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**PRESENTATION AT MUSLIM YOUTH MOVEMENT WORKSHOP ON  
DEVELOPING STRATEGIES FOR THE IMPLEMENTATION OF THE DRAFT  
ISLAMIC MARRIAGES BILL**

**Holiday Inn, Garden Court, Eastern Boulevard, Cape Town  
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**By Waheeda Amien**

**This presentation is based on the submission tendered to the South African Law Commission Project Committee ('Project 59') on 16 November 2002 by:**

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**1. THE SPIRIT OF ISLAMIC LAW**

We commend the Project Committee for its efforts in arriving at a point of consensus that has made room for the divergent visions of Muslim Family Law prevailing in the country. We consider the proposed Act representative of the process of community consultation, and it is this process which makes the proposed Act a legitimate expression of community concerns.

The process of developing this legislation has been further informed by the range of opinions available from within Islamic Law. Nonetheless, the Project Committee has found a means at arriving at an acceptable consensus. The outcome of this consensus is a very valuable measure of certainty. As a result, the Project Committee has been able to provide clarity on issues previously undefined in South African law.

We believe that the progress and implementation of this legislation will rest on the degree of certainty provided by the final legislation. To maintain this certainty, we suggest:

- a. that the preamble to the legislation include the following: "This Act is in keeping with the spirit of justice and equity as embodied by the *Qur'an* and *Sunnah*, and reflected in Islamic Law".

- b. that the repetitive reference to ‘Islamic law’ throughout the proposed Act be removed. Inclusion of the phrase in the preamble will make it unnecessary to repeat the phrase consistently throughout the proposed Act.

**Recommendation:**

**Insert in Preamble:**

**This Act is informed by the spirit of justice and equity as embodied by the *Our’an* and *Sunnah*, and reflected in Islamic Law.**

Example:

Clause 1(vi):

1. (vi) “*Faskh*” means a decree of dissolution of marriage granted by a court, upon the **institution of an action for a decree of divorce in the form of faskh in a competent court [application of] by** 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 -

The reference to “any ground or basis permitted by Islamic Law” opens an avenue for a number of interpretations as to what may or may not be acceptable under Islamic Law as grounds for faskh. That interpretation will differ from school to school. We recommend instead a closed list of grounds that is defined by the proposed Act and which are accepted as definite grounds upon which spouses may apply for a faskh. Given that the Preamble would read as suggested above, the grounds would nonetheless be informed by Islamic Law.

## 2. DEFINITIONS AND PROCEDURES

### Marriage officer – Clause 1(ix)

The proposed Act envisages marriage officers having a much broader remit than other South African marriage officers. In effect, the proposed Act establishes marriage officers to function both as marriage officer and divorce officer. The latter places an additional burden on the function of the marriage officer as envisaged by the proposed Act because the civil law system only requires the marriage officer to officiate and register a marriage. Initiation of divorce proceedings in the civil law system is done through the registrar of the court. Requiring marriage officers to also assume the functions of divorce officer and registrar of the court, means that they will have to undergo training in respect of South African legal proceedings as well as aspects of Muslim Family Law. The cost of this training will have to be borne by the state. This expense is an unnecessary one given that there is already an existing infrastructure with the registrars of courts who will be able to register proceedings for dissolution of Islamic marriages.

In line with current South African practice, we recommend that the function of marriage officers be limited to only officiating and registering Islamic marriages for the proposed Act. However, should the current provisions be retained, we recommend that the marriage officer be required to have the same qualifications as required of registrars of the court, and further that they be required to undergo a course in Muslim family law located in South Africa and appropriately accredited under the National Qualifications Framework.

**Recommendation:**

1. (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;

***Consequences for violation of the Bill by the marriage officer – New Clause 6(11)***

Marriage officers bear significant responsibilities as registrars of marriage, and consequently need to be held to high standards of accountability. In Sri Lanka, marriage officers who knowingly violate the requirements of a validity of an Islamic marriage are guilty of a punishable offence.

**Recommendation:**

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

**New Clause 6 (11):**

**6. (11) A marriage officer who registers an Islamic marriage in violation of the provisions set out in this Act, shall be guilty of an offence and liable on conviction to a fine not exceeding R50 000 and/or a period of imprisonment of not less than five (5) years.**

***Violation for procedures for Polygynous Marriages – New Clause 8(11)***

The proposed Act makes no provision for a penalty to be imposed against a marriage officer who violates the provisions of Clause 8(6). We believe that a marriage officer ought to be held to higher standards of accountability and therefore recommend a fine of R50 000 and/or a period of imprisonment.

**Recommendation:**

8. (11) A marriage officer who registers a polygynous Islamic marriage in violation of the provisions set out in this Act, shall be guilty of an offence and liable on conviction to a fine not exceeding R50 000 and/or a period of imprisonment of not less than five (5) years

### **Irrevocable Talaq – Clause 1(viii)**

#### ***Husband determines irrevocability (Sub-clause (viii)(b))***

This allows a husband to determine that a talaq is irrevocable even before a period of iddah has passed. This amounts to an instant repudiation. In most schools of jurisprudence, this instant repudiation is generally frowned upon. Should the husband be allowed to deem the divorce irrevocable at his instance, it might open avenues for the husband to avoid paying an iddah maintenance. Among others, Egypt, Bangladesh and Pakistan all prevent instant repudiation.

We therefore recommend the deletion of sub-clause (viii)(b) in its entirety.

#### **Recommendation:**

1. (viii)“**irrevocable Talaq**” refers -

(a) to a first or second revocable *Talaq* pronounced by a husband which becomes irrevocable upon the expiry of the *Iddah*; **or**

**[(b) to a *Talaq* expressly pronounced as irrevocable at the time of pronouncement; and]**

(c) to the pronouncement of a third *Talaq*;

### **Talaq – Clause 1(xvii)**

#### ***Grounds***

Talaq, as conceptualised in the proposed Act, ie without grounds and with no avenues for a court to examine the grounds, is in effect a repudiation of the marriage. For it to be considered a divorce would require both grounds and an opportunity for the court to examine those grounds. Unless these changes are made to the proposed Act, we recommend that the proposed Act refer to talaq as a repudiation of a valid marriage, rather than as a dissolution of a valid marriage.

The proposed Act does not stipulate grounds upon which a talaq may be pronounced. This has the potential to perpetuate hardships already endured by South African women married under Islamic Law. Currently Muslim men have the right to issue a unilateral talaq with little or no regard for the impact this has on the wife. Case studies have proven that this has resulted in severe hardship for women. We recommend that in keeping with

the practice of South African law a husband should be required to at the very least cite ‘shiqaq’ ie, discord which alludes to the breakdown of the marriage, as a ground for obtaining a talaq.

**Recommendation:**

**Talaq with grounds –**

1. (xvii) “*Talaq*” means the dissolution of a valid marriage, [**forthwith or at a later stage,**] by a husband or his wife or agent, duly authorised by him or her to do so **on the grounds of shiqaq (discord)**, using the word *Talaq* or a synonym or derivative thereof in any language

or

**Talaq without grounds –**

1. (xvii)“*Talaq*” means the [**dissolution**] **repudiation** of a valid 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 *Talaq* or a synonym or derivative thereof in any language

***Procedure***

**Duly authorised representative of the wife – Clause 9(2)(a) and 9(2)(b)**

The phrase ‘duly authorised by her’ is ambiguous and could very well be interpreted as the wife’s guardian (‘*wallee*’) acting on her behalf without her knowledge or authorisation. We therefore recommend that it be rephrased to read ‘her representative duly authorised by her’.

**Written record of talaq for the wife – Clause 9(2)(b)**

The proposed Act does not make provision for the wife to have a written record that the talaq is being registered. Also, there is no provision for her to get notice of the proceedings. We recommend that the wife should be given a written record that the talaq is being registered. She should also have the divorce proceedings served on her personally ie, there should be a return of service that confirms personal service. This would conform to the procedure that is already in place in South African civil law, as well as the example in Pakistan, where provision is made for a copy of the husband’s written notice to be given to the wife.

**Initiating divorce proceedings – Clause 9(2)(a), 9(2)(b), 9(2)(e)**

The discussion regarding marriage officers refers. In line with current South African practice, we recommend that the function of marriage officers be limited to only officiating and registering Islamic marriages for the proposed Act. Consequently, registration of divorce proceedings will rest, as they currently do in South African civil law, with the registrars of the court.

### **Confirmation of a decree of divorce by the court – Clause 9(2)(f)**

Talaq is not actually a process of divorce. It is in fact a repudiation of the marriage. The granting of the decree of the divorce by a court in terms of the proposed Act is merely an administrative process confirming the talaq. It makes no provision for a court to inquire into the validity of the talaq. We recommend that the court be allowed to inquire into and pronounce upon the validity of the irrevocable talaq (ie, that the correct administrative procedures have been followed) as well as the grounds upon which the talaq has been pronounced. The court should then have the authority to grant a decree of divorce and further and/or alternative orders.

### **Check list for parties for dissolution of marriages**

We further recommend that to ensure due compliance with procedures, the registrars of the court be required to provide both parties with a check list detailing the procedure for obtaining the final dissolution of the marriage through talaq, faskh, khula' and mubarat. This check list should also include relevant information on: the institution of the divorce proceedings; the division of the estate; custody, guardianship, access and maintenance in respect of the children; past maintenance due; iddah and post-iddah maintenance. This provision may be catered for in the regulations envisioned in Clause 18.

### **Minor Children – Clause (9)(2)(f)(i)**

This section is similar to the Rule 43 and Rule 32 procedures in the High Court and Divorce Courts respectively. Both Rules of Court make provision for application for interim guardianship of the minor child, in addition to interim custody of, or access to, or payment of maintenance in respect of a minor child. To maintain consistency with the civil law, we recommend that provision also be made in the proposed legislation for an application *pendente lite* in respect of interim guardianship of a minor child.

In keeping with Clause 9(5), all matters regarding minor children are to be governed by the Mediation in Certain Divorce Matters Act 24 of 1987 and sections 6(1) and 6(2) of the Divorce Act 70 of 1979.

### **Withdrawal of Talaq – New Clause 9(2)(h)**

The proposed Act also does not make provision for a withdrawal of the registered talaq nor the withdrawal of the divorce proceedings. We recommend that an administrative procedure or some kind of record must be provided for to make provision for this. Also, the husband should be bound by the third registration ie, he should not be allowed to withdraw after the third attempt at registration.

### **Recommendation:**

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] this Act**. 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.

9. (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] the registrar of the court** in the magisterial district closest to his wife's residence, in the presence of such wife or her **[duly authorised]** representative **duly authorised by her** and two competent witnesses.

(b) If the presence of the wife or her **[duly authorised]** representative **duly authorised by her** cannot be secured for any reason, then the **[marriage officer] registrar of the court** shall:

**(i) register the irrevocable *Talaq* only in the event that the husband satisfies the [marriage officer] registrar of the court that due notice in the prescribed form of the intended registration was served upon her by the sheriff or by substituted service; and**

**(ii) cause a written record of the registration of the talaq to be 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 **R25 000 [R1 000] and/or a period of imprisonment for not less than two (2) years.**

(e) If a spouse disputes the validity of the irrevocable *Talaq*, [according to Islamic Law], the [marriage officer] **registrar of the court** shall [not register the same, until] **record** 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.] **and refer such dispute for mediation or arbitration in terms of Clauses 13 and 14 of the proposed Act.**

(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 court must grant a decree of divorce in the form of *Talaq* on the grounds specified in the definition of *Talaq* in section 1, and if it is satisfied that the appropriate procedures specified in this Act have been complied with.** 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 *interim* relief -

(i) an application *pendente lite* for an interdict or for the interim **guardianship**, custody of, or access to, a minor child of the marriage concerned or for the payment of maintenance **in respect of a minor child, which application shall be subject to clause 9(5) of the proposed Act;**

...

Insert new clause 9(2)(h)

**9. (2)(h) A spouse who revokes a *Talaq* must within seven (7) days cause such revocation to be lodged with the registrar or clerk of the court, and cause a written record of the revocation to be served upon the wife by the sheriff or by substituted service.**

Faskh – Clause 1(vi)

### ***Procedure***

The legislation requires an application by a spouse. We believe that the institution of an action may be a more preferable route. It is less burdensome and more accessible.

### ***Grounds***

We commend the Project Committee on recognising that faskh is applicable to both parties. However, we note that the grounds stipulated in the definition section (Clause 1(vi)(a)-(j)) apply only to women, whereas no grounds have been stipulated for men to apply for faskh. The stipulation of grounds upon which men could apply for faskh as well would provide legislative consistency. We therefore recommend that these be inserted in the proposed Act.

Notwithstanding the above, with regard to the grounds contained in Clause (1)(vi), we note the following:

#### ***Missing husband (Sub-clause (a)):***

It is unclear what a 'substantial period of time' would amount to.

We recommend that the period of time should be stipulated as six (6) months.

Regard could be had to the following jurisdictions, which stipulate specific periods of time in which a husband must be missing or during which his whereabouts are unknown: Iran - 6 months; Algeria - more than 1 year; Indonesia and Gambia - more than 2 consecutive years; Pakistan - more than 4 years.

#### ***Imprisonment (Sub-clause (c)):***

The period of imprisonment should not be restricted to three (3) years. We recommend that the legislation not specify a period of imprisonment. In this respect, regard could be had to the following jurisdictions: Sudan - no period; Phillipines - at least 1 year; Algeria - exceeding 1 year; Malaysia - at least 3 years.

#### ***Marital obligations (Sub-clause (g)):***

The phrase 'unreasonable period' is too vague and could result in judicial discretion being applied in a manner that disadvantages or prejudices women. We recommend that no period be included.

#### ***Violation of procedure as prescribed by the proposed Act (New Sub-clause (k)):***

We recommend that an additional ground should be inserted to recognise a wife's right to apply for a faskh where her husband is in violation of the procedures prescribed for rendering a marriage polygynous or further polygynous. Other jurisdictions such as Iraq allow for this.

#### ***Absence of wife's permission (New Sub-clause (l)):***

We recommend that a further ground be inserted to recognise a wife's or wives' right to apply for a faskh should a husband take a subsequent wife without or against her permission or consent.

<b>Recommendation:</b>
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1. (vi) “*Faskh*” means a decree of dissolution of marriage granted by a court, upon the **institution of an action for a decree of divorce in the form of faskh in a competent court [application of] by** 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] period of six (6) months;**
  - (b) husband fails 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 the wife with cruelty in any form, which renders cohabitation intolerable;
  - (g) husband has failed, without valid reason, to perform his marital obligations **[for an unreasonable period];**
  - (h) husband is a spouse in more than one Islamic marriage, and fails to treat his wife justly **and equitably** in accordance with the injunctions of the *Qur’an* and *Sunnah*;
  - (i) husband commits *dharar* (harm) against his wife, **[as recognised by Islamic law];** **[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 a reasonable option in the circumstances (*shiqaq*);
  - (k) **husband fails to adhere to procedures for entering into a further Islamic marriage(s) as prescribed by this legislation; or**
  - (l) **husband enters into a further Islamic marriage(s) without the consent or permission of the existing wife/wives;**

**Project Committee to insert specific grounds for the husband to obtain a Faskh .**

### **Khula’ – Clause 1(x)**

Historically, in terms of Islamic jurisprudence, khula’ has been interpreted as a process where the wife makes a financial compensation, most commonly foregoing her deferred mahr and/or returning her prompt mahr in exchange for her release from the marriage. In jurisdictions where khula’ is seen as an **agreement** between husband and wife, wives are forced to negotiate all sorts of rights including their deferred mahr, their iddah maintenance, custody of their children, and may even be forced to pay further financial compensation for release from the marriage. For example, in Syria, Kuwait and Libya, child support can be forfeited as part of compensation for khula’. In Egypt, it is mandatory that a woman forfeits her mahr and her right to post iddah maintenance.

On the other hand, Algeria sets a limit to the amount that can be given as compensation (not exceeding the value of mahr). For this reason khula' in this form can be severely detrimental to the rights of women.

However, the classical definition of khula' has been recently pronounced by Al-Azhar as incongruent with the Prophetic tradition in so far as it requires the agreement of the parties to the marriage. No such agreement is required. Further, no grounds need be provided by the woman beyond stating that remaining within the marriage may threaten her ability to comply with the dictates of her faith. Egypt and Jordan have now followed this jurisprudence. A Pakistani court reached the same conclusion many decades ago. There is no reason for the proposed Act not to adopt definitions in line with the al- Azhar jurisprudence, especially when it is fairer to women.

We therefore recommend that khula' not be restricted to an agreement between spouses. Its effect as a means through which a woman may facilitate her release from a marriage needs to be recognised and facilitated.

**Recommendation:**

1. (x) “*Khula'*” means the dissolution of the marriage bond, **at the instance of the wife and upon her offer to make a compensation (financial or otherwise) in return for a release from the marriage, [in terms of an agreement between the spouses according to Islamic Law];**

**Mubarat – New Clause 1(xix)**

No provision is made in the proposed Act for Mubarat ie, a mutually agreed dissolution of the marriage (no fault divorce), in spite of the fact that it is an established form of dissolution of the marriage in Islamic law. We submit that this would be the most preferable form of dissolution of the marriage. We recommend that following the example of Tunisia, where a court may grant divorce based on agreement between the spouses, the proposed Act should make provision for an additional sub-clause that incorporates mubarat. Furthermore, where both parties institute proceedings at the same time, then the court could ‘commute’ the two proceedings into a mubarat.

**Recommendation:**

**Insert new Clause 1 (xix):**

**1 (xix) “Mubarat” means the dissolution of the marriage by mutual agreement between the husband and the wife.**

***Procedure: Faskh, Khula' and Mubarat – Clause 9(3), 9(4) and new Clause 9(5)***

The discussion referring to the definitions of faskh, khula' and mubarat above apply here with the consequent recommendations. Since mubarat refers to an agreement between spouses, it stands to reason that spouses should jointly institute an application for a decree of divorce.

**Recommendation:**

9. (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 spouse]** 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, including a *Faskh* granted **[upon application] in the case** of the husband, shall have the effect of terminating the marriage.

9. (4) **[The spouses] A wife** who **wishes to** [have] effect[ed] a *Khula'* shall **[personally and jointly]** appear before **[a marriage officer] the registrar or clerk of the court** and cause same to be registered in the presence of two competent witnesses, **after which she shall institute action in a competent court for a decree confirming the dissolution of the marriage by way of Khula'.** **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 *Khula'* by a court shall have the effect of terminating the marriage.**

**Insert New Clause 9(5)**

**9. (5) Spouses who have effected a mubarat shall personally and jointly appear before the registrar of the court and cause the same to be registerd in the presence of two competent witnesses. Both spouses shall jointly institute an application for a decree of divorce in the form of *Mubarat* 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 *Mubarat* by a court shall have the effect of terminating the marriage.**

### **Iddah (Clause 1(vii))**

It is unclear why the proposed Act makes a distinction in the calculation of the period of Iddah for divorced and widowed women. The distinction between three menstrual cycles and an exact quantification of 130 days could prove problematic and may cause great uncertainty, as it may result in some women having to observe longer or shorter periods of Iddah than others. We therefore recommend that the Iddah periods for divorced and widowed women be made quantifiably consistent with each other.

#### **Recommendation:**

**1. (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] if she is not pregnant, is 90 days;**  
**[(b) does not menstruate for any reason, is three months;]**  
**[(c) if she 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.”

### **3. REQUIREMENTS FOR VALIDITY OF ISLAMIC MARRIAGES**

#### ***Age of marriage – Clause 5(1)(d)***

With regard to Clause 5(1), the age difference between male and female will give rise to a constitutional challenge. We therefore recommend that provision be made for the same age of consent for males and females ie, 18 years (this will also be in line with the Recognition of Customary Marriages Act, which makes provision for 18 years as the age of consent for both males and females).

#### ***Dower – New Clause 5(1)(e)***

Dower is universally accepted as an essential requirement for the conclusion of a valid Islamic marriage. The Bill does not make specific provision for this to form a necessary requirement for the validity of an Islamic marriage.

#### ***Prohibition on marriage – Clause 5(9)***

Reference is made to the prohibition of an Islamic marriage on unspecified grounds. Once again, this opens avenues for a number of different interpretations emerging from the various schools of thought in Muslim Family Law. The consequent lack of certainty may undermine the implementation of the proposed Act.

**Marriage contract – New Clause 5(1)(e)**

A marriage contract is a common practice in a number of Muslim Family Law jurisdictions. Research has also shown that women's rights are most effectively protected through a system of written marriage contracts. Further, the practice is already gaining currency within the South African Muslim context. We have seen couples include terms and conditions for dower and deferred dower, maintenance during the marriage and thereafter, as well as terms and conditions for dissolution of the marriage and dispute resolution.

While this is a growing practice in South Africa, the majority of women remain unable to negotiate substantial protections for themselves, before the marriage, during the marriage, or at the dissolution thereof. To afford a suitable degree of protection for women, we recommend that parties be required to enter into a marriage contract. This can be facilitated through forms produced by the Ministry detailing basic terms and conditions of the marriage contract, and with the option for parties to record additional or alternative agreements between them. We therefore recommend that the regulations should make provision for a form incorporating a pro forma marriage contract. Attached is a list of the basic issues that can be recorded in the pro forma marriage contract (*See Annexure A*).

**Recommendation:**

5. (1) For an Islamic 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 proxies, if any, whether the parties to the prospective marriage have consented thereto; and

(c) two witnesses must be present [as required by Islamic law] at the time of conclusion of the marriage.

(d) the **prospective spouses must both have attained the age of 18 years; [prospective groom must have attained the age of 18 years, and the prospective bride must have attained the age of 15 years.]**

**(e) parties must have agreed to the terms and conditions of the marriage contract including but not limited to the dower and/or deferred dower, matrimonial property regime, terms and conditions of maintenance, and the terms and conditions of the dissolution of the marriage.**

...

5. (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.

#### ***Notarising the Ante-nuptial contract – Clause 8(2)***

Clause 8(2) of the proposed Act provides that an ante-nuptial contract need not be attested by a notary. This effectively will undermine an existing system that seeks to regulate and protect the rights and benefits negotiated and agreed upon in an ante-nuptial contract. We recommend that ante-nuptial contracts in terms of the proposed Act be regulated in accordance with the Matrimonial Property Act 88 of 1984, requiring ante-nuptial contracts to be attested by a notary. This requirement for attestation by a notary need not apply to the pro-forma marriage contract that would be contained in the regulations, since that pro-forma ought to be drafted in a manner that would afford basic protection to the parties. The requirement for attestation by a notary should therefore only apply to a marriage contract other than the aforementioned pro-forma marriage contract.

#### **Recommendation:**

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

## **4. REGISTRATION OF ISLAMIC MARRIAGES**

#### ***Time period for registration – Clause 6(1)(b)***

The proposed Act makes provision for marriages to be registered at some time after the conclusion thereof. We see no reason for allowing an extended period before registration of new marriages. In the interim, this may leave women without the protections intended by the proposed Act. To give recognition and effect to this marriage we recommend that new marriages be registered at the time of the conclusion of the marriage and not at a later date.

#### ***Registration and Validity – Clause 6(11)***

In de-linking registration and validity, the proposed Act denies women in valid Islamic marriages the protection afforded by the legislation. To date the majority of women in valid Islamic marriages have consistently been denied legal protections. Removing the link between validity and registration will perpetuate the hardships currently suffered by women in valid Islamic marriages, as well as frustrate the benefits intended by the proposed Act.

#### **Recommendation:**

**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.**]

....

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

## **5. PROPRIETARY CONSEQUENCES OF ISLAMIC MARRIAGES**

### **Contributions to the estate – Clause 9(6)(b)**

The legislation proposes a default regime of ‘out of community of property’. Further it gives the court the discretion, only upon application by one of the parties, to decide whether or not to consider contributions that are made to the maintenance or increase of each other’s estates, or if they have assisted or rendered services in the operation or conduct of a business / family business.

The requirement for a further application is cumbersome, particularly given that Islamic law automatically recognises the contributions of a wife to the household and the estates. We recommend that the court should have to consider the contributions made by the parties, particularly the wife, irrespective whether or not an application has been made.

### **Mut’ah – Clause 9(6)(g)**

Hanafi jurists conclude that *mut’ah* is obligatory only when the wife has been divorced before consummation and when no mahr has been set. In Malaysia where Shaf’i law is followed, the divorced wife is entitled to mut’ah in addition to iddah maintenance and mahr. In Egypt where generally Hanafi law is followed, the divorce and marriage law was amended in 1979 to provide that the wife divorced without fault and without her consent would be entitled to obtain mut’ah in addition to her mahr and iddah maintenance. Egypt defines mut’ah as an amount equivalent to not less than two years’ expenses and subject to no maximum limit. The amount of mut’ah is determined with reference to the means of the husband, the circumstances of the divorce and the duration of the marriage. If necessary or convenient, the mut’ah may be paid in instalments.

Given the unfavourable conditions many divorced women find themselves in, a mandatory mut’ah payable by the husband may substantially alleviate hardships which

follow divorce and the consequent loss of financial support. We therefore recommend that the payment of mut'ah be made mandatory upon dissolution of the marriage.

**Recommendation:**

9. (6) 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] must**, if it deems **it** 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] must** order that any person who in the court's opinion has a sufficient interest in the matter be joined in the proceedings;

(e) **[may] must** 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, **, which order shall be subject to clause 9(5) of the proposed Act;**

(f) must, when making an order for the payment of maintenance, including past maintenance, take into account all relevant factors; and

(g) **[may] must** make an order for a conciliatory gift (*mut'ah*).

***Maintenance***

**Compensation for household expenses and/or household work – Clause 12(2)(a)**

In Iran, a woman is entitled to half of her husband's assets if the court finds that the divorce was initiated by the husband and not caused by any failure on the wife's part. A reform introduced in 1992 extended the divorced wife's financial rights to include the right to sue for payment for household services rendered to the husband during marriage.

In Jordan, during the course of the marriage, the wife has no financial obligations for her own upkeep.

**Gynaecological and allied expenses – Clause 12(2)(c)(i)**

Precedent exists in Sri Lanka for the husband to bear the delivery costs of a woman divorced during pregnancy.

**Provision of accommodation for wife who has custody of child – Clause 12(2)(c)(ii)**

Whether or not a wife has her own separate residence does not detract from the husband's obligation to provide her with accommodation during the post-iddah period.

**Recommendation:**

12. (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, **which shall include compensation for household expenses and/or housework incurred, delegated or supervised by the wife. In instances where the wife has incurred such expenses without retaining proof thereof, she shall be compensated to the minimum value of 5% of the husband's estate without having to furnish such proof.**
- (b) the father is obliged to maintain his children until they become self-supporting;
- (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, and in the case of a pregnant wife such maintenance shall include but not be limited to all gynaecological costs, costs of delivery of the baby and other allied expenses;**
  - (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*) 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 **but shall not be limited to** the provision of food, clothing, separate accommodation, medical care, **[and]** education **and allied expenses**.

### ***Procedure for Polygynous Marriages – Clause 8(6)***

Certain international jurisdictions stipulate conditions upon which a husband may render his marriage polygynous through application to a court:

- In some Malaysian jurisdictions, the court makes a determination based on the husband's ability to support all the wives equally.
- Pakistan and Bangladesh require that the subsequent marriage should be just and necessary.
- Sri Lanka makes provision for the wife's immediate right to divorce when her husband enters into a subsequent marriage.
- Iran imposes a penalty (including imprisonment) for both the husband and the marriage officer, where the consent of the first wife was not obtained. Prior to 1979, the penalty was 6 months imprisonment.
- In Malaysia, reform efforts are currently being aimed at encouraging judges to wind up the first estate before allowing the husband to enter into a second marriage (ie, the contractual obligations of the first marriage must first be fulfilled before engaging in the second marriage).

With due regard to the above, we recommend that a husband be required to establish the consent of the existing wife / wives before entering into a further marriage. To further protect the rights of the existing wife / wives, it would be prudent for the court when considering the application to ensure that the rights of the present wife / wives are not prejudiced by the subsequent marriage.

### **Violation for procedures for Polygynous Marriages – Clause 8(10)**

The penalty of R1 000 payable by a man who violates the provisions of Clause 8(6) will not act as sufficient deterrent. We therefore recommend a fine of R25 000 and/or a period of imprisonment.

### **Recommendation:**

8. (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:

**(i) obtain written proof of his existing wife or wives consent to render the existing marriage/s polygynous or further polygynous**

**(ii) 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.**

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

(c) must grant approval if it is satisfied that:

**(i) the consent of the existing wife or wives has been obtained; and**

**(ii) the rights of the present wife or wives are not prejudiced by the subsequent marriage/s; and**

**(iii) that the husband is able to maintain equality between his spouses as prescribed by the Holy *Qur'an***

...

8. (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 [R1 000] **R25 000 and/or a period of imprisonment of not less than two (2) years.**

## 6. GUARDIANSHIP, CUSTODY AND ACCESS OF MINOR CHILDREN

The proposed Act does not make specific provision for joint guardianship to be awarded to both parents upon dissolution of the Islamic marriage by divorce. This will prejudice the rights of Muslim mothers and children, and is at odds with the civil law position. We therefore recommend that the proposed legislation specifically provide for joint guardianship to be awarded to both parents upon dissolution of the Islamic marriage by divorce, unless the court deems otherwise.

Furthermore, the proposed Act makes provision for the Family Advocate to become involved only in instances of variation and rescission of custody, guardianship and access (Clause 11(4)). Provision should be made for the extension of the powers of the Family Advocate to become involved in these matters at the inception of any action or application involving minor children. We therefore recommend that any action or application concerning minor children must be referred to the Family Advocate.

### **Recommendation:**

**Insert new clause 11(1)**

**11. (1) Upon dissolution of an Islamic marriage, both parents shall be awarded joint guardianship, unless otherwise ordered by the court, who shall in making such order give effect to Clause 9(5) of the proposed Act.**

[1] **(2)** 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]**, consider the welfare and best interests of the child.

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

[3] **(4)** 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 (Al-Hadaanah)]**, in awarding or granting custody or guardianship **or access** of minor children, award or grant custody or guardianship **or access** to such person as the court deems appropriate, in all the circumstances.

**Insert new clause 11(5)**

**11. (5) Subsections 2, 3 and 4 above shall be subject to clause 9(5) of the proposed Act.**

**11. [(4)] (6)** 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 (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.

## **7. MEDIATION**

The discussion above relating to the involvement of the Family Advocates' Office refers.

### **Recommendation:**

13. (1) In the event of a dispute arising during the subsistence of an Islamic marriage or otherwise arising from such a marriage, **the registrar of the court and/or** 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.

Insert new clause 13(2)

**13. (2) Should the dispute referred to in sub-clause 1 relate to guardianship, custody, and/or access of minor children, the referring party or parties shall give effect to Clause 9(5) of the proposed Act.**

...

13. (3)(a) The Mediation Council, upon resolution of the dispute, shall submit the mediation agreement to a court within seven days from resolution and such court shall, if satisfied that the interests of any minor children **and both spouses** are duly protected, confirm the mediation agreement **or make such other order as it deems just** .

**(b) In matters concerning minor children, the mediation agreement shall be referred to the Family Advocate for recommendation prior to the confirmation of the mediated agreement by the Court.”**

13. (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; **and if it refers to minor children, shall be referred to the Family Advocate in terms of section 4 of the Mediation in Certain Divorce Matters Act 24 of 1987 for a recommendation.**

## 8. ARBITRATION

The discussion above relating to the involvement of the Family Advocates' Office refers.

### **Recommendation:**

14. (4) No arbitration award affecting the welfare of minor children shall come into effect unless it is **referred to the Family Advocate for a recommendation and** confirmed by the **[High] [C]court** upon application to such court and upon notice to all parties who have an interest in the outcome of the arbitration.

## 9. JUDGES & ASSESSORS

With regard to judges, the provisions relating to Muslim judges or the alternative provided for in the Bill, will give rise to practical problems in respect of implementation.

There are not sufficient Muslim judges and advocates or attorneys with at least 10 years standing as acting presiding officers, including Muslim women in those positions, to preside over the matters. This will certainly have implications for access to justice, in terms of which many parties will be prejudiced if their matters cannot be dealt with due to lack of presiding officers or insufficient presiding officers.

**The following table depicts the number and gender composition of Muslim judges nationally:**

<b>DIVISIONS</b>	<b>NUMBER</b>	<b>GENDER</b>
Constitutional Court	1	Male
Supreme Court of Appeal	1	Male
Transvaal Provincial Division	4	All Males
Cape of Good Hope Provincial Division	4	3 Male; 1 Female
Natal Provincial Division	2	Male
Free State Provincial Division	1	Female
Ciskei Supreme Court	1	Male
Northern Cape Division	1	Male

**Total Number of Muslim Judges: 15 (i.e. 13 Male and 2 Female)**

**The following table depicts the number of Muslim presiding officers of the five Family Court Pilot Projects nationally:**

<b>DIVISION</b>	<b>NUMBER</b>
Western Cape	0
Eastern Cape	0
Gauteng	0
KwaZulu-Natal	0
Lebowa Goma	0

**Total Number of Muslim Presiding Officers: 0**

### **Practicing Muslim Officers**

Clarity is required in respect of the phrase ‘practicing Muslim advocate or attorney of at least 10 years’ standing as acting presiding officer’. Clarity is also required in respect of ‘10 years standing as acting presiding officer’ – does this refer to an uninterrupted period of 10 years or irregularly over a period of 10 years?

### **Muslim Judges and Presiding Officers – Clause 15 (1)**

We recommend that:

- clause 15(1)(a) should be replaced with a transitional clause incorporating an interim period of five (5) years from date of enactment of the legislation that makes provision for disputes, particularly those involving issues of status, to be presided over by any court, or any judge.
- there should also be a course in Muslim family law appropriately accredited under the National Qualifications Framework that is directed to all legal practitioners, assessors and the judiciary.
- with regard to assessors, Clause 15(1)(b) should incorporate an interim period of five (5) years during which the assessors should have the following:
  - A university level education that has included one or more courses in Islamic law;
  - In depth knowledge of the provisions of the Act;

- ❑ Proven track record of understanding and applying gender-sensitive approaches, particularly in the area of Muslim Personal Law;
  - ❑ Legal qualification as a recommendation.
- after the interim period, there should be a course in Muslim family law appropriately accredited under the National Qualifications Framework, located in South Africa and accessible to all South Africans.

Given the above scenario, in the interim it may be necessary to allow for all judges and presiding officers to preside on Muslim marriage and divorce matters, provided they are assisted by two Muslim assessors, at least one of whom shall be female. The latter is recommended in light of the paucity of female judges and presiding officers, to ensure gender representivity when matters arising out of the proposed Act are adjudicated in court.

**Authoritative bodies – Clause 15(4) and (5)**

Introducing an additional party to the proceedings at the stage of appeal will give rise to irregularity and inconsistent practise in respect of the procedures and rules of court. It may very well be tantamount to the introduction of new evidence at an appeal stage that was not tendered in the court a quo. This will also prejudice parties by violating their right to be treated equally before the law. Furthermore, many Muslim institutions currently are gender-insensitive and have a history of gender discrimination. In addition, the provision that legal opinion be obtained from only two *Muslim* institutions is discriminatory against other existing institutions, including human rights organisations, which may not qualify as Muslim institutions, but which may have an equally relevant interest in the matter. We therefore recommend that Clause 15(4) should be deleted.

We further recommend that the process allowing for the submission of *amicus curiae* adopted by the Constitutional Court be similarly adopted by the Supreme Court of Appeal in respect of the proposed Act. This will afford *all* interested parties the opportunity to submit opinions on a matter.

**Recommendation:**

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

- (a) the Judge-President or other titular 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] with the appropriate experience;**

(b) the court shall be assisted by two Muslim assessors, **at least one of whom shall be female**, who shall have [**specialised knowledge of Islamic Law**];

**(i) a university level education that has included one or more courses in Islamic law;**

**(ii) in depth knowledge of the provisions of the Act;**

**(iii) a proven track record of understanding and applying gender-sensitive approaches, particularly in the area of Muslim Personal Law; and**

**(iv) a legal qualification as a recommendation.**

15. (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 assessors shall participate in any application for leave to appeal, where such leave is necessary.

**[15. (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.]**

**[15. (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.]**

17. (1) In the event of proceedings being instituted under this Act for the confirmation or grant of a decree of dissolution of an Islamic 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.

## **10. AMENDMENT OF LAWS**

**Insert the following:**

**Unemployment Insurance Fund Act:** definition of spouse / dependant should be extended to include those parties married in terms of the proposed Islamic Marriages Act.

**Prescription Act:** should be amended to exempt women affected by the proposed Act who have claims arising from the Islamic marriage as well as the dissolution of the marriage, and post dissolution of the marriage. This recommendation is made on the basis that Islamic Law does not subject claims arising from the Islamic contract of marriage nor upon the dissolution of the marriage to any period of prescription. We recommend that this Islamic Law benefit be extended to women in terms of the proposed Act as well.

## **11. CHOICE OF PARTIES TO BE BOUND BY THE BILL**

It is quite possible that parties in existing Muslim marriages may not wish to have themselves regulated by the proposed Act. To facilitate this, we recommend that such parties' have the opportunity to register themselves under existing South African civil marriage legislation. Furthermore, parties in marriages conducted after the implementation of the proposed Act may similarly wish to be excluded from the proposed Act and to be governed by South African civil marriage legislation instead. To facilitate this, we recommend marriage registration forms to allow parties' a choice of legislation under which to have their marriages regulated.

Parties who do not wish to be regulated by either Act will effectively engage in a common law relationship bereft of the benefits and protections afforded by South African legislation.

## **12. PUTATIVE MARRIAGES**

Insert applicable provisions of the Marriage Act 25 of 1961.

## **13. ADVOCACY COLLECTIVE**

As an advocacy strategy, we propose the establishment of an advocacy collective, comprising various NGOs, interested parties and roleplayers, for advocacy purposes during the various stages that the proposed Act will undergo before finally being passed through Parliament.

## **‘Annexure A’**

### **BASIC ELEMENTS FOR INCLUSION IN THE PRO FORMA MARRIAGE CONTRACT:**

#### **Mandatory requirements:**

- (a) Names, identity number, address of both parties
- (b) Age of both parties
- (c) Consent of both parties
- (d) Dower and/or deferred dower
- (e) Matrimonial property regime
- (f) Terms and conditions for Maintenance during the marriage
- (g) Terms and Conditions for Divorce –

#### Procedure/Form of Divorce

- Delegated right to divorce ie Tafwid-ul-Talaq
- Conditions for a suspended Talaq eg wife’s right to divorce should her husband wish to enter into a subsequent marriage; other conditions

#### Consequences of Divorce

- Payments at divorce ie mut’ah, past maintenance due, compensation for household expenses incurred, compensation for household services rendered
- Iddah maintenance including pregnancy and related expenses
- Post Iddah Maintenance

#### **Additional agreements (not limited to those noted here)**

- (a) Minor Children
- (b) Sexual Relations
- (c) Employment
- (d) Study
- (e) Extended Family Obligations
- (f) HIV/AIDS testing and disclosure
- (g) Etc
- (h) Etc .....