COMMENTS ON THE SOUTH AFRICAN LAW COMMISSION'S DISCUSSION PAPER NO 101

Islamic Marriages and Related Matters

GENDER UNIT & GENERAL PRACTICE UNIT
LEGAL AID CLINIC
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A. INTRODUCTION *

'And women shall have rights similar to the rights against them, according to what is equitable ..'.[1]

1. Background to submission

This submission is a combined project of the Gender Unit and General Practice Unit of the Legal Aid Clinic (University of the Western Cape), Shura Yabafazi ('Consultation of Women'), the National Association of Democratic Lawyers (NADEL) (Western Cape) and the NADEL Human Rights Research and Advocacy Project (hereafter referred to as the NADEL 'Project').

The **Gender Unit and General Practice Unit** are specialised units of the university-based **Legal Aid Clinic** at the **University of the Western Cape**. Both units offer litigation to indigent clients including Muslim Personal Law related matters, with a specific focus on protecting and promoting gender and socio-economic rights. They also provide practical and theoretical training to final year law students in gender and socio-economic related areas, and are involved in relevant research and advocacy work, including Muslim Personal Law related matters.

Shura Yabafazi comprises a group of individuals who are committed to promoting substantive gender equality for women, and to the transformation of the legal and social environment surrounding Islamic marriages. This group was established as a response to the hardships and discrimination suffered by women as a result of non-recognition of Islamic marriages and current Muslim Personal Law practices. It seeks to ensure that women have access to a system of family law that recognises their faith and is simultaneously non-discriminatory. It also aims to promote an environment in which women affected by Muslim Personal Law can make informed choices and decisions about their lives, free from fear of discrimination.

NADEL (Western Cape) is a branch of NADEL, which is a national lawyers' organisation. It's aim is to promote transformation of the legal profession and judiciary, as well as society in general in a manner that protects and enhances a human rights culture, including the protection and promotion of women's rights.

The **NADEL Project** is a non-government human rights organisation. Its primary aim is to contribute towards a human rights culture through research, education and training, networking,

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* Many of the arguments put forth in this submission have also been expressed in a previous submission made by the Gender Project, Community Law Centre (UWC) and the Gender Unit, Legal Aid Clinic (UWC) on Issue Paper No 15. (See Gender Project, Community Law Centre (UWC) and Gender Unit, Legal Aid Clinic (UWC) *Comments on the South African Law Commission's Issue Paper No 15: Islamic marriages and related matters* (2000).

[1] *Qur'an* Sura II Verse 228.

monitoring, and advocacy activities and the production of publications. The organisation seeks to contribute to the transformation of society, to achieving equality and non-discrimination, and the improvement of the quality of lives and well-being of communities, especially women and the poor.

The preparation of this submission was informed by and has benefited from discussions and ideas held at various workshops to debate the contents of the Discussion Paper,[2] as well as insights gained by the Gender and General Practice Units arising out of Muslim Personal Law related matters that have been taken on by the Legal Aid Clinic. We believe that this submission is based on the lived realities of Muslim women=s experiences, as well as extensive academic- and practically based research undertaken by the attorneys at the Legal Aid Clinic.

2. Substantive equality

This submission is based on the ideal of attainment of substantive sex and gender equality in our constitutionally democratic dispensation.[3] The achievement of substantive equality would take

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[2] On 12 February 2002, representatives of the Legal Aid Clinic (UWC) attended a workshop conducted by the Commission on Gender Equality. On 25 August 2000, representatives of the Legal Aid Clinic (UWC) and Shura Yabafazi (‘Consultation of Women’) hosted a workshop with congregants of the Claremont mosque. On 21 February 2002, the Legal Aid Clinic (UWC) held a focus group with the Muslim Women=s Divorce Support Group at Strandfontein mosque.

[3] Section 9 *The Constitution of the Republic of South Africa* Act 108 of 1996 (hereafter referred to as >the Constitution=). Furthermore, in its interpretation of the equality clause contained in the Bill of Rights, the Constitutional Court has adopted a substantive approach to equality (see *inter alia Brink v Kitshoff NO* 1996 (6) BCLR 752 (CC); *President of the Republic of South Africa and Another v Hugo* 1997 (6) BCLR 708

into account the different circumstances of people living in South Africa, and would therefore focus on the ***impact*** of legal provisions to ensure >equality of outcome=. When considering the adoption of specific provisions, it is essential to consider not only the formal >face= of such provisions, but also to determine what the impact of such provisions would be on the lives of people in a specific context. It is for this reason that we have attempted to bring the real concerns of women living in Muslim communities in South Africa to the attention of the Law Commission.

South African Muslims have suffered negative consequences as a result of the non-recognition of Muslim marriages. Moreover, Muslim women have been disproportionately affected by this lack of recognition, thus mere recognition of Muslim marriages on a formal level will not be sufficient to address those historical and current disadvantages. The proposed legislation must therefore provide for gender-sensitive provisions that will address and redress the inequalities suffered by Muslim women not only as a result of non-recognition, but also because of discriminatory practices and prescriptions that have become entrenched in Muslim communities.

(CC)).

It seems that the preceding Issue Paper [4] and the present Discussion Paper are both premised on the assumption that there is only one form of Muslim Personal Law being practised in South African Muslim communities. It is our submission that this is an incorrect assumption because Muslim Personal Law has evolved out of centuries of male-biased interpretation of the primary sources of Islam,[5] which has resulted in various forms of Muslim Personal Law being practised in the different Muslim communities throughout South Africa.. Those conservative interpretations have given rise to discriminatory practices and prescriptions in the Muslim communities.[6] At the same time, there are gender-sensitive interpretations of Islamic law that would be consistent with the constitutional principle of equality, and if applied, would accord with the provisions of the Constitution. Thus, in response to the concern raised in the Discussion Paper [7] whether or not >*recognition of the system or aspects thereof* [would be] *consistent with Islamic Law?*=, it is our submission that the adoption of a gender-sensitive interpretation of Muslim Personal Law would allow the legislation regulating Islamic marriages to be consistent with the Constitution and simultaneously be in accordance with a gender-sensitive interpretation of Islamic law.

Given the unequal power relations between men and women in our society, and having regard to the fact that women in South Africa constitute a historically vulnerable and marginalised group, we also believe that the final legislation must be drafted in a way that affords automatic protection to those who are in a weaker contracting or negotiating position. In the South African context, this would include Muslim children and the majority of Muslim women.

Furthermore, in drafting the final legislation, we urge the Law Commission to be mindful of the provisions of article 16 of the Convention on the Elimination of All Forms of Discrimination Against Women,[8] which enjoins states parties to take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations. States parties must *inter alia* ensure, on a basis of equality of men and women -

(1) the same right to enter into marriage;
(2) the same right freely to choose a spouse and enter into marriage only with their free and full consent; and

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4 Issue Paper No 15: *Islamic marriages and related matters*.

5 The primary sources are the Qur=an and Ahadith of the Prophet Muhammad (p.b.u.h.), from which Islamic law is *inter alia* derived.

6 Amien W 'Recognition of Muslim marriages in South Africa' (2001) 12. Accepted for publication in the South African Law Journal.

7 At page 3.

8 Adopted 18 December 1979, G.A. Res 34/180, U.N. GAOR, 34th Session, Supp. No. 46, U.N. Doc A/34/36 (1980) (entered into force 3 September 1981).

(3) the same rights and responsibilities during marriage and at its dissolution.[9]

3. Informed discussions within Muslim communities

In our preparation for this submission, one area of persistent concern was the fact that many communities were not informed and were unaware of the publication of the Discussion Paper and the invitation to comment on its contents. The issues dealt with in the Discussion Paper form part of religious and cultural perceptions that are held in such high regard by Muslim communities that it becomes almost unthinkable to question or challenge these perceptions of how Islamic law should be practised. We therefore urge the Law Commission in its next phase to embark on a countrywide process of consultation with Muslim communities to raise awareness, to educate and to help inform the process of investigating how the recognition of Muslim marriages can best be achieved. In this regard, we wish to draw the Law Commission=s attention to the fact that the time-frame for submission of comments on the Discussion Paper was unreasonably short to elicit sufficiently widespread and representative participation from South African Muslims.

4. Conceptual framework

In our submission, we have attempted to analyse the issues dealt with in the Discussion Paper on two levels namely, compliance with the provisions of the Constitution (most notably the Bill of Rights), and potential conformity with existing provisions of the South African civil law of marriage and divorce.

5. Focus on identification of issues

In compiling this submission, we have decided to focus on nine key areas: definitions; requirements for validity; registration; proprietary consequences; polygynous marriages; dissolution of Islamic marriages; custody and access; maintenance; and assessors. This choice does not imply that we consider other issues included in the Discussion Paper to be unimportant, but a selection was dictated by time and resource constraints. In addition, we have attempted to identify issues that have not been dealt with in the Discussion Paper, but that we believe deserve attention, such as prescription and alternative dispute resolution.

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[9] Article 16(1)(a)-(c).

B. Clause 1: DEFINITIONS

"Dower@ (**subclause (iv)**)

We submit that the reason for the dower contained in the draft Bill is incorrect. The dower constitutes 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. [10]

Recommendation:

The definition of "dower" in subclause (iv) should be replaced by the following:

" … means the money or property which must be payable by the husband to the wife as an *ex lege* consequence of the marriage itself ".

"*Faskh*@ (**subclause (vi)**)

The grounds for dissolution of an Islamic marriage by a wife contained in this subclause are not similarly stipulated for a husband in the case of '*talaq*'. Also, the wife is required to make application to court for a '*faskh*' to be granted whereas a husband simply has to pronounce an intention of '*talaq*' for it to be considered valid, notwithstanding the fact that this pronouncement must be registered by a marriage officer and confirmed by a court. However, the confirmation by a court arises from an institution of divorce proceedings and not by way of application. We submit that these differentiations applicable to a husband and wife for the purposes of dissolving an Islamic marriage would place an additional burden on the wife and constitute forms of gender inequality. We therefore propose that the final legislation should not contain a distinction between '*faskh*' and '*talaq*' and that this definition should be omitted.

In the event that the final legislation still makes provision for a dissolution of an Islamic marriage by way of '*faskh*' at the instance of the wife, we submit that the ground of 'irretrievable breakdown of the marriage' would in any event subsume the grounds contained in subclauses (1)(vi)(a)-(h) and include other grounds that are not stipulated in the draft Bill. We therefore propose that the final legislation 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'. This would also bring the legislation into conformity with existing civil law. [11]

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10 Amien W 'Recognition of Muslim marriages in South Africa' (2001) 3. Accepted for publication in the South African Law Journal.

11 See section 4 of the Divorce Act 70 of 1979.

Recommendation:

- **Provision should not be made for a dissolution of an Islamic marriage by way of '*faskh*' and hence this definition should be omitted.**
- **In the event that the final legislation makes provision for a dissolution of an Islamic marriage by way of '*faskh*' at the instance of the wife, 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'.**

"*Iddah*" (**subclause vii**)

This mandatory waiting period is applicable to women only, and places an enormous burden on women that effectively keeps them housebound and restricts them from courting or marrying anyone else during this period. These conditions and restrictions are not applicable to men. Furthermore, these restrictions and conditions do not accord with our modern context because in situations of divorce, women are usually the primary caretakers of children and need to have access to the world outside of the house to take care of the children for example, taking children to and fetching them from school. Also, even though the ex-husband may be paying maintenance in respect of the ex-wife and/or children, experience has shown that most women still have to find employment outside of the home to sufficiently meet their basic needs and those of the children. Moreover, 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. As a result, it is our submission that this Islamic prescription is discriminatory against women on the grounds of gender and sex, and should be omitted as a compulsory requirement that women have to adhere to.

Recommendation:

- **The *iddah* should not be made a mandatory requirement applicable to women only.**

"irrevocable *Talaq*" (**subclause viii**)
"revocable *Talaq*" (**subclause xv**)
"*Tafwid ul Talaq*" (**subclause xvi**)
"*Talaq*" (**subclause xvii**)

These forms of obtaining a dissolution of an Islamic marriage are the sole preserve of a husband,

and we submit that this differentiation on the grounds of gender and/or sex constitutes unfair discrimination against women. We therefore propose that these definitions be omitted from the final legislation.

In the event that the final legislation includes these definitions, we submit the following:

With regard to "irrevocable *Talaq*":

"(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;"

We submit that it is unclear from this subclause how many pronouncements need to be given. If the Project Committee intends for more than one pronouncement to be given, then it is unclear what the periods are between which they need to be given, as well as at which stage the period of *iddah* commences and expires. It is also unclear what the length of the *iddah* should be between the pronouncements before the *talaq* is considered irrevocable.

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

We submit that it is unclear from this subclause what the length of the periods are between the pronouncements of the first and second *talaqs*, as well as the length of the *iddah* during those periods.

Recommendation:

- **The following definitions should be omitted from the final legislation:**
  "irrevocable *Talaq*" (subclause viii)
  "revocable *Talaq*" (subclause xv)
  "*Tafwid ul Talaq*" (subclause xvi)
  "*Talaq*" (subclause xvii)

- **Should the final legislation include the above definitions:**

In respect of subclause (viii)(a) of the draft Bill:
Clarity must be given regarding how many pronouncements need to be given. If more than one pronouncement is intended, clarity must be given regarding the extent of the periods between which they need to be given, as well as at which stage the period of *iddah* commences and expires. Clarity is also required regarding the length of the *iddah* between the pronouncements before the *talaq* is considered irrevocable.

In respect of subclause (viii)(c) of the draft Bill:

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.

"*Khul=a*" (**subclause (x)**)

This form of the dissolution of an Islamic marriage as defined in the draft Bill is not similarly applicable to the husband. We therefore submit that this differentiation on the grounds of gender and/or sex constitutes unfair discrimination against women. We propose that this definition be omitted from the final legislation.

Should the definition be retained in the final legislation, we submit that the definition for *khul'a* contained in the draft Bill is incorrect. In actual fact, it is a form of dissolution of the Islamic marriage simply at the instance of the wife, and not in accordance with an agreement between the parties. The wife can obtain a *khul'a* if she cannot keep the limits prescribed by Allah. It is our submission that this ground reflects a subjective state of mind, and can include any number of reasons for the dissolution of the marriage, including the wife's unwillingness to continue to be bound by the Islamic contract of marriage. Accordingly, we propose that a wife should be able to institute divorce proceedings against her husband by obtaining a *khul'a* 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'. This would also bring the legislation into conformity with existing civil law. [12]

Recommendation:

- **The definition of '*khul'a*' should be omitted from the final legislation.**
- **Should the definition be retained in the final legislation, it should be replaced by the following:**

"*Khul'a*" 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'.

Amarriage officer@

12 Ibid.

Islamic law does not require an independent third person to officiate a marriage. It recognises a marriage as valid if it is simply concluded between two persons in the presence of two witnesses. However, for practical purposes, we accept that a designated marriage officer should officiate at the conclusion of the marriage contract. However, we do not believe that the marriage officer needs to be a Muslim person nor does this person need to have knowledge of Islamic law. By including these requirements, the legislation would be placing a burden on the conclusion of an Islamic contract of marriage that is not even required by Islamic law. We propose that the marriage officer should be 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.

Recommendation:

The definition of 'marriage officer' 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".

C. Clauses 2 - 4: We support the proposals contained herein.

D. Clause 5: REQUIREMENTS FOR VALIDITY OF ISLAMIC MARRIAGES

Subclause (1):

We support the requirement that both parties must be 18 years or older, and that they must both consent to be married to each other. However, to ensure that women are protected from having to enter forced marriages, we believe that the consent should be actual and informed, and that it should be given in writing. We propose that a prescribed form ('consent form') should be provided that should require the parties to stipulate: that they consent to be married to each other; the matrimonial property regime that they wish to apply to their marriage if it is anything other than the automatic regime provided for by the legislation; and the dower agreed upon by the parties including if it is prompt or deferred as well as any agreement that has been reached between the parties in respect of the dower. We propose further that the marriage officer must be satisfied that actual and informed consent has been given by both parties, including that they understand the consequences of the matrimonial property regime that they have agreed to as well as any agreement reached between them regarding the dower. Special provision must be made for illiterate parties. The marriage officer must be directed to inform the parties about what they

are consenting to and the consequences thereof.

Recommendation:

1. **The consent should be actual and informed and must be given in writing.**

2. **Special provision must be made for illiterate parties.**

3. **Both parties should be required to fill in a prescribed 'consent form' that reflects:**
   That they consent to be married to each other;
   The matrimonial property regime that they wish to apply to their marriage if it is anything other than the automatic regime provided for by the legislation; and
   The dower agreed upon by the parties including if it is prompt or deferred as well as any agreement that has been reached between the parties in respect of the dower.

4. **The marriage officer must inform the parties about what they are consenting to and the consequences thereof.**

5. **The marriage officer must be satisfied that actual and informed consent has been given by both parties, including that they understand the consequences of the matrimonial property regime that they have agreed to and any agreement reached between them regarding the dower.**

Subclause (9):

The prohibition of an Islamic marriage for 'any other reason' other than blood, affinity or fosterage to be 'determined by Islamic law' is too vague, because there is no consensus among Muslim scholars regarding the prohibition of marriage between parties in certain respects for example, a marriage between a Muslim woman and a non-Muslim man. Traditional scholars regard this type of marriage as invalid whereas a gender-sensitive interpretation of Islamic law views this type of marriage as permissable in terms of Islamic law. A second example would be the concept of ***halala***, [13] in terms of which a gender-sensitive interpretation of Islamic law would not require a woman to marry another man before she can remarry her current husband. Furthermore, it is our submission that these types of prohibition constitute a grave form of gender inequality and place an unacceptable limit on the personal autonomy of women, and would certainly be subject to and succeed on a constitutional challenge.

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13 This is a process which requires a woman who has been party to a final or irrevocable divorce from her husband to first marry someone else, consummate that marriage and secure a divorce from the second husband (or wait until he dies) before she can remarry the first husband.

Recommendation:

The words 'or any other reason' in subclause (9) should be omitted and the subsection should be substituted with the following clause:

'The prohibition of an Islamic marriage between persons on account of their relationship by blood or affinity or fosterage, is determined by Islamic law'.

E. Clause 6: REGISTRATION OF ISLAMIC MARRIAGES

We do not support the proposal that existing monogamous Muslim marriages entered into before the commencement of the Act should be registered. To date, Muslim marriages have not received legal recognition because it has not conformed to the Western Christian notion of marriage as a >... union of one man with one woman to the exclusion while it lasts of all others=.[14] As a result of this non-recognition, Muslim men, women and children have suffered adverse consequences, including:

- The duty of support which is owed to a wife by her husband had up until recently not been recognised;
- Muslim women have not been able to access their husbands unemployment benefits from the Department of Labour in the event of their husband=s deaths;
- Muslim women suffer negatively in respect of both testate and intestate succession, and their access to housing is impeded as a result of their Islamic marriage;
- Muslim women bear the brunt in respect of proprietary consequences on termination of the marriage;
- Muslim men have to make application to the High Court to gain guardianship, custody and/or access rights to their minor children because these rights are not automatically recognised; and
- Muslim children bear the stigma of illegitimacy. [15]

We therefore submit that existing monogamous marriages entered into before the

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[14] *Ebrahim v Mahomed. Essop* (1905) T.S. 59.

15 Fatimah Essop *Discussion Paper on the Recognition of Muslim Marriages – Gender consequences* (Unpublished paper: Women's Legal Centre) (1999) 1 – 3. See also Amien W 'Recognition of Muslim marriages in South Africa' (2001) Accepted for publication in the South African Law Journal.

commencement of the Act should not be stigmatised any further by requiring them to be registered. We submit further that the matrimonial property regimes of these marriages should simply revert to the automatic regime provided for in the legislation. Only in the event that parties agree that their matrimonial property regimes should be something other than the automatic regime provided for in the legislation, should they then be required to register such written agreement.

Nevertheless, in the event that the final legislation still incorporates a requirement for registration of existing monogamous marriages entered into before the commencement of the Act, we submit that the period of registration should be extended to 24 months after the date of commencement of the Act. An extensive educational programme will have to be undertaken countrywide to inform parties of the requirement of registration as well as the process that will have to be followed, thus we believe that 12 months will be insufficient to achieve this and will place a further burden on Muslim spouses.

In respect of existing polygynous marriages entered into before the commencement of the Act, we support the proposal that these marriages should be registered within 24 months from the date of commencement of the Act, with the requirement that the husband (*not any of the wives*) should make application to court to have a written contract regulating the matrimonial property regimes of the marriages approved by court**.** In this instance, we submit that clauses 8(7) - (9) of the draft Bill could apply. We submit that a husband who fails to register the existing polygynous marriages and fails to make the aforementioned application to court should be found guilty of an offence and on conviction, should be liable to a fine, failing which a period of imprisonment.

We support the proposal that monogamous Islamic marriages entered into after the commencement of the Act should be registered by a marriage officer immediately after the conclusion of the contract of marriage, as provided for in clause 6(4) of the draft Bill. However, since an Islamic marriage is simply a contract based on an offer and acceptance of marriage, we believe that it should not be limited to a prescribed formula including the *Tazawwajtuha* and *Nakahtuha*. The minimum requirement should be an agreement between the two parties in the presence of two witnesses and a marriage officer (which agreement should be recorded in writing and signed by the two parties, the two witnesses, and the marriage officer) that the two parties wish to be married to each other. This would not preclude parties from engaging in whatever is considered to be the accepted practise of concluding an Islamic contract of marriage in their communities.

We also propose that the parties should be required to complete and sign a standard 'consent form' and a standard marriage contract (***nikahnama***) that makes specific provision for the following:

- That both parties consent to be married to each other;
- The matrimonial property regime that they wish to apply to their marriage ie, the automatic

regime provided for by the legislation or any other regime other than the automatic regime that they both have reached agreement on. If this agreement is recorded in writing, then such agreement should be attached to the standard marriage contract;

- The amount or form of the dower and time of payment of the dower ie, prompt or deferred. If deferred, the terms of deferral must be recorded in the standard marriage contract and/or attached written agreement.

With regard to clause 6(3)(b) of the draft Bill, it is not clear what the >prescribed affidavit= should contain, nor what its intended purpose is. We are therefore not in a position to make an informed comment and suggest that the Law Commission provide clarity in this regard.

Recommendation:

1. Existing monogamous Islamic marriages entered into before the commencement of the Act should not have to be registered. The matrimonial property regimes of these marriages should revert to the automatic regime provided for in the legislation. In the event that parties agree that their matrimonial property regimes should be something other than the automatic regime provided for in the legislation, only then should they be required to register such written agreement.

2. Should the final legislation incorporate a requirement for registration of existing monogamous marriages entered into before the commencement of the Act, the period of registration should be 24 months after the date of commencement of the Act.

3. With regard to existing polygynous marriages entered into before the commencement of the Act, these marriages should be registered by the husband within 24 months from the date of commencement of the Act, and he should make application to court to have a written contract regulating the matrimonial property regimes of the marriages approved by the court. In this instance, clauses 8(7) - (9) of the draft Bill could apply. A husband who fails to register the existing polygynous marriages and fails to make the aforementioned application to court should be found guilty of an offence and on conviction, should be liable to a fine, failing which a period of imprisonment.

4. The conclusion of an Islamic marriage should not be limited to a prescribed formula including the *Tazawwajtuha* and *Nakahtuha*. The minimum requirement should be an agreement between the two parties in the presence of two witnesses and a marriage officer (which agreement should be recorded in writing and signed by the two parties, the two witnesses, and the marriage officer) that the two parties wish to

be married to each other.

5. Provision should be made for a standard 'consent form' and a standard marriage contract (*nikahnama*).

6. The Law Commission should state clearly what the >prescribed affidavit= referred to in clause 6(3)(b) of the draft Bill is intended for and what it should contain.

F. Clause 7:

We support the proposals contained herein.

G. Clause 8: PROPRIETARY CONSEQUENCES OF ISLAMIC MARRIAGES

We do not support an automatic or default >out of community of property= matrimonial regime. To date, this has proved to be disadvantageous to Muslim women. Experience has shown that on dissolution of an Islamic marriage, the woman may end up with nothing since most of the assets acquired during the subsistence of the marriage would be registered in the husband=s name. Even though the draft Bill makes provision for the court to consider whether or not a party has assisted in the conduct of a business during the subsistence of the marriage or contributed to the maintenance or increase of the other=s estate (*Clause 8(7)(a)-(b)*), this consideration will only take place on application by the affected party. We submit that this would place an unnecessary burden on the wife to prove any claim that she may have, and that the onus should more reasonably be shifted to the other party to prove that her or his spouse should not be entitled to an automatic benefit arising from the division of the estate. This would also be consistent with the automatic property regime of a civil marriage. Furthermore, indigent Muslim women may be denied access to justice to make their applications to court since Legal Aid does not always have the resources nor capacity to fund these types of matters. Even if the parties are given the option to contract out of this type of matrimonial property regime, we submit that women do not usually contract from a position of strength. They are generally not aware of their choices or rights and may find themselves pressurised to conform to whichever regime their husbands choose.

At the workshops conducted with Muslim women, the majority felt very strongly that they would not want an automatic >out of community of property= matrimonial regime. Some indicated that they would prefer the automatic >in community of property= regime incorporating the right to claim a forfeiture of benefits, and others preferred an automatic regime encompassing >out of community of property subject to accrual=. In both instances, the women felt that parties should at the same time be given the right to contract out of either option. Since Islamic law permits parties to contract the terms of their marriage, the women felt that this position would not be

inconsistent with Islamic law.[16]

We believe that it is premature at this stage to make a definitive suggestion in respect of either an automatic regime of >in community of property= or >out of community of property subject to the accrual system=, since more research needs to be done in respect of both regimes, to determine their respective impact, and to see which of the two would be most beneficial to women. We submit that the Law Commission needs to undertake this research as a matter of urgency, before the final legislation is drafted, and that the views of Muslim women throughout the country needs to be obtained to inform which of the two matrimonial property regimes should be adopted as the automatic regime.

Recommendation:

[16] These comments were made by the congregants of the Claremont mosque on 25 August 2000, and by the Muslim Women=s Divorce Support Group at the Strandfontein mosque on 21 February 2002.

The proposed >out of community of property= matrimonial regime should be replaced by either an automatic >in community of property= matrimonial regime or automatic >out of community of property subject to accrual= matrimonial regime in respect of monogamous marriages [17] entered into before or after the commencement of the Act, while simultaneously affording parties the option to contract out of the automatic regime. The Law Commission should undertake research to determine which of the two options will be the most appropriate and beneficial to women as the automatic regime.

H. Clause 8 (6)-(10): POLYGYNOUS MARRIAGES[18]

We submit that a constitutional scrutiny of polygyny can lead to one conclusion only: that the practice offends against the principle of gender equality. There are different aspects of the practice that need to be considered, most notably the fact that the taking of more than one spouse is the exclusive right of men. In addition, it is our submission that except in circumstances where the estate of the husband may be large enough to >absorb= the impact of additional marriages, the conclusion of a second or further marriage can only lead to deleterious financial and economic consequences for the wives, particularly the first wife. Thus, if one applies the test set out in *Harksen v Lane NO* [19] to determine whether a particular legal provision violates the prohibition against unfair discrimination in section 9(3) of the Constitution, one could argue that the differentiating provision amounts to >discrimination= because it is applicable to men only. As such, the discrimination is based on sex and/or gender and can be presumed to be >unfair=. An assessment of the impact of the practice would also show that the discrimination is unfair. Furthermore, we believe that it would not withstand scrutiny in terms of the limitations contained in section 36 of the Constitution, thus the continued practice of polygyny is inconsistent with constitutional provisions.

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17 Our position regarding polygynous marriages is set out in Section H of our submission.

18 A more comprehensive discussion on polygyny is contained in a previous submission on the Issue Paper No 15 (Gender Project, Community Law Centre (University of the Western Cape)) & Gender Unit, Legal Aid Clinic (University of the Western Cape) *Comments on the South African Law Commission=s Issue Paper No 15: Islamic marriages and related matters* (2000) at 15).

19 1998 1 SA 300 (CC).

It is also instructive to consider the views expressed by Muslim women: During a recent workshop,[20] the majority of women felt very strongly that the practice of polygyny should be abolished because it results in hardships borne by the wives, and whereas polygyny served a specific societal purpose at the time of its Qur=anic recognition, this purpose does not exist in current communities.

It is our submission therefore that the practice of polygyny should be made unlawful, and that a proscription against polygyny should apply to husbands who wish to enter into polygynous marriages after the commencement of the Act. Thus, those husbands contracting a polygynous marriage after the commencement of the Act should be found guilty of an offence, and be liable to a fine, failing which a period of imprisonment. It is our submission that this proscription should not apply to polygynous marriages entered into before the commencement of the Act because it would place undue hardships on the spouses of those marriages - the regulation of those marriages could be subject to clause 8(6)-(9) of the draft Bill. We further submit that clause 8(10) of the draft Bill should include a period of imprisonment in the event that the husband fails to pay a fine.

Nevertheless, should the practice of polygyny after the commencement of the Act be permitted in the final legislation, we submit that clause 8 (6), (7)(a)(b)(d), (8) and (9) should apply. However, we believe that the penalty set out in clause 8(10) of the draft Bill should also include a period of imprisonment in the event that the husband fails to pay a fine.

With regard to clause 8(6), we propose that the written contract should incorporate a matrimonial property regime that includes the following: each spouse should bear her or his own losses; the wives should be entitled to retain their own assets; and each wife should be entitled to share in the husband's profits. Thus, following this and with regard to clause 8(7)(c), we propose that in the event that the written contract does not reflect this regime, the court should not deem it to be a marriage out of community of property, but should make an order directing that the matrimonial property regime will follow the aforementioned equitable arrangement that is: each spouse bears her or his own losses; the wives are entitled to retain their own assets; and each wife is entitled to share in the husband's profits.

Furthermore, provision should be made for the husband to obtain written consent of the existing wife / wives that she / they consent/s to him taking a subsequent wife. The court must therefore be directed to have regard as to whether or not such consent has been obtained in considering an application by a husband to enter into a polygynous marriage. The court should also be satisfied

[20] Held with the Muslim Women=s Divorce Support Group at Strandfontein mosque on 21 February 2002.

that this consent was given freely and voluntarily, without duress or undue influence. Failure to obtain this 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 and in the event that the existing wife or wives choose to remain in the Islamic marriage.

In the event that 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 Islamic marriage, we propose that 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 Islamic marriage, then we propose that she or they would have the option of instituting divorce proceedings in accordance with our proposal regarding dissolution of the Islamic marriage as set out in Section I of our submission. Furthermore, a new written contract would have to be entered into between the husband and the remaining spouse/s and confirmed by a court.

In respect of polygynous marriages entered into before the commencement of the Act, we propose that the parties should be required to enter into a written contract that regulates an equitable matrimonial regime on the basis that: each spouse bears her or his own losses; the wives are entitled to retain their own assets; and each wife is entitled to share in the husband's profits. This contract should be registered with a marriage officer and confirmed by a court.

Recommendation:

- **The practice of polygyny after the commencement of the Act should be made unlawful. Those husbands contracting a polygynous marriage after the commencement of the Act should be found guilty of an offence, and be liable to a fine, failing which a period of imprisonment.**

- **Polygynous marriages entered into before the commencement of the Act should be regarded as valid and parties should be required to enter into a written contract 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 share in the husband's profits. This contract must be registered by a marriage officer and confirmed by a court.**

In the event that the final legislation permits the practice of polygyny after the commencement of the Act:

- **Clause 8 (6), (7)(a)(b)(d), (8) and (9) of the draft Bill should apply.**

- **Clause 8(10) of the draft Bill should include a period of imprisonment in the event that the husband fails to pay a fine.**

- **In respect of clause 8(6) of the draft Bill, 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 clause 8(7)(c) of the draft Bill, 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 Islamic 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 Islamic marriage, she or they would have the option of instituting divorce proceedings in accordance with our proposal regarding dissolution of the Islamic marriage set out in Section I below. A new written contract must then be entered into between the husband and the remaining spouse/s and confirmed by a court.**

I. Clause 9: DISSOLUTION OF ISLAMIC MARRIAGES

We do not support the distinction between "*talaq*" (including all of the different forms contained in the Definitions section of the draft Bill), "*faskh*" and "*khul'a*", contained in this clause of the draft Bill as well as the Definitions clause (clause 1 of the draft Bill), because the differentiation is based on the grounds of gender and/or sex and amounts to unfair discrimination. The impact of the differentiation furthermore disadvantages women by limiting their personal autonomy and

burdening them with requirements and grounds that men are not expected to meet or prove respectively. For example, a simple pronouncement of a *talaq* will allow a man to obtain a dissolution of the marriage without having to show any grounds for wanting the dissolution, whereas a woman has to set out and prove the grounds for wanting a *faskh*. In this regard, she is furthermore burdened with having to make application to court whereas a pronunciation of *talaq* by a man simply has to be confirmed by court by way of instituting an action for divorce. In the case of *khul'a* (as defined by the draft Bill), a woman is burdened with having to show that an agreement exists between herself and her husband in terms of which she is entitled to initiate the dissolution of the marriage. We submit that these differentiations amounting to unfair discrimination is a constitutional violation of a woman's right to gender equality and to be treated equally before the law, and to equal protection and benefit of the law. [21] We therefore propose that each party (husband and wife) should equally be entitled to institute an action for divorce on the grounds 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'. This would also bring the legislation into conformity with existing civil law. [22]

Should the final legislation retain the different forms of dissolution of an Islamic marriage, we propose that in each instance ("*talaq*", "*faskh*" and "*khul'a*"), the relevant party should be entitled to pronounce her or his intention to dissolve the Islamic marriage in writing, which written pronunciation should be followed by the plaintiff (husband or wife) instituting an action for divorce in court within fourteen (14) days thereof, and that there should only be one ground for dissolution of the marriage namely: ''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".

Recommendation:

- **The final legislation should not distinguish between "*talaq*", "*faskh*" or "*khul'a*".**
- **Each party (husband and wife) should equally be entitled to institute an action for divorce on the grounds 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'.**
- **Should the final legislation retain the different forms of dissolution of an Islamic marriage, in each instance ("*talaq*", "*faskh*" and "*khul'a*"), the relevant party should be**

21 Sections 9(1) and (3) of the Constitution.
22 Note 11.

entitled to pronounce her or his intention to dissolve the Islamic marriage in writing, which written pronunciation should be followed by the plaintiff (husband or wife) instituting an action for divorce in court within fourteen (14) days thereof, and there should only be one ground for dissolution of the marriage applicable to both the husband and wife namely: ''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".

J. Clause 10: AGE OF MAJORITY: We support the proposal contained herein.

K. Clause 11: CUSTODY, ACCESS AND GUARDIANSHIP

We support the proposal that in making an order for the custody of, or access to a minor child, the court must have regard to the principle of the best interests of the child as the paramount consideration.

However, we do not support the proposals contained in subclause (2)(a)-(c) of the draft Bill, because it is our contention that issues of custody and access need to be decided on a casuistic basis since circumstances may differ from case to case, and the application of the principle of the best interests of the child may result in different conclusions depending on the facts of the case at hand. Furthermore, at a recent workshop, [23] a number of Muslim women raised the concern that the application of the proposals contained in subclause (2)(a)-(c) of the draft Bill may not always produce a result that is in the best interests of the child. Thus, we propose that the position regarding custody and/or access of children born of Islamic marriages should be brought into conformity with the civil law position in that both parents would have inherent rights of custody and/or access, and upon dissolution of the marriage, the court would decide each case having regard to the best interests of the child as the paramount consideration. We furthermore propose that this position should apply to children conceived before and after the conclusion of the Islamic marriage.

We also wish to point out that the draft Bill is silent regarding guardianship rights of the parents of children born of Islamic marriages. It is our proposal that the provisions of the Guardianship Act (192/1993) should apply so that both parents are granted inherent rights of guardianship in respect of their children conceived before or after the conclusion of the Islamic marriage.

Recommendation:

23 Note 21.

- **Subclause (2)-(4) should be omitted, and the legislation should make provision for both parents having inherent rights of guardianship, custody and access of the minor children born of an Islamic marriage, including children conceived before and after the conclusion of the Islamic marriage, and subject to the Court (as the upper guardian of all minor children) limiting those rights upon dissolution of the marriage by having regard to the paramount consideration of the best interests of the child.**

L. Clause 12: MAINTENANCE

We support the provisions contained herein except for the following:

With regard to **subclause (2)(b)**, we do not believe that a distinction should be made between the male and female child. The Islamic law distinction in respect of a father's duty of support to his male and female children must be considered in its historical context when women were financially supported by their fathers, brothers or husbands. In the current South African context, this situation is not always applicable since most male and female children enter the workplace at some point in their lives. We do not support the proposal that a father's duty of support ends when the child reaches the age of majority or becomes self-supporting, whichever occurs first, because this could potentially place a burden on children who reach the age of majority and are either still studying or are unable to find employment. We therefore propose that the father should have a duty to support his children (male and female) until they are self-supporting. However, in recognition of the fact that this could potentially place a burden on the father to support his children for an unlimited period of time, we further propose that in the event that a child reaches the age of majority and is not studying, and is in a position to be working, the father's duty of support should end unless the child is able to show that after a diligent search for employment, she or he is unable to find employment.

With regard to **subclause (2)(c)(ii)**, we do not support the provision that post-divorce spousal maintenance in respect of the wife by the husband should be restricted for the period during which she has custody of the children only. We believe that the relevant Qur'anic verses can be interpreted in a manner that supports maintenance of the wife by the husband after divorce for an extended period of time.[24] We therefore propose that the husband should be obliged to maintain the wife after divorce until her death or remarriage. This will also bring the legislation into conformity with the existing civil law regarding post-divorce spousal maintenance.

24 For example: see *Qur'an* Sura Al-Baqarah (Sura II: Verse 233), which states that " No mother shall be treated unfairly on account of her child …"

With regard to **subclause (2)(d)**, we propose that this subsection be omitted because it is inappropriately placed in this legislation.

Recommendation:

- **Subclause (2)(b) should be amended to place an obligation on the father to maintain his child (male and female) until the child becomes self-supporting.**
- **A father's duty of support in respect of his children continues when:**
- **the child reaches the age of majority and is still studying;**
- **the child reaches the age of majority and is not studying but is unable to find employment after having conducted a diligent search to find employment.**

- **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.**

- **Subclause (2)(d) should be omitted from the final legislation.**

M. Clause 13: ASSESSORS

We submit that the requirement that the assessors have 'specialised knowledge of Islamic law' is too vague. Since the assessors will have the onerous task of pronouncing on both fact and l**aw** when a dispute is referred for adjudication, and given the proposal that the majority decision of the court (two out of the three presiding ie, judge and two assessors) will be the prevailing decision of the court, we propose that the criteria for assessors should include 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.

Recommendations:

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;**

- **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.**

N. CLAUSES 14 – 17:

We support the proposals contained herein.

O. PRESCRIPTION

The judgment in *Ryland v Edros* [25] drew attention to the potentially negative impact of prescription on the right to claim arrear maintenance from a former spouse (or existing spouse). Islamic law does not apply a period of prescription to any claim that a wife would have arising out of the Islamic contract of marriage. Accordingly, we propose that the Prescription Act (18 of 1943) [26] should be amended to expressly exclude all claims arising from the Islamic contract of marriage from the operation of prescription.

Recommendation:

The Prescription Act (18/1943) should be amended to exclude all claims arising from the Islamic contract of marriage from the operation of prescription.

P. ALTERNATIVE DISPUTE RESOLUTION

In keeping with the Islamic approach that advocates an avenue of arbitration, mediation and conciliation before resorting to a final dissolution of the marriage, we propose that the legislation should make provision for parties contemplating a separation or divorce to refer the dispute to an alternative dispute resolution forum. This is because the adversarial nature of litigation does not always facilitate constructive negotiation and often has a negative impact on the parties, their relationships and consequences. Alternative dispute resolution mechanisms include negotiation, facilitation, mediation and arbitration. Provided there exists a controlled environment, alternative dispute resolution can be conducive to a more cost effective and speedy settlement. The extra-judicial forum could assist parties to formulate a mutually agreeable position regarding their future and/or division of estate. We propose that this form of alternative dispute resolution should be voluntary, and that the extra-judicial forum should be registered and regulated by a body with governing rules.

25 1997 1 BCLR 77 (CC).

26 See section 3 of this Act.

Recommendation:

- **Provision should be made in the legislation to encourage parties to refer disputes to an extra-judicial or alternative dispute resolution forum.**
- **Alternative dispute resolution mechanisms should be voluntary for parties.**
- **The extra-judicial or alternative dispute resolution forum should be registered and regulated by a body with governing rules.**

Q. CONCLUSION

We thank the Law Commission for giving us the opportunity to tender this submission. We hope that it will contribute to the deliberations of the Law Commission and its appointed Project Committee. We acknowledge the difficult task faced by the Project Committee in drafting the legislation. We wish the Project Committee well in its endeavour and look forward to the final legislation.

Compiled and edited by

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RAPCAN