall be subject to the procedures prescribed from time to time by the applicable rules of court. This does not preclude a spouse from seeking the following relief -

- (i) an application *pendente lite* for an interdict or for the interim custody of, or access to, a minor child of the marriage concerned or for the payment of maintenance; or
 - (ii) an application for a contribution towards the costs of such action or to institute such action, or make such application, *in forma pauperis*, or for the substituted service of process in, or the edictal citation of a party to, such action or such application.
- (g) An irrevocable *Talaq* taking effect as such prior to the commencement of this Act shall not be required to be registered in terms of the provisions of this Act.

(3) A court must grant a decree of divorce in the form of a *Faskh* on any ground which is recognised as valid for the dissolution of marriages under Islamic Law, including the grounds specified in the definition of *Faskh* in section 1. The wife shall institute action for a decree of divorce in the form of *Faskh* in a competent court, and the procedure applicable thereto shall be the procedure prescribed from time to time by rules of court, including appropriate relief *pendente lite*, referred to in subsection (2)(f). The granting of a *Faskh* by a court shall have the effect of an irrevocable *Talaq*.

(4) The spouses who have effected a *Khul'a* shall personally and jointly appear before a marriage officer and cause same to be registered in the presence of two competent witnesses. The marriage officer shall register the *Khul'a* as one irrevocable *Talaq*, in which event the provisions of subsection (2)(f) will apply with the changes required by the context.

(5) In the event of a dispute between the spouses with regard to the amount of compensation in the case of *Khul'a*, the court may fix such amount as it deems just and equitable having regard to all relevant factors.

(6) The Mediation in Certain Divorce Matters Act, 1987 (Act No. 24 of 1987) and sections 6(1) and (2) of the Divorce Act, 1979 (Act No. 70 of 1979), relating to safeguarding the welfare of any minor or dependent child of the marriage concerned, apply to the dissolution of an Islamic marriage under this Act.

(7) A court granting or confirming a decree for the dissolution of an Islamic marriage -

- (a) has the powers contemplated in sections 7(1), 7(7) and 7(8) of the Divorce Act, 1979, and section 24(1) of the Matrimonial Property Act, 1984 (Act No. 88 of 1984);
- (b) may, if it deems just and equitable, on application by one of the parties to the marriage, and in the absence of any agreement between them regarding the division of their assets, order that such assets be divided equitably between the parties, where-
 - (i) a party has in fact assisted, or has otherwise rendered services, in the operation or conduct of the family business or businesses during the subsistence of the marriage; or
 - (ii) the parties have contributed, during the subsistence of the marriage, to the maintenance or increase of the estate of each other, or any one of them, to the extent that it is not practically feasible or otherwise possible to accurately quantify the separate contributions of each party.
- (c) must, in the case of a husband who is a spouse in more than one Islamic marriage, take into consideration all relevant factors including the sequence of the marriages, any contract, agreement or order made in terms of section 8(3) and (7).
- (d) may order that any person who in the court's opinion has a sufficient Interest in the matter be joined in the proceedings;
- (e) may make an order with regard to the custody or guardianship of, or access to, any minor child of the marriage, having regard to the factors specified in section 11; and
- (f) must, when making an order for the payment of maintenance, take into account all relevant factors.

Age of majority

10. For the purposes of this Act, the age of majority of any person is determined in accordance with the Age of Majority Act, 1972 (Act No. 57 of 1972).

Custody of and access to minor children

11. (1) In making an order for the custody of, or access to a minor child, the court shall at all times have regard to the welfare and best interests of the child as the paramount consideration.

(2) Unless the court directs otherwise having regard to the welfare and best interests of the child -

- (a) the custody of a male child until he reaches the age of nine years, and the custody of a female child until she attains puberty shall vest in the mother of that child;
- (b) the male child, when reaching the age of nine years, and the female child when attaining puberty, shall choose the parent with whom he or she wishes to be placed in custody;
- (c) the non-custodian parent shall enjoy reasonable access to the child at regular intervals, but at least once a week.

(3) Despite subsection (2), but subject to subsection (1), the court shall deprive a parent of custody, or, otherwise, shall not grant custody to that parent, if the court is at any time of the opinion that the custody of the child by that parent –

- (a) has exposed, or will expose, the child to circumstances which may seriously harm the physical, mental, moral, spiritual and religious well-being and development of the child;
- (b) has resulted, or will result, in the child being in a state of physical or mental neglect for any reason.

(4) In the absence of both parents, or, failing them, for any reason, but subject to subsection (1), the court must, in awarding or granting custody of minor children, award or grant custody to such person as the court deems appropriate, in all the circumstances.

(5) An order in regard to the custody or access to a child, made in terms of this Act, may at any time be rescinded or varied, or, in the case of access to a child, be suspended by a court if the court finds that there is sufficient reason therefore: Provided that if an enquiry is instituted by the Family Advocate in terms of section 4(1)(b) of the Mediation in Certain Divorce Matters Act, 1987 (Act No. 24 of 1987), the court shall consider the report and recommendations of the Family Advocate concerning the welfare of minor children, before making the relevant order for variation, rescission or suspension, as the case may be.

Maintenance

12. (1) The provisions of the Maintenance Act, 1998 (Act No. 99 of 1998) shall apply, with the changes required by the context, in respect of the duty of any person to maintain any other person. Without derogating from the provisions of that Act, the following provisions shall apply:

(2) Notwithstanding the provisions of section 15 of the Maintenance Act, 1998, or, the common law, the maintenance court shall, in issuing a maintenance order, or otherwise in determining the amount to be paid as maintenance, take into consideration that—

- (a) the husband is obliged to maintain his wife during the subsistence of an Islamic marriage according to his means and her reasonable needs;
- (b) the father is obliged to maintain his male child until the age of majority, or, until he is able to become self-supporting, whichever is earlier, and he is obliged to maintain his female child until she is married;
- (c) in the case of a dissolution by divorce of an Islamic marriage -
 - (i) the husband is obliged to maintain the wife for the mandatory waiting period of *Iddah*;
 - (ii) where the wife has custody in terms of section 11, the husband is obliged to maintain the wife, including the provision of separate residence, for the period of such custody only;
 - (iii) the wife shall be separately entitled to maintenance for a breastfeeding period of two years calculated from date of birth of an infant;
 - (iv) the husband's duty to support a child born of such marriage includes the provision of food, clothing, separate accommodation, medical care and education.
- (d) a major child is obliged to maintain his or her needy parents.

(3) Any amount of maintenance so determined shall be such amount as the maintenance court may consider fair and just in all the circumstances of the case.

(4) A maintenance order made in terms of this Act may at any time be rescinded or varied or suspended by a court if the court finds that there is sufficient reason therefor.

Assessors

13. (1) If any dispute is referred to a court for adjudication, the following provisions shall apply -

- (a) the court shall be assisted by two Muslim assessors who shall have specialised knowledge of Islamic Law;
- (b) the assessors shall be appointed by the Minister by proclamation in the Gazette and shall hold office for five years from the date of the relevant proclamation: Provided

that the appointment of any such assessor may at any time be terminated by the Minister for any valid reason;

- (c) any person so appointed shall be eligible for reappointment for such further period or periods as the Minister may think fit.

(2) The decision of the court on any question arising for decision before the court, shall be decided by the majority, and the court and the assessors shall give written reasons for their decision.

(3) Any decision of the court shall be subject to appeal in accordance with the applicable Rules of Court, save that the assessors shall participate in any application for leave to appeal, where such leave is necessary.

Dissolution of existing civil marriage

14. (1) In the event of a spouse to an existing civil marriage instituting a divorce action in terms of the Divorce Act, 1979 (Act No. 70 of 1979), after the commencement of this Act, the court shall not dissolve the civil marriage by the grant of a decree of divorce until the court is satisfied that the accompanying Islamic marriage has been dissolved.

(2) In the event of the husband refusing, for any reason, to pronounce an irrevocable *Talaq*, the wife to the accompanying Islamic marriage shall be entitled in the same proceedings to make an application for a decree of *Faskh* for the purposes of dissolving such Islamic marriage, in which event the provisions of this Act shall apply, with the changes required by the context.

(3) Where in addition to the existing civil marriage, the husband has concluded a further Islamic marriage or marriages registrable under this Act, the husband's existing spouse or spouses must be joined in the divorce action contemplated in subsection (1).

Regulations

15. (1) The Minister of Justice, in consultation with the Minister, may make regulations -

- (a) relating to -

- (i) the requirements to be complied with and the information to be furnished to a Marriage officer in respect of the registration and dissolution of an Islamic marriage;
 - (ii) the manner in which a Marriage officer must satisfy himself or herself as to the existence or the validity of a Islamic marriage;
 - (iii) the manner in which any person may participate in the proof of the existence or in the registration of any Islamic marriage;
 - (iv) the form and content of certificates, notices, affidavits and declarations required for the purposes of this Act;
 - (v) the custody, certification, implementation, rectification, reproduction and disposal of any document relating to the registration of Islamic marriages or of any document prescribed in terms of the regulations;
 - (vi) any matter that is required or permitted to be prescribed in terms of this Act; and
 - (vii) any other matter which is necessary or expedient to provide for the effective registration of Islamic marriages or the efficient administration of this Act; and
- (b) prescribing the fees payable in respect of the registration of an Islamic marriage and the issuing of any certificate in respect thereof.

(2) Any regulation made under subsection (1) which may result in financial expenditure for the State must be made in consultation with the Minister of Finance.

(3) Any regulation made under subsection (1) may provide that any person who contravenes a provision thereof or fails to comply therewith shall be guilty of an offence and on conviction be liable to a fine or to imprisonment for a period not exceeding one year.

Amendment of laws

16. (1) Section 17 of the Deeds Registries Act, 1937 (Act No. 47 of 1937), is hereby amended by the substitution for paragraph (b) of subsection (2) of the following paragraph:

- “(b) where the marriage concerned is governed by the law in force in the Republic or any part thereof, state whether the marriage was contracted in or out of community of property or whether the

matrimonial property system is governed by customary law in terms of the Recognition of Customary Marriages Act, 1998 (Act No. 120 of 1998), or, is governed in terms of section 8 of the Islamic Marriages Act, 20.. .”

(2) Section 45*bis* of the Deeds Registries Act, 1937, is hereby amended -

(a) by the substitution for paragraph (b) of subsection (1) of the following paragraph:

“(b) forms or formed an asset in a joint estate, and a court has made an order, or has made an order and given an authorisation, under section 20 or 21(1) of the Matrimonial Property Act, 1984 (Act No. 88 of 1984), or under sections 8 or 9 of the Islamic Marriages Act, 20.. , or under section 7 of the Recognition of Customary Marriages Act, 1998 (Act No. 120 of 1998), as the case may be, in terms of which the property, lease or bond is awarded to one of the spouses;” and

(b) by the substitution for paragraph (b) of subsection (1A) of the following paragraph:

“(b) forms or formed an asset in a joint estate and a court has made an order, or has made an order and given an authorisation under section 20 or 21(1) of the Matrimonial Property Act, 1984 (Act No. 88 of 1984), or under section 7 of the Recognition of Customary Marriages Act, 1998 (Act No. 120 of 198), or under sections 8 or 9 of the Islamic Marriages Act, 20.. , as the case may be, in terms of which the property, lease or bond is awarded to both spouses in undivided shares;”.

(3) Section 1 of the Intestate Succession Act, 1987 (Act No. 81 of 1987) is hereby amended by the addition to subsection (4) of the following paragraph:

“(g) “spouse” shall include a spouse of an Islamic marriage recognised in terms of the Islamic Marriages Act, 20.. , and shall otherwise include the spouse of a deceased person in a union recognised as a marriage in accordance with the tenets of any religion: Provided that in the event of a deceased man being survived by more than one spouse, the following shall apply -

- (i) for the purposes of subsection (1)(c), such surviving spouse shall inherit the intestate estate in equal shares;
- (ii) for the purposes of subsection (1)(c), such surviving spouses shall each inherit a child's share of the intestate estate or so much of the intestate estate in equal shares as does not exceed in value the amount so fixed as contemplated in this section."

(4) Section 1 of the Maintenance of Surviving Spouses Act, 1990 (Act No. 27 of 1990) is hereby amended by the insertion after the definition of "survivor" of the following definition:

"Marriage" shall include an Islamic marriage recognised in terms of the Islamic Marriages Act, 20.. , and shall otherwise include a union recognised as a marriage in accordance with the tenets of any religion."

Short title and commencement

17. This Act is called the Islamic Marriages Act, 20.. , and comes into operation on a date fixed by the President by proclamation in the *Gazette*.

ANNEXURE C

LIST OF RESPONDENTS WHO SUBMITTED WRITTEN COMMENT ON DISCUSSION PAPER 101

1. Islamic Research Organisation (Benoni)
2. Mr M A Moosagie (Academy of Islamic Research)
3. Mr M S Nacerodien (Attorney, Wynberg)
4. Mr I Fataar (Mitchell's Plain)
5. Ms Nazeema du Toit
6. Prof A Tayob (University of Cape Town)
7. The Women's Forum (Grassy Park)
8. The Women's Cultural Group (Wandsbeck)
9. Women's Legal Centre
10. Darul Uloom Zakariyya (Lenasia)
11. Madresah Taaliemul Banaat (Kimberley)
12. Miftahuddin Islamic Institute (Kimberley)
13. Zakkariya Islamic University (Lenasia)
14. Mr I Manjra (Durban)
15. Waterval Islamic Institute
16. Young Men's Muslim Association (Benoni)
17. Islamic International Research Institute (Benoni)
18. Islamic Forum (Azaadville)
19. Mowbray Mosque Congregation
20. Moulana Y A Mussowir Tive (Kimberley)
21. Mr M S Sulaiman (Kenwyn)
22. The Institute of Islamic *Shari'ah* Studies (Surwell)
23. Joint submission (Endorsed by Black Lawyers' Association - Western Cape):
 - * Gender Unit & General Practice Unit: Legal Aid Clinic (UWC)
 - * Shura Yabafazi (Consultation of Women)
 - * National Association of Democratic Lawyers (NADEL: Western Cape)
 - * National Association of Democratic Lawyers (Human Rights Research and Advocacy Project)
24. The Association of Muslim Lawyers (Athlone)
25. The Muslim Assembly (Cape)
26. Office of the Family Advocate (Cape Town)
27. Ms Rogaya Toefy-Salie

28. The Islamic Careline (Fordsburg)
29. Mr A K Kadwa (Morningside)
30. Society of Advocates of KwaZulu-Natal
31. Sadlers Attorneys (Johannesburg)
32. Commission on Gender Equality
33. Darul-Ihsan Research and Education Centre (Stanger)
34. Woodstock Moslem Congregation (incorporating Sulaimania Mosque)
35. The Careers Research and Information Centre (CRIC)
36. Masjidul Jumu'ah Westridge (Division of Mitchell's Plain Islamic Society)
37. Goldfields Muslim Jamaat (Welkom)
38. Goolhurst Islamic Educational Society (Grassy Park)
39. Islamic Da'wah Movement (Cape Town)
40. Siddique Islamic Centre (Elsies River)
41. Heidelberg Muslim Jamaat
42. Al-Jaamia Madrassa (Grassy Park)
43. Nylstroom Muslim Community and Welfare Society
44. Homestead Park Islamic Institute (Fordsburg)
45. Sunni Ulama Council of Southern Africa (Transvaal)
46. Mashid-E-Noor (Vereeniging)
47. Baitul - Mahmood (Lawley)
48. Kempton Park Jamaat Khana
49. Masjid-E-Omar Farouk (Lenasia)
50. Darul Quraan Lenasia
51. Soofie Masjid (Lenasia)
52. Moulana M J Rahmatullah (Marriage Officer, Durban)
53. Wellington Muslim Community
54. Jaame Masjid (Lenasia)
55. Crescent of Hope (Lenasia)
56. Vanderbijl Civic Centre Ibaadat Khana
57. Saaberie Jumma Masjid and Madressa Trust (Lenasia)
58. Shaanul Islam Masjid and Madressah Trust
59. Masjidus Salaam (Lenasia)
60. Petition: Nurul Islaam Jamaat Khana (70 signatures)
61. Petition: Colenso Mosque (23 signatures)
62. Petition: Siraatul Haq Islamic School (92 signatures)
63. Petition: Bergville (152 signatures)
64. Joint submission:

- * Fatima Noormohamed
 - * Haseena Rawat
 - * Fowzia Mall
65. Madrasah Taleemuddeen
 66. Community Law Centre (University of the Western Cape)
 67. Imran Khamissa (Port Shepstone)
 68. Potgietersrus Muslim Association
 69. The Association of Muslim Lawyers of Gauteng
 70. Jameah Mahmoodiyah Darul - Iftaa' (Springs)
 71. Muslim Judicial Council
 72. Madrasah In'aamiyyah (Camperdown)
 73. Jamiatul Ulama (KwaZulu-Natal)
 74. Ms Z Bulbulia (Lenasia)
 75. Dr Abu-Bakr M Asmal
 76. Mr M I Patel
 77. Masjidul Quds (Gatesville)
 78. Ermelo Muslim Jamaat
 79. Khalid Dhorat
 80. Jamiatul 'Ulama Transvaal
 81. United Ulama Council of South Africa
 82. Ms F Asmal (An Nisaa)
 83. Joint submission:
 - * Ms S Khan
 - * Dr A Randaree
 - * Ms F Ajam
 - * Ms F Rawat
 - * Ms Y Khan
 84. Ms F H Amod (representing an Islamic Women's Forum)

The following submissions were received after 10 April 2002 and have not been cited:

1. Darul Uloom Newcastle
2. Masjidul Ishraq (Lotus River)
3. Khairul Madaaris Masjid Baitul-Khair (Mayfair West)
4. Mujlisul Ulama of South Africa (Port Elizabeth)
5. Azaadville Women's Forum
6. Bertrams Muslim Association

7. Madrasah Arabia Islamia (Ifta Department)
8. Shaamillah Davis
9. Galielol Raghmaan Jamaa (Gatesville)
10. Association of Accountants and Lawyers for Islamic Law
11. Jamiatul Ulama (Eastern Cape)
12. Shaheda Gool
13. M Gamieldien
14. S Miller-Mahomed
15. Zaqqoom
16. A1-Mu Minaat Publications
17. H Mohamed
18. F Patel
19. Call of Imaan
20. South African Muslim Women's Forum (Boksburg North)
21. Jamiah Masihyyah Ashrafiyyah
22. Idrees Ameen
23. Zaid (Uitenhage)
24. O M Adam
25. E M Vally
26. Ms N Vaid
27. Abdul Khalek
28. Sealake Industries
29. A J Khan

ANNEXURE D**LIST OF RESPONDENTS WHO SUBMITTED WRITTEN COMMENT ON ISSUE PAPER 15**

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

23. Ittigaadun-Nisaa and the Women's Institute for Leadership Development and Democracy*
24. Haroon Yusuf Laher and Faizal Manjoo
25. Adv R Carloo
26. A Kays
27. Gender Research Project: Centre for Applied Legal Studies (Wits)
28. Dr MNZ Adams
29. Zehir Omar Attorneys
30. Mohamed Bham
31. Achmad Majiet
32. The Law Society of the Cape of Good Hope
33. Adv A Louw
34. Ms Christa Rautenbach (PU for CHE)
35. Nazeem Goolam (Vista University: Bloemfontein)
36. Waterval Islamic Institute
37. Dr Elsje Bonthuys (Law School: Wits)
38. Islamic Unity Convention
39. Waheeda Carvello
40. Association of Accountants and Lawyers for Islamic Law
 - * Dr Abu-Baker M Asmal
 - * Abdul Rahim Kazi
 - * Dr Moulana Ahmed Khalil Aziz

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

ANNEXURE E**LIST OF RESPONDENTS WHO SUBMITTED ORAL AND/OR WRITTEN REPRESENTATIONS SUBSEQUENT TO THE WORKSHOPS HELD IN OCTOBER 2002**

1. The Office of the Family Advocate (Cape Town)
2. The Muslim Youth Movement (Cape Town)
3. Women's Legal Centre (Cape Town)
4. Islamic Forum Azaadville
5. Prof J I Neels (Rand Afrikaans University)
6. Commission on Gender Equality (Cape Town)
7. Commission on Gender Equality (Johannesburg)
8. Mr Ashraf Mohammed
9. Dr Abu-Bakr M Asmal
10. Jamiatul-Ulama KwaZulu/Natal
11. Sheikh Achmat Sedick
12. Mr H Sader
13. Adv H Saldulker
14. Islamic Careline

ANNEXURE F

LIST OF PARTICIPANTS WHO ATTENDED WORKSHOPS HELD IN OCTOBER 2002

<u>PRETORIA</u>		<u>12 OCTOBER 2002</u>	
1.	M S Cachalia	16.	Adv A Kalla
2.	H E Sader	17.	Moulana F Manjoo
3.	Adv H Saldulker	18.	Z Omar
4.	F A Boda	19.	Adv A I Cajee
5.	A F Ebrahim	20.	Y Tayob
6.	M Sollie	21.	M Ashraf
7.	H I Ebrahim	22.	I Moosa
8.	I M Bhula	23.	F M Ameeroodin
9.	A A E Laher	24.	N M I Goolam
10.	E S Dockrat	25.	A R Kazi
11.	W M Carvello	26.	Y Patel
12.	Z Bulbulia	27.	I Mahomed
13.	S Nawab	28.	Adv R Essack
14.	H Hoosen	29.	Y Dockrat
15.	S A Dadabhai	30.	A Jeena
<u>CAPE TOWN</u>		<u>19 OCTOBER 2002</u>	
1.	O A Karjieker	25.	S Mia
2.	N Parker	26.	Imam A M Saban
3.	M Gamiel dien	27.	Sheikh M F Latief
4.	N Abrahams	28.	Sheikh M A Fakier
5.	F Sondag	29.	Imam F Manie
6.	N Bawa	30.	Y Karan
7.	S Karaan	31.	K Kariem
8.	F Waggie	32.	S Sulaiman
9.	F Adams	33.	A K Allie
10.	Adv S Ebrahim	34.	Imam A Gierdien
11.	Y Agherdien	35.	H Hercules
12.	M F Majjet	36.	N Mintin
13.	S Samuels	37.	A R Kazi
14.	M S Nacerodien	38.	S Ndashe
15.	E Clayton	39.	S Davis

16. F Ryklief	40. M Agherdien
17. G Fakier	41. Moulana I Hendricks
18. W Amien	42. Imam Y Harris
19. N Manie	43. Imam G Solomon
20. N Smith	44. Sheikh A Sedick
21. N Manuel-Davids	45. Sheikh E Gabriels
22. R Davids	46. M I Higgins
23. S Allie	47. M I Taliep
24. A Mahomed	48. P Nhoma
<u>DURBAN</u>	<u>26 OCTOBER 2002</u>
1. B Ngcobo	16. S Dangier
2. T Dumisa	17. A R Wahab
3. A Mayat	18. A Y Lockhat
4. Z Paruk	19. A K Aziz
5. Z Mayal	20. Y M Sithole
6. Z Moolla	21. A Suliman
7. F Z Kadwa	22. I Amod
8. H Patel	23. Zakariyya
9. J Singh	24. E Desai
10. Z Fakroodeen	25. A R Kazi
11. A Abditllah	26. S A Jazbhay
12. M Osman-Hyder	27. S E Lockhat
13. B Bhayat	28. Y A Ballim
14. H Abbas	29. F Bulbulia
15. I Bobut	30. A M Asmal