



**UNITED ULAMA
COUNCIL OF
SOUTH AFRICA**

MISSION STATEMENT:
"To unify, co-ordinate and represent
Muslims of South Africa on a national
and international level"

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Submission to the:
Minister of Justice and Constitutional Development
on amendments to the

Muslim Marriages Bill
dated: 21 January 2011

Submitted By:

The United Ulama Council of South Africa
UUCSA

May 2011

مجلس اتحاد العلماء بجنوب أفريقيا

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30 May 2011

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Per Post and email

Written Submission on the Muslim Marriages Bill (MMB)

Sir

Attached herewith please find submission of the United Ulama Council of South Africa which includes the following:

- 1 Profile of the United Ulama Council of South Africa (UUCSA) marked as document 001
- 2 Overview of the submission of the United Ulama Council of South Africa (UUCSA) marked as document 002
- 3 The MMB as amended by UUCSA marked as document 003
- 4 Historical Background of Muslims in South Africa marked as document 004
- 5 Historical Background of Muslim Personal Law marked as document 005

We thank you for affording us the opportunity of making relevant input and will be more than willing to engage with your esteemed offices.

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FOUNDER MEMBERS

JAMIATUL ULAMA NATAL; MUSLIM JUDICIAL COUNCIL (SA); SUNNI ULAMA COUNCIL; SUNNI JAMIATUL ULAMA; JAMIATUL ULAMA TRANSVAAL

001- PROFILE OF THE UNITED ULAMA COUNCIL OF SOUTH AFRICA (UUCSA)

The United Ulama Council of South Africa (UUCSA) was founded in 1994 with the object of providing a unified, credible and competent leadership on behalf of the major theological formations in South Africa. The advent of a new democratic dispensation created the need for a cohesive forum that would lend itself towards the preservation, promotion and protection of the distinct Muslim identity in South Africa. As a major initiative it championed the cause for the recognition of Muslim personal law in South Africa. It interacted and co-operated closely with the South African Law Reform Project Committee 59, headed by Justice Mohammed Navsa. UUCSA had two members represented on the Project Committee 59. It has ever since engaged with various stakeholders including our former President Nelson Mandela and has played an active role in quest of appropriate legislation.

FUNCTIONS

UUCSA is a voluntary association of Muslim theologian bodies, the members of which usually officiate at the various mosques under their jurisdiction. These mosques are usually attached to affiliated seminaries. UUCSA through its affiliates has been responsible for the solemnization and the provision of the marriage certificates of common-law Muslim marriages. It is also responsible for mediating marital disputes with the view of effecting reconciliation. In the absence of such reconciliation, it has the necessary religious authority to pronounce on the dissolution of the marriage in the case of a dispute between the parties. Members of UUCSA therefore are acutely aware of the social problems that arise from the non-recognition of Muslim marriages and have the necessary experience and expertise

concerning the administration pertaining to Muslim marriages and the consequences flowing from such marriages.

The overarching functions of the affiliate bodies include:

- Establishment and management of Islamic seminaries
- Issuance of religious edicts
- Welfare Services
- Social Services
- Marriage Counseling
- Mediation and Arbitration Services
- Liaison with national and provincial governmental structures
- Regulation of Muslim dietary needs

COMPOSITION

The United Ulama Council of South Africa (UUCSA) is an umbrella body comprising major Muslim theological formations in South Africa. It comprises of the following seven affiliates:

- Jamiatul Ulama South Africa – Established in 1923
- Muslim Judicial Council of South Africa – Established in 1945
- Jamiatul Ulama KZN – Established in 1955 ***
- Sunni Jamiatul Ulama of South Africa – Established in 1978
- Sunni Ulama Council of South Africa – Established in 1992
- Eastern Cape Islamic Congress - 1996

➤ Council of Ulama Eastern Cape - 1999

(**Six of the seven members support the legal recognition of Muslim Marriages and their consequences. The Jamiatul Ulama (Kwazulu-Natal) opposes legal recognition.)

REPRESENTATION

UUCSA is representative of and enjoys the confidence and support of the vast majority of the Muslim populace in South Africa. UUCSA represents approximately 1350 members made up mostly of Muslim scholars. Geographically, UUCSA represents all nine provinces of South Africa. More specifically UUCSA through its affiliates represents approximately 400 Mosques and 200 educational institutes and religious seminaries in South Africa.

002- OVERVIEW OF SUBMISSIONS IN THE REDRAFTED BILL OF THE UNITED ULAMA COUNCIL OF SOUTH AFRICA (UUCSA)

1. DEFINITIONS

1.1 Changes have been made to some of the definitions for purposes of greater clarity, efficacy and technical accuracy.

1.2 The definitions of Faskh and Iddah have been revised since they contain more than the required classification. The grounds of "Faskh" and the

delineation of the "Iddah" time period have been accordingly incorporated as separate sections in the body of the redrafted UUCSA Bill.

2. APPLICATION OF THE ACT

2.1 The Bill provides for an 'OPT IN' election for Muslim marriages contracted after the commencement of the Act and an 'OPT OUT' election for Muslim marriages contracted before the commencement of the Act.

2.2 It would be unfair for marriages contracted before the commencement of this Act to be subject to the provisions of this Act by default.

2.3 The more equitable option would be for parties to make a conscious election that will bind them to the Act in view of its far reaching consequences and implications.

2.4 The 'OPT OUT' election may inadvertently lead to friction between couples who are unable to mutually agree on regulating their marriage under the Act.

2.5 Those who do not opt out within the prescribed time limit of 36 months may later challenge the automatic regulation of their marriages, and the state will then be embroiled in unnecessary litigation.

2.6 The 'OPT OUT' election potentially allows for mass exodus of couples which may negatively impact on the integrity of the Bill.

2.7 The Bill redrafted by UUCSA in section 2 (2) allows for an "OPT IN" election for marriages contracted before the commencement of this Act. It states that: "The provision of this Act shall not apply to Muslim Marriages contracted before the commencement of this Act, unless the parties jointly elect in the prescribed manner to be bound by the provisions of this Act, in which event the provisions of this Act shall apply to such a marriage."

2.8 The various permutations flowing from the proposed change have been accordingly effected in the relevant sections of the redrafted Bill.

3 CONTRAVENTIONS

- 3.1 Section 6(8) imposes a fine not exceeding R20 000 upon a marriage officer who knowingly registers a marriage in contravention of the provisions of the Act.
- 3.2 A similar penalty is however not imposed on marriage officers guilty of the same offence in the case of the Marriage Act, the Civil Unions Act or the Customary Marriages Act.
- 3.3 The incrimination and draconian penalties imposed for various breaches in the Bill are out of synchronisation with the overall legislative framework pertaining to marriages in South Africa.

3.4 The Bill redrafted by UUCSA suggests that the non-compliance of the provisions of the Act should be decriminalised and synchronised with the broader legislative framework pertaining to marriages. All violations are accordingly dealt with under section 19 headed "CONTRAVENTIONS"

4 UNDUE ENCUMBERANCE

4.1 Sections 6(9) (a) and (b) imposes obligations on **any person** who

facilitates the conclusion of a Muslim Marriage irrespective of whether that person is a Marriage Officer or not and incriminates him for breach of such obligation.

4.2 It is grossly unfair to extend the ambit of this Act to individuals who are not bound by it. A similar imposition is not made on persons solemnizing other common law marriages.

4.3 The relevant sections have been accordingly deleted in the Bill redrafted by UUCSA.

5. PROPRIETARY CONSEQUENCES

5.1 Although section 8 (1) states that Muslim marriages are deemed to be out of community of property without the accrual system, it however provides for an alternate proprietary regime by mutual agreement of the spouses.

- 5.2 An alternate proprietary regime mutually agreed by the spouses must not be regarded as a consequence of marriage but as an outcome of a separate contract between two individuals who in this case happen to be spouses.
- 5.3 An alternate proprietary regime should therefore not be brought within the purview of the Act.
- 5.4 The Bill redrafted by UUCSA in section 8 (1) accordingly limits itself to setting out the position by stating that: "A Muslim marriage to which this Act applies is deemed to be a marriage out of community property excluding the accrual system."

6 POLYGAMY

- 6.1 Section 8(6) of the Bill requires a husband who wishes to conclude a further marriage to apply to Court for approval.
- 6.2 In terms of Islamic law, the husband does not require the permission of a court to conclude a further marriage.
- 6.3 The Customary Marriages Act also does not require a husband to seek the approval of the courts before concluding a further marriage.
- 6.4 It is however necessary that the proprietary rights of all spouses in a polygamous marriage are protected.

6.5 To ensure such protection, the court should play an oversight role. The Bill redrafted by UUCSA states in section 8(5) that: "A husband in a Muslim marriage, to which this Act applies, who wishes to conclude a further Muslim marriage with another woman after the commencement of this Act, must make an application to the court to approve a written contract which will regulate the future matrimonial systems of his marriages. In the event of a dispute the matter shall be referred to mediation/arbitration or the court in terms of section 13, 14 and 15" The various permutations flowing from the proposed change have been accordingly effected in the relevant sections of the redrafted Bill.

7 TERMINATION OF MUSLIM MARRIAGES

7.1 Section 9 (3) requires the husband to register an irrevocable Talaq within 30 days of its pronouncement with a marriage officer.

7.2 The utterance of a Talaq whether revocable or irrevocable results in certain irrevocable legal consequences.

7.3 All Talags whether revocable or irrevocable will therefore have to be registered with a marriage officer. A Talaq issued before the commencement of the Act will also have to be disclosed at the time of registering the marriage. The relevant changes have been effected in section 9 (3) (a) of the UUCSA Bill.

- 7.4 The Bill in section 9 (3) (d) states that if a spouse disputes the validity of the irrevocable Talaq, the marriage officer may not register it until the dispute is resolved by a court or pursuant to a written settlement between the spouses. The UUCSA Bill has confined the resolution of the dispute to a court and excluded the option of a written settlement between the spouses, since the utterance of a Talaq in certain circumstances result in irrevocable consequences which may not be tenable with the proposed settlement agreement. The relevant portion has therefore been expunged from the section.
- 7.5 The Bill redrafted by UUCSA in section 9 (3) (a) includes the need to register a reconciliation in the case of a revocable Talaq with a marriage officer, for the same reasons as stated above. It states: "The husband must register any Talaq as well as a reconciliation in the case of a revocable Talaq." The redrafted Bill has an additional clause marked as section 9 (3) (i) that states: "Where the spouses agree to re-marry each other, they must declare to the Marriage Officer the number of Talaqs issued previously and such a marriage must be consistent with Islamic Law" The number of Talaqs issued determines whether spouses are able to reconcile or even re marry each other. A record of the number of Talaqs is therefore always critical.
- 7.6 The Bill in section 9 (3) (e) obligates the spouse to institute an action in a competent court for a decree confirming the dissolution of the marriage within

14days from the date of registration of the irrevocable Talaq. The UUCSA Bill has extended the period from 14 to 30 days for practical considerations.

7.7 Section 4 (b) of the Bill now appears as section 9 (3) (j) in the UUCSA Bill on account of the realigning of sections. Section 4 (b) states that if an irrevocable Talaq is not registered in terms of this Act, it is nonetheless effective as from the time of its pronouncement. The UUCSA Bill has amended the section to include both a revocable and irrevocable Talaq, since both become effective from the time of pronouncement.

8 FASKH – DISSOLUTION OF A MARRIAGE

8.1 The Bill had originally tabulated the grounds of Faskh under the definition section.

8.2 The Bill limited itself to the grounds for Faskh, but did not deal with the prescribed Islamic process before a decree of dissolution of a marriage is made by the courts.

8.3 The Bill redrafted by UUCSA has moved Faskh from the definition section and has resurrected it in the corpus of the Bill under section 9 (4)

8.4 The Bill redrafted by UUCSA states in section 9.4 that: “A court may grant a decree of a dissolution in the form of a Faskh subject to: (a) adhering to the prescribed Islamic process and (b) on such grounds recognized as valid under Islamic Law as set out hereunder”

- 8.5 The Bill in section 9 (8) (g) permits the courts to make an award for a conciliatory gift in defined circumstances permitted by Islamic Law. This section has been expunged in the UUCSA Bill since a gift by its very definition is a voluntary and gratuitous act which shall become mandatory through the determination of the courts.
- 8.6 The redrafted UUCSA Bill has included an additional clause as section 9 (8) (g) which permits the courts to make an order for any unpaid dower in the instance of the termination of the marriage. Unpaid dower is deemed to be a debt on the husband which becomes immediately payable in the case of the termination of the marriage.
- 8.7 Section 9 (9) of the Bill has been expunged from the UUCSA Bill since it deals with the administration of the estates.

9 **IDDAH**

- 9.1 The Bill had originally set out the time period for IDDAH (waiting periods) under the definition section. It has two broad categories, one in respect of a divorced woman and the other is in respect of a widowed woman.
- 9.2 The delineation of the time period does not form part of the definition of the IDDAH.
- 9.3 The redrafted UUCSA Bill has moved this section from the definition section to the corpus of the Bill under section 10

10 **COMPULSORY MEDIATION**

- 10.1 Although the heading in section 12 of the Bill refers to compulsory mediation, the body of the section however gives discretion to the parties by stating: “any party to the marriage **may** refer the dispute, at any time ...to a prescribed accredited mediation council.”
- 10.2 The redrafted UUCSA Bill has amended the section as follows: “any party to the marriage **shall** refer the dispute, at any time ...to a prescribed accredited mediator” The amendment further refers to an accredited mediator and not necessarily an accredited mediation council

11 **ARBITRATION (New Section)**

- 11.1 The Arbitration Section that was expunged from the Project Committee Bill has been reinserted in the UUCSA Bill under section 14.
- 11.2 The Project Committee had successfully solicited expert opinion on the constitutionality of the arbitration section in the Bill prior to handing the Bill to the Minister of Justice.
- 11.3 In terms of Islamic Law a marriage between the spouses is a contract. This has been confirmed by our courts. In terms of South African Law any dispute arising from a contract, other than matrimonial and status disputes, can be the subject matter of arbitration, provided the parties agree thereto.
- 11.4 The Arbitration Act provides “For the settlement of disputes by arbitration tribunals in terms of written arbitration agreement and for the enforcement of

the awards of such arbitration tribunals". The courts therefore will always have an oversight role in ensuring that the award made by the Arbitrator does not adversely affect the matrimonial causes and the status of the parties.

11.5 Likewise the best interests of the minor children are safeguarded through the provision of the Family Advocate reports to the court on the award pertaining to minor children before such award is confirmed by the court.

11.6 Arbitration is cheaper, speedier and more conducive to the settlement of acrimonious marital disputes in private. It lends itself to the fabric of the Muslim community where disputes are not generally ventilated in the atmosphere of the courts, with all its attendant drama and expose.

11.7 Needless to say that the court will still have an oversight role:

- (a) As the upper guardian where minor children are involved
- (b) To protect the status of persons
- (c) To ensure a fair and equitable distribution of the estate where necessary

12 COURTS AND ASSESSORS (NEW SECTION)

12.1 Provisions relating to courts and assessors in the Project Committee Bill have been reinstated with certain amendments under section 15 of the UUCSA Bill.

- 12.2 The redrafted UUCSA Bill makes provision for Muslim Judges/ Magistrates and Muslim assessors to adjudicate on disputes arising from the provisions of the Act.
- 12.3 The stipulation of a Muslim Judge/Magistrate stems from the religious nature of both marriage and divorce. Marriage in Islam is regarded as a solemn covenant whilst an entire chapter of the Quran is dedicated to issues pertaining to divorce.
- 12.4 Both marriage and divorce fall within the purview of worship. The pre requisite for worship is faith. A marriage therefore can only be solemnized by a Muslim and likewise a decree for the dissolution of a marriage can only be made by a Muslim.
- 12.5 The rich heritage of Islamic jurisprudence that spans more than 1400 years cannot be understood or appreciated through only a cursory perusal or superficial study of Islamic law. Hence, the need for assessors with the requisite qualifications.
- 12.6 The need for qualified assessors is to obviate the potential of an un Islamic ruling which may inadvertently be issued by a Judge/ Magistrate.
- 12.7 The Bill is sourced in Article 15 of the Constitution which entrenches the right to freedom of conscience, religion, thought, belief and opinion. The Bill of Rights also gives recognition to such rights by empowering the legislator to

pass legislation of general application recognising marriages of persons professing a particular religion.

12.8 Implicit in such a constitutional imperative is:

- a) Recognition of Muslim marriages and Muslim personal and family law;
- b) The need of the legislature to pass legislation of general application to give recognition to such constitutional provisions
- c) The Muslim Marriages Bill (MMB) is the law of general application giving recognition to Muslim marriages and the consequences flowing therefrom.

12.9 Article 31 of the Bill of Rights also provides for the recognition of cultural, religious and linguistic communities and the right to enjoy their cultural practice, their religion and the use of their language or to form their own cultural, religious and linguistic associations.

12.10 Unlike other democratic countries where religious, personal and family law is accommodated albeit reluctantly, in South Africa such rights are championed as first generation rights. It is in pursuance to such recognition that the legislature is considering the enactment of the MMB as the law of general application in order to give content to the constitutional imperative.

12.11 Muslim Judges/Magistrates and Muslim assessors would be sensitive to the implementation of the Muslim personal and family Law. They will have the

necessary background and understanding of the Muslim family and community. Their presence on the bench would give greater credibility to the judgments of the Court in the eyes of the Muslim litigants and the Muslim public.

12.12 The risk of doctrinarian entanglement which the courts have tried to avoid would be reduced.

12.13 There can be no justifiable constitutional dilemma in prescribing that “only Muslim Judges/Magistrates and Muslim assessors” may serve as arbiters of Muslim marriages.

12.14 The redrafted UUCSA Bill provides for Muslim assessors with specialised knowledge of Islamic law to assist the Muslim Judges/Magistrates who may not have such specialised knowledge.

12.15 It further contends that as is the case of assessors in terms of the Criminal Procedure Act No. 51 of 1977 and the Promotion of Equality and Prevention of Unfair Discrimination Act No. 4 of 2000, the assessors be given adjudicating powers. They will together with the Judge/Magistrate have the power to make findings of fact and matters affecting Islamic Law. The decision of the majority shall be the finding of the Court, but on matters of Law, other than Islamic Law, the presiding Judge/Magistrate shall be the sole arbiter.

12.16 Other administrative matters incidental to the appointment of assessors are also covered in the proposals. On matters of fact and Islamic Law the decision of the Court shall be final and no appeal shall lie to another court. When a competent court together with expert assessors pronounce on a religious matter, parties must accept such pronouncements, as is the case with arbitration.

12.17 It is also in the interest of the parties and the children that finality be brought to litigation.

12.18 In matters of law, other than, Islamic law, the appeal shall lie to the Supreme Court of Appeal or to the Constitutional Court.

13 DISSOLUTION OF EXISTING CIVIL MARRIAGE

13.1 The Bill in section 13 makes provision for the dissolution of an existing civil marriage either through a decree of divorce or a decree of dissolution of a common law Muslim marriage. The dissolution of an existing civil marriage is best left to the Divorce Act where a similar provision is found in respect of Jewish marriages. This section has therefore been expunged from the redrafted UUCSA Bill.

14. UNOPPOSED PROCEEDINGS (NEW SECTION)

14.1 The redrafted UUCSA Bill in section 16 states that: "In the event of proceedings being instituted under this Act for the confirmation or grant of a dissolution of a Muslim marriage to which this Act applies, or other relief, and such proceedings are not opposed, or in the event of parties having concluded a settlement agreement, the matter shall be heard by a Muslim Judge/ Magistrate sitting with two assessors." The presence of a Muslim Judge/Magistrate and two assessors even in unopposed matters is to ensure that the dissolution of a Muslim marriage or a settlement agreement effected between the parties is consistent with the provisions of Islamic Law. A settlement agreement between the parties may help in resolving conflict but such resolution may not necessarily be consistent with the tenets of Islamic Law.

15. RECOGNITION OF FOREIGN MUSLIM MARRIAGES

15.1 The Bill in section 18 makes reference to "Recognition of foreign Muslim Marriages. The heading for sake of clarity and efficacy in the redrafted UUCSA Bill reads as "RECOGNITION OF MUSLIM MARRIAGE SOLEMNIZED IN A FOREIGN COUNTRY" The section makes provision for Muslim marriages solemnized in a foreign country to be recognized as valid marriage for purposes of this Act. It also makes provision for adjudication in

the case of dispute regarding the recognition of such a marriage under this Act.

16. INTERPRETATION (NEW SECTION)

The redrafted UUCSA Bill has in section 20 provided for a clause on Interpretation which reads as follows: "In the interpretation, application and implementation of this Act, a court as contemplated in this act shall give cognisance to the rules of Islamic law in the light of the provision of section 15 of the constitution. It further states that the "The court in the exercise and enjoyment of any rights flowing from this Act shall be limited to such an extent that Islamic law permits." This section is meant to protect and preserve Islamic Law from becoming diluted and dismembered either through judicial activism or through misinterpretation.

17 CONTRAVENTIONS (New Section)

All the contraventions have been collected under one heading and have been decriminalised. The sanction for any contravention is the imposition of a fine. Such fine shall have the effect of a Civil Judgement and the court is authorised to issue a Warrant of Execution against the property of the recalcitrant party.

18. DEREGISTRATION (New Section)

- 18.1 The redrafted UUCSA Bill contains a section that deals with Deregistration. It permits parties to a marriage governed in terms of this Act, to deregister their marriage, should the Act be amended by the legislature or through case law to such an extent that it affects the core belief of the parties and is in open conflict with Islamic law.
- 18.2 Such deregistration is conditional upon both the parties agreeing thereto and the court on the application of the parties confirming the same.
- 18.3 The marriage shall thereafter be governed by the common law save for the property regime.
- 18.4 Muslims believe that certain laws pertaining to marriage and divorce are of divine origin. Any change to such an explicit text of Islamic Law is proscribed in the following words of the Quran: " And if any fail to judge by what God has revealed, they are indeed wrong doers"
- 18.5 This section serves as an exit device in the case where parties are unable to reconcile themselves to a change that they regard as incongruous to the explicit tenets of their faith.

19 **GENERAL**

Sections of the Bill in respect of which no comments have been made, may for all intents and purposes be regarded as acceptable

20 **REDRAFTED BILL.**

We have redrafted the Cabinet approved Bill in terms of these submissions and annexed hereto is the Bill as amended by UUCSA

003- The MMB as amended by UUCSA

REPUBLIC OF SOUTH AFRICA

MUSLIM MARRIAGES BILL

((As approved and recommended by the South African Law Reform Commission and adapted by the Department of Justice and Constitutional Development))

(The English text is the official text of the Bill)

(MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT)

[B —20.]

BILL

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

Parliament of the Republic of South Africa enacts as follows:—

Definitions

1. In this Act, unless the context otherwise indicates-

“**court**” means a High Court of South Africa, or a court for a regional division as provided for in section 29(1B) of the Magistrates’ Courts Act, 1944 (Act No. 32 of 1944);

“**Deeds Registries Act**” means the Deeds Registries Act, 1937 (Act No. 47 of 1937);

“**Deferred dower**” means the dower or part thereof which is payable on an agreed future date but which, in any event, becomes due and payable upon the dissolution of a marriage by divorce or death;

“**dispute**” means a dispute or an alleged dispute relating to the interpretation or application of any provision of this Act or any applicable law;

“**Divorce Act**” means the Divorce Act, 1979 (Act No. 70 of 1979);

“**dower**” (*mahr*) means the money, property or anything of value as determined by Islamic law, including benefits which must be payable by the husband to the wife as an *ex lege* consequence of the marriage;

“**existing civil marriage**” means an existing marriage contracted according to Islamic law which has also been registered and solemnised in terms of the Marriage Act before the commencement of this Act;

“**facilitating a marriage**” as referred to in section 6(9) means applying the marriage formula in a ceremony (*nikah*);

“Family Advocate” means any Family Advocate appointed under section 2(1) of the Mediation in Certain Divorce Matters Act, 1987 (Act No. 24 of 1987);

“Faskh” means a decree of dissolution of a marriage granted by a court, upon the application of a spouse, on any ground or basis permitted by Islamic law as set out in the body of the text;

“Iddah” means the mandatory waiting period arising from the dissolution of the marriage by *Talāq*, *Khula’*, *Faskh* or death during which period the wife may not remarry: (See further grounds for *iddah*)

“irrevocable Talāq” (*Talāq Bā-in*) refers -

- (a) to a first or second revocable *Talāq* pronounced by a husband which becomes irrevocable upon the expiry of the *Iddah*;
- (b) to a *Talāq* expressly pronounced as irrevocable at the time of pronouncement; and
- (c) to the pronouncement of a third *Talāq*;

“Islamic Law” means the law as derived from the *Holy Qur’an*, the *Sunnah* (Prophetic model), the consensus of Muslim Jurists (*Ijma*) and analogical deductions based on the primary sources (*Qiyas*) as interpreted by the recognized Schools of Islamic Jurisprudence;

“Khula’ ” means the dissolution of the marriage bond at the instance of the wife, in terms of an agreement for the transfer of property or other permissible consideration between the spouses according to Islamic law;

“Maintenance court” means a maintenance court as referred to in section 3 of the Maintenance Act, 1998 (Act No. 99 of 1998);

“Marriage Act” means the Marriage Act, 1961 (Act No.25 of 1961);

“Marriage officer” means any Muslim person with knowledge of Islamic law approved by a recognized Muslim judicial body and appointed as marriage officer for purposes of this Act by the Minister or an officer acting under the Minister’s written authorization.

“Muslim” means a person who believes in the oneness of Allah and who believes in the Holy Messenger Muhammad (peace be upon him) as the final prophet and who has faith in all the essentials of Islam (*Dharuriyyat Al-Din*);

“Muslim Marriage” for purposes of this act means a marriage between a Muslim man and woman contracted in accordance with Islamic law;

“**prescribed**” means prescribed by regulation made under section 22;

“**prompt dower**” means the dower or part thereof which is payable at the time of the conclusion of a marriage;

“**Registrar of Deeds**” means the Registrar of Deeds appointed in terms of section 2 of the Deeds Registries Act;

“**revocable Talāq**” (*Talāq Raj’i*) is one or two Talaqs which does not completely terminate the marriage before the completion of the *Iddah*, and in terms of which the husband may, effect a reconciliation, before the expiry of the *Iddah* only;

“**Tafwīd al-Talāq**” means the delegation according to Islamic Law by the husband of his right of *Talāq* to the wife or any other person at the time of the conclusion of the marriage, so that the wife or the appointed person may terminate the marriage by pronouncing a *Talāq* strictly in accordance with the terms of such a delegation;

“**Talāq**” means the dissolution of a Muslim Marriage, immediately or at a later stage, by a husband or his agent by using the word *Talāq* or a synonym or a derivative or an ambiguous expression accompanied by the intention to terminate the marriage;

“**this Act**” includes the regulations.

Application of Act

2. (1) The provisions of this Act apply to Muslim Marriages concluded after the commencement of this Act where the parties to the marriage elect, in the prescribed manner, to be bound by the provisions of this Act.

(2) The provisions of this Act shall not apply to Muslim Marriages contracted before the commencement of this Act, unless the parties jointly elect in the prescribed manner to be bound by the provisions of this Act, in which event the provisions of this Act shall apply to such a marriage.

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

(4) The provisions of this Act –

- (a) apply to an existing civil marriage in so far as the spouses to such a marriage have elected, in the prescribed manner, to make the provisions of this Act, excluding sections 5, 6 and 7 applicable to their marriage so long as any vested proprietary rights arising from a marriage in community of property or a marriage subject to the accrual system, or in terms of an antenuptial contract, remain unaffected;
- (b) do not apply to a civil marriage solemnised under the Marriage Act after the commencement of this Act; and
- (c) do not apply to a customary marriage registered under the Recognition of Customary Marriages Act, 1998 (Act No.120 of 1998).

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

Equal Status and Capacity of Spouses

3. A wife and a husband in a Muslim Marriage are equal in human dignity and both have, on the basis of equality, full status, capacity and financial independence, including the capacity to own and acquire assets, to dispose of them, to enter into contracts and to litigate.

Disputes

4. (1) Any dispute arising from a Muslim Marriage which was concluded but terminated before the commencement of this Act, must be dealt with outside the provisions of this Act, unless the parties, by agreement in the prescribed manner, elect to have the dispute dealt with within the provisions of this Act.

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

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

Requirements for Validity of Muslim Marriages

5. (1) A Muslim Marriage to which this Act applies concluded after the commencement of this Act is a valid Muslim Marriage if the following provisions have been complied with:

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

(2) No spouse in a Muslim Marriage to which this Act applies to whom this Act applies may subsequently conclude a marriage under the Marriage Act or any other civil law governing marriages, except this Act, during the subsistence of such a Muslim Marriage.

(3) If a marriage is concluded in contravention of the provisions of subsection (2), such a purported marriage is deemed to be null and void.

(4) If either of the prospective spouses is a minor, the *Wali* (guardian) of the minor must conclude the marriage on behalf of the minor.

(5) The Cabinet member responsible for home affairs or any Muslim person or Muslim body authorised in writing thereto by him or her, may grant written permission to a person under the requisite age to conclude a Muslim Marriage to which this Act applies under this Act if the Cabinet member or the person or body in question considers the marriage to be desirable and in the interests of the parties in question.

(6) If a person under the requisite age has concluded a Muslim Marriage without the written permission of the Cabinet member, or person or body authorised by him or her, the Cabinet member or the person or body in question may, if he, she or it considers the marriage to be desirable and in the interests of the parties in question, and if the marriage was in every other respect in accordance with the provisions of this Act, declare, in writing, that the marriage is a valid Muslim Marriage in terms of this Act for all purposes.

(7) Nothing contained in this section precludes a person under the age of 18 years, assisted by the Family Advocate, from approaching a court for appropriate relief.

(8) The prohibition of a Muslim Marriage to which this Act applies between persons on account of their relationship by blood or affinity or fosterage, or any other reason, is determined by Islamic law.

Registration of Muslim Marriages

6. (1) A Muslim Marriage -

(a) contracted before the commencement of this Act, where the parties have elected to be bound by the provisions of this Act as provided for in section 2 (2), or

(b) contracted after the commencement of this Act, where the parties have elected to be bound by the provisions of this Act as provided for in section 2(1) must be registered in the prescribed manner in the regulations promulgated in terms of section 22.

(2) No marriage officer may register any marriage unless –

(a) each of the parties in question produces to the marriage officer his or her identity document issued under the provisions of the Identification Act, 1997 (Act No.68 of 1997), or his or her birth certificate issued under the provisions of the Birth and Deaths Registration Act, 1992 (Act No.51 of 1992) ;

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

(3) The marriage officer must –

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

(4) A Muslim Marriage to which this Act applies must be concluded in accordance with the formulae prescribed in Islamic law, including *zawwajtuka* and *ankahtuka* (“I marry you (to)...”).

(5) If the marriage officer is satisfied that the requirements for a valid Muslim Marriage to which this Act applies were not complied with, he or she must refuse to register the marriage.

(6) A court may, upon the application of any of the spouses, order -

(a) the registration of any Muslim Marriage; or

(b) the cancellation or rectification of any registration of a Muslim Marriage to which this Act applies effected by a marriage officer.

(7) A certificate of registration of a Muslim Marriage issued under this section or any other law providing for the registration of Muslim Marriages to which this Act applies constitutes *prima facie* proof of the existence of the Muslim Marriage and of the particulars contained in the certificate.

(8) Failure to register a Muslim Marriage as provided for in subsection (1) (a) does not affect the religious validity of such a marriage.

Proof of Age of Parties to Proposed Marriage

7. If parties appear before a marriage officer for the purpose of concluding a Muslim Marriage in terms of this Act with each other and the marriage officer reasonably suspects that either of them is of an age which debars him or her from concluding a valid Muslim Marriage without the consent or permission of some other person, the marriage officer may refuse to register a marriage between them, unless he or she is furnished with the required consent or permission in writing, or with satisfactory proof showing that the party in question is entitled to conclude a marriage without consent or permission.

Proprietary Consequences of Muslim Marriages and Contractual Capacity of Spouses

8. (1) A Muslim Marriage to which this Act applies is deemed to be a marriage out of community of property excluding the accrual system.

(2) Spouses in a Muslim Marriage to which this Act applies may jointly apply to a court for leave to change the matrimonial property system, provided that any contemplated change is not inconsistent with principles of Islamic Law. The court may, if it is satisfied that -

- (a) there are sound reasons for the proposed change;
- (b) sufficient written notice of the proposed change has been given to all creditors of the spouses for amounts exceeding R500 or any other amount as may be determined by the Cabinet member responsible for the administration of justice by notice in the *Gazette*; and
- (c) no other person will be prejudiced by the proposed change,

order that the matrimonial property system applicable to the marriage or marriages will no longer apply and authorise the parties to the marriage or marriages to enter into a written contract in terms of which the future matrimonial property system of their marriage or marriages will be regulated.

(3) In the case of a husband who is a spouse in more than one Muslim Marriage to which this Act applies, all persons having a sufficient interest in the matter, and in particular the husband's existing spouses, must be joined in the proceedings.

(4) Where the husband is a spouse in an existing civil marriage, and in a Muslim Marriage in terms of common law, all his existing spouses must be joined in those proceedings.

(5) A husband in a Muslim Marriage, to which this Act applies, who wishes to conclude a further Muslim Marriage in terms of this Act with another woman after the commencement of this Act must make an application to the court to approve a written contract which will regulate the future proprietary regimes of his marriages. In the event of a dispute the matter shall be referred to mediation/arbitration and or the court in terms of Sections 13, 14 and 15.

(6)(a) The court must in the case of an existing marriage which is in community of property or which is subject to the accrual system or other contractual

arrangement; terminate the matrimonial propriety regime which is applicable to that marriage and may -

- (i) order an immediate division of the joint estate concerned in equal shares, or on such other basis as the court may deem just; or
- (ii) order the immediate division of the accrual concerned in accordance with the provisions of Chapter 1 of the Matrimonial Property Act, 1984 (Act No. 88 of 1984), or on any other basis as the court may deem just.

(b) The court must make an order in respect of the prospective estate of the spouses concerned as is mutually agreed, or, failing any agreement, the marriage is deemed to be out of community of property.

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

(8) If a court approves the contract as provided for in subsection (2) or (5), the registrar or clerk of the court, as the case may be, must furnish each spouse with an order of the court including a certified copy of the contract and must cause the order and a certified copy of the contract to be sent to each Registrar of Deeds of the area in which the court is situated for the purposes of recording the agreement in terms of section 3(1)(w) of the Deeds Registries Act.

(9) No marriage officer may register a second or subsequent Muslim Marriage, unless the husband provides the marriage officer with an approved marriage contract as contemplated in subsection (5).

Termination of Muslim Marriages

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

(2) Notwithstanding the provisions of section 3(a) of the Divorce Act or anything to the contrary contained in any law or the common law, a Muslim Marriage to which this Act applies, may be dissolved by a court on any ground permitted by Islamic law and the provisions of this section also apply, with the changes required by the context, to an existing civil marriage in so far

as the parties have, in the prescribed manner, elected to make the provisions of this Act applicable to the consequences of their marriage.

(3) In the case of *Talāq* the following provisions are applicable:

- (a) The husband must register any *Talāq* (which takes effect as from the time of pronouncement thereof) or a reconciliation in the case of a revocable *Talāq* immediately, but in any event, not later than 30 days after its pronouncement, with a marriage officer, in the presence of two competent witnesses, and after due notice to the wife.
- (b) The marriage officer may register the irrevocable *Talāq* only if the husband satisfies the marriage officer that due notice in the prescribed form of the intended registration was served upon the wife by the sheriff or by substituted service.
- (c) The provisions of paragraphs (a) and (b) apply, with the changes required by the context, where the husband has delegated to the wife the right of pronouncing a *Talāq*, and the wife has pronounced an irrevocable *Talāq* (*Tafwīdal-Talāq*), according to the terms of the delegation.
- (d) If a spouse disputes the validity of the irrevocable *Talāq*, according to Islamic Law, the marriage officer may not register it, until the dispute is resolved by the court.
- (e) A spouse must, within 30 days as from the date of the registration of the irrevocable *Talāq*, institute an action in a competent court for a decree confirming the dissolution of the marriage by way of *Talāq* and the action so instituted must be in accordance with the applicable uniform rules of court.
- (f) A copy of the certificate of registration of the irrevocable *Talāq* must be annexed to the summons initiating the action referred to in paragraph (e).
- (g) The registration of an irrevocable *Talāq* and the institution of an action referred to in paragraph (e) does not preclude a spouse from seeking the following interim relief:
 - (i) An application *pendente lite* for an interdict or for the interim custody of, or access to, or payment of maintenance to a minor child of the marriage concerned;
 - (ii) an application for a contribution towards the costs of the action or to institute the action, or make the application, *in forma pauperis*, or for the substituted service of process in, or the edictal citation of a party to, the action or the application; or
 - (iii) an application for maintenance during the *'Iddah* period.

- (h) A *Talāq* taking effect before the commencement of this Act is not required to be registered in terms of the provisions of this Act, but must be declared and disclosed at the time of registering a marriage.
- (i) Where the spouses agree to re-marry each other, they must declare to the Marriage Officer the number of *Talāqs* issued previously and such a marriage must be consistent with Islamic Law.
- (j) Where a *Talāq* has not been registered in accordance with subsection (3), it is nonetheless effective as from the time of its pronouncement.

(4) A court may grant a decree of a dissolution in the form of a *Faskh* subject to:

(a) adhering to the prescribed Islamic process.

(b) on such grounds recognized as valid under Islamic law are set out hereunder:

- (i) the husband is missing, or his whereabouts are not known, for a substantial period of time (*Maḥqūd al-Khabar*);
- (ii) the husband fails to maintain his wife (*Adam al-Infāq*);
- (iii) the 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 the dissolution of the marriage after a period of one year as from the date of imprisonment;
- (iv) the husband is mentally ill, or in a state of continued unconsciousness as provided for in section 5 of the Divorce Act, which provisions apply with the changes required by the context (*Junūn*);
- (v) the husband suffers from impotence or a serious disease which renders cohabitation intolerable (*Ayb*);
- (vi) the husband treats his wife with cruelty in any form, which renders cohabitation intolerable (*Dharar*);
- (vii) the husband has failed, without valid reason, to perform his marital obligations for an unreasonable period (*Dharar*);
- (viii) the husband is a spouse in more than one Muslim Marriage in terms of this Act and fails to treat his wife justly in accordance with the injunctions of the *Qur'an* and *Sunnah* (*Dharar*);
- (ix) the husband commits harm against his wife, as recognised by Islamic law (*Dharar*); or

(x) 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 the dissolution of the marriage is an option in the circumstances (*Shiqāq*);

(c) The wife must institute an action for a termination of the marriage in the form of *Faskh* in a competent court, which must be in accordance with the procedures provided for by the applicable uniform rules of court.

(d) The institution of an action referred to in paragraph (c) does not preclude a spouse from seeking appropriate relief *pendente lite*, referred to in subsection (3) (g).

(e) The granting of a *Faskh* by a court, including a *Faskh* granted upon the application of the husband, has the effect of terminating the marriage, in accordance with Islamic Law.

(5) (a) Spouses who have effected a *Khula'* by mutual agreement must personally or through their authorized representatives appear before a marriage officer and cause it to be registered in the presence of two competent witnesses.

(b) The marriage officer must register the *Khula'* as one irrevocable *Talāq*, in which event the provisions of subsection (3) (e), (f) and (g) apply with the changes as may be required by the context.

(6) The Mediation in Certain Divorce Matters Act, 1987 (Act No.24 of 1987), and section 6(1) and (2) of the Divorce Act relating to safeguarding the welfare of any minor or dependent child of the marriage concerned, apply to the dissolution of a Muslim Marriage under this Act.

(7) A court granting or confirming a decree for the dissolution of a Muslim Marriage to which this Act applies -

(a) has the powers referred to in section 7(1), (7) and (8) of the Divorce Act and section 24(1) of the Matrimonial Property Act, 1984 (Act No.88 of 1984);

(b) must, if it deems it just and equitable, in the absence of any agreement between the parties to the marriage regarding the division of their assets, order that the assets be divided equitably between the parties, where-

(i) a party has in fact assisted, or has otherwise rendered services, in the operation or conduct of the family business or businesses during the subsistence of the marriage; or

- (ii) the parties have actually contributed, during the subsistence of the marriage, to the maintenance or increase of the estate of each other, or any one of them, to the extent that it is not practically feasible or otherwise possible to accurately quantify the separate contributions of each party;
- (c) must, in the case of a husband who is a spouse in more than one Muslim Marriage, take into consideration all relevant factors, including any contract, agreement or order made in terms of section 8(2) or (6);
- (d) may order that any person who in the court's opinion has a sufficient interest in the matter, be joined in the proceedings;
- (e) may make an order with regard to the custody or guardianship of, or access to, any minor child of the marriage, having regard to the provisions of section 11;
- (f) must, when making an order for the payment of maintenance, including past maintenance, take into account all relevant factors; and
- (g) must, make an order for any unpaid dower

Iddah

- 10. (a) The '*Iddah* of a divorced woman who -
 - (i) menstruates, is three menstrual cycles;
 - (ii) is not able to menstruate due to age, is three lunar months or 90 days;
 - (iii) is pregnant, extends until the time of delivery;
 - (iv) is not able to menstruate due to any reason other than age, will be 12 months
- (b) The '*Iddah* of a widowed woman -
 - (i) if she is not pregnant, is 130 days or four lunar months and ten days;
 - (ii) if she is pregnant, extends until the time of delivery.

Custody of and Access to Minor Children

11. (1) In making an order for the custody of, or access to a minor child, or in making a decision on guardianship, the court must, with due regard to Islamic law and the report and recommendations of the Family Advocate, which must take into account Islamic norms and values, consider the welfare and best interests of the child.

(2) Subject to subsection (1), the non-custodian parent must be afforded reasonable access to a child.

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

(4) (a) An order regarding the custody or guardianship of, or access to, a child made in terms of this Act, may, subject to paragraph (b), at any time be rescinded or varied or, in the case of access to a child, be suspended by a court on good cause shown.

(b) If an enquiry is instituted by the Family Advocate in terms of section 4(1) (b) of the Mediation in Certain Divorce Matters Act, 1987, the court must consider the report and recommendations of the Family Advocate concerning the welfare of minor children in accordance with Islamic Law before making an order referred to in paragraph (a).

Maintenance

12. (1) Subject to subsection (2), the provisions of the Maintenance Act, 1998 (Act No.99 of 1998), apply with the changes required by the context, in respect of the duty of any person to maintain any other person.

(2) Without derogating from the provisions of the Maintenance Act, 1998, and despite the provisions of section 15 of the Maintenance Act, 1998, or the common law, a maintenance court must, when making a maintenance order, or otherwise when determining the amount to be paid as maintenance, take into consideration -

(a) that a husband is obliged to maintain his wife during the subsistence of a Muslim Marriage to which this Act applies, according to his means and her reasonable needs;

(b) that a father is obliged to maintain his –

(i) female children until they are married; and

(ii) male children until they reach the age of majority or otherwise for the period that they are in need of support;

- (c) in the case of the dissolution of a Muslim Marriage to which this Act applies by divorce -
- (i) that a husband is obliged to maintain his wife for the mandatory waiting period of *'Iddah* only;
 - (ii) where the wife has custody of any children as provided for in section 10, the wife may claim, after the expiry of *'Iddah*, remuneration for care taking (*ujrah al-Hadānah*);
 - (iii) that the wife is entitled to be remunerated (*ujrah al-Radha'at*) in relation to a breastfeeding period not exceeding two years, calculated from the date of birth of an infant, provided she has in fact breast-fed the child; and
 - (iv) that a husband's duty to support a child born of the marriage includes the provision of all necessities having regard to his financial means

(3) Any amount of maintenance determined under this section must be fair and just, having regard to all the circumstances of the case.

(4) A maintenance order made in terms of this Act may at any time be rescinded or varied or suspended by a court on good cause shown.

(5) Any unpaid arrear maintenance, either mutually agreed to or in terms of a court order, which is due and payable to a wife may not be extinguished by prescription, not with standing the provisions of the Prescription Act, 1969 (Act No.68 of 1969), or any other law.

Compulsory Mediation

13. (1) In the event of a dispute arising during the subsistence of a Muslim Marriage to which this Act applies, or otherwise arising from such a marriage, any party to the marriage shall refer the dispute, at any time, whether before or after the institution of legal proceedings as provided for in subsection 9 (3) (e) or (5) (b), but before the adjudication thereof by a court, to a prescribed accredited mediator.

(2) The mediator must attempt to resolve a dispute by means of mediation within 30 days from the date of the referral thereof and the parties may each be represented at the mediation proceedings by a representative of their choice.

(3) The mediator must, upon resolution of the dispute, submit the mediation agreement to court within 45 days and the court must, if it is satisfied that the interests of any minor children are duly protected, confirm the mediation agreement.

(4) If the mediator certifies that a dispute remains unresolved or if a dispute remains unresolved after the expiry of 45 days from the date of referral thereof, the dispute may be adjudicated by a court.

Arbitration (*Tahkim*)

14. 1. Notwithstanding anything to the contrary contained in the Arbitration Act, 1965 (Act 42 of 1965), or any other law, the parties to a Muslim marriage to which this Act applies, may at any time agree to refer a dispute arising during the subsistence of such marriage or otherwise arising from such marriage to a competent Muslim arbitrator/s, who is/are knowledgeable in Islamic Law, to be resolved through arbitration.

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

3. The arbitrator shall ensure that-

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

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

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

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

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

Courts and Assessors

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

- (a) the Judge/Magistrate President or other head of the court which has jurisdiction, shall appoint a Muslim Presiding Officer from that court to hear such dispute, and if there is no Muslim Presiding Officer, 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;
- (b) the court shall be assisted by two Muslim assessors approved by *bona fide* Muslim judicial body who shall have specialized knowledge of Islamic family law as prescribed by the regulation in the term of section 22.
- (c) the assessors shall be appointed by the Minister of Justice and Constitutional Development by proclamation in the Gazette. Provided that the appointment of any such assessor may at any time be terminated by the Minister for any valid reason;

In any proceedings under this Act which are opposed the court shall summon to its assistance 2 (two) assessors appointed in terms of this Act to sit in and act as assessors.

(2) Assessors in terms of paragraph 1 are deemed to be members of the court for the purposes of this Act.

(3) Any matter of law other than Islamic law, arising for decision at proceedings concerned, and any question as to whether a matter for decision is a matter of fact or a matter of law must be decided by the presiding officer in the prescribed manner. All matters of Islamic law shall be decided by the court constituting the presiding officer and the two assessors. The decision and / or finding of the majority of the members of that court, is the decision or finding of that court.

(4) If any assessor dies or become incapacitated, or in the opinion of the presiding officer becomes unable to act as an assessor, or is for any reason absent, or has been ordered to recuse himself before completion of the proceedings concerned, the presiding officer may in the interest of justice and after due consideration of submissions made by parties to the proceedings,

- (i) Direct that proceedings continue before the remaining members of the court,
- (ii) Direct that proceedings start afresh, or
- (iii) If an assessor is absent, postpone the proceedings in order to secure the assessors presence.

provided that in urgent matters and in cases of an application, the matter shall be referred to a Muslim Judge/Magistrate who shall grant the party interim relief without the assistance of an assessors.

(5) Any decision of the court on matters of fact and matters of Islamic Law shall be final and binding upon the parties. The courts shall be empowered to make such order or grant such relief as it deems just and equitable. On matters of law other than Islamic Law the parties shall have the right to take the matter on appeal to Supreme Court of Appeal and / or Constitutional Court.

(6) In matters of law other than Islamic Law, the Supreme Court of Appeal and / or Constitutional Court shall be the sole arbiters.

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

Unopposed Proceedings

16. (1) In the event of proceedings being instituted under this Act for the confirmation or grant of a decree of dissolution of a Muslim Marriage to which this Act applies 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/Magistrate sitting with two (2) assessors.

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

Costs in Divorce Action

17. A court is not bound to make an order for costs in favour of the successful party in a divorce action, but the court may, having regard to the means of the parties and their relevant conduct, make an order as it considers just in the circumstances and the court may order that the costs of the proceedings be apportioned between the parties.

Recognition of Muslim Marriages Solemnised in a Foreign Country

18. A Muslim marriage solemnised in a foreign country, shall be recognized as a valid marriage in terms of this Act. In the event of a dispute relating to whether or not a Muslim Marriage concluded in a foreign country is recognised as a valid Muslim Marriage under this Act, the dispute must be determined by the court, having regard to all relevant factors, including the principles of conflict of laws and in accordance with Islamic Law.

Contraventions

19. (i) A husband whose marriage is registered under this Act, who concludes a further Muslim marriage without an approved proprietary regime shall be liable on conviction to a fine not exceeding R5000. The court imposing such fine shall be empowered to make such order with regard to the proprietary regime which in its opinion is fair and equitable in the light of all circumstances;

(ii) Any marriage officer who contravenes this Act in addition to being liable for the payment of a fine may also have his license as a marriage officer revoked.

(iii) If the court imposes a fine it shall have the effect of a civil judgment and shall be recoverable in terms of the civil law.

(iv) The court shall be empowered to authorise the issue of a warrant addressed to the sheriff of the court authorising him/her to levy the amount of the fine by attachment and execution.

(v) The court shall be empowered to make such order or grant such relief as it deems just and equitable.

Interpretation

20. (1) In the interpretation, application and implementation of this Act, a court as contemplated in this act shall give cognisance to the rules of Islamic law in the light of the provision of section 15 of the constitution.

(2) The court in the exercise and enjoyment of any rights flowing from this Act shall be limited to such an extent that Islamic law permits.

Amendment of Laws

21. (i) The Acts specified in the Schedule are hereby amended to the extent set out in the third column of that Schedule. If the Minister responsible proposes to amend the Bill, such proposed amendments shall not be introduced in Parliament unless the Muslim community has been consulted in connection with such amendment.

(ii) To effect substantial amendments to the Bill, he shall ask for written submissions in respect of such proposed amendments and shall consider such submissions before introducing such amendments to parliament for consideration and adoption.

(iii) The Acts specified in the Schedule are hereby amended to the extent set out in the third column of that Schedule

Regulations

22. (1) The Cabinet member responsible for the administration of justice, after consultation with the Cabinet member responsible for home affairs, may make regulations –

(a) relating to

(i) the requirements to be complied with and the information to be furnished to a marriage officer in respect of the registration and dissolution of a Muslim Marriage;

(ii) the manner in which a marriage officer must satisfy himself or herself as to the existence or the validity of a Muslim Marriage to which this Act applies;

(iii) the form and content of certificates, notices, affidavits and declarations required for the purposes of this Act;

(iv) the custody, certification, implementation, rectification, reproduction and disposal of any document relating to the registration of Muslim Marriages to which this Act applies or of any document prescribed in terms of the regulations;

(v) any matter that is required or permitted to be prescribed in terms of this Act; and

(vi) any other matter which is necessary or expedient to provide for the effective registration of Muslim Marriages to which this Act applies or the efficient administration of this Act.

(b) prescribing the fees payable in respect of the registration of a Muslim Marriage to which this Act applies and the issuing of any certificate in respect thereof.

(2) Any regulation made under subsection (1) which may result in financial expenditure for the State must be made in consultation with the Cabinet member responsible for finance.

(3) Any regulation made under subsection (1) may provide that any person who contravenes a provision thereof or fails to comply therewith is guilty of an offence and is liable on conviction to a fine.

Deregistration

23. (1) The parties to a marriage governed by the MMA shall have the right to have their marriage de-registered from the applicable provisions of this Act, should any provision of this Bill be amended, changed, altered, or inserted, through legislation, or case law, and such amendment, change, alteration or insertion is contrary to Islamic law and impacts in such a way that it affects the core and fundamental belief system of the parties.

(2) The De-registration shall be subject to the following conditions;

- (a) that both parties to the marriage consent thereto;
- (b) that the same proprietary regime which applied in terms of this Act shall apply;
- (c) that the marriage and consequences shall thereafter be governed by the Common law and the law as developed by our courts; and
- (d) that the parties shall jointly make an application to the High Court for such de-registration subject to the aforesaid terms.

(3) That the court having jurisdiction shall have the power to grant such deregistration on good cause shown and subject to such terms and conditions as it may deem fit.

(4) The manner and form of the de-registration shall be prescribed by regulation promulgated under this act.

Short title and commencement

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

SCHEDULE

(Section17)

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

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

Act No and year	Short title	Extent of repeal or amendment
Act 47 of 1937	Deeds Registries Act, 1937	<p>1. Amendment of section 17 –</p> <p>(a) by the substitution for paragraph (b) of subsection (2) of the following paragraph:</p> <p>“(b) where the marriage concerned is governed by the law in force in the Republic or any part thereof, state whether the marriage was contracted in or out of community of property or whether the matrimonial property system is governed by customary law in terms of the Recognition of Customary Marriages Act, 1998, <u>or is governed in terms of the Muslim Marriages Act, 2009;</u>”;</p> <p>(b) by the substitution for subsection (4) of the following subsection:</p> <p>“(4) where immovable property, a bond or a notarial bond –</p> <p>(a) is registered in the name of a person who has married since the registration took place;</p> <p>(b) is registered in the</p>

Act No and year	Short title	Extent of repeal or amendment
		<p>name of a person who on the date of registration was married out of community of property or whose marriage was on that date governed by the law of another country, and whose marriage was subsequently dissolved by death or divorce;</p> <p>(c) forms an asset in a joint estate and was registered in the name of the husband only; or</p> <p>(d) is registered in the name of a person who on the date of the registration was a party to a marriage governed by the Recognition of Customary Marriages Act, 1998(Act No. 120 of 1998),<u>or a marriage governed by the Muslim Marriages Act, 20..</u></p> <p>the registrar shall on the written application by the person concerned and on the submission of the deed in question and of proof of the relevant facts, endorse the change in status or make a note to the effect that the said person is a party to a marriage in community of property, as the case may be: Provided that where there are two or more mutually dependent deeds, all such deeds must be submitted for endorsement: Provided further that in the case of an order envisaged in section 7(9)of the Recognition of Customary Marriages Act 1998 (Act 120 of 1998), <u>or in section ... of the Muslim Marriages Act, 20...</u>, the registrar shall, on</p>

Act No and year	Short title	Extent of repeal or amendment
		<p>submission of the relevant deed and court order and without the necessity of a written application, make the endorsement or note.”</p> <p>2. Amendment of section 45<i>bis</i> –</p> <p>(a) by the substitution for paragraph (b) of subsection (1) of the following paragraph:</p> <p>“(b) forms or formed an asset in a joint estate, and a court has made an order and given an authorisation, under section 20 or 21(1) of the Matrimonial Property Act, 1984 (Act 88 of 1984, [or] under section 7 of the Recognition of Customary Marriages Act, 1998, <u>or under sections.. or .. of the Muslim Marriages Act, 20</u>, as the case may be, in terms of which the property, lease or bond is awarded to one of the spouses;” and</p> <p>(b) by the substitution for paragraph (b) of subsection (1A) of the following paragraph:</p> <p>“(b) forms or formed an asset in a joint estate and a court has made an order, or has made an order and given an authorisation under section 20 or 21(1) of the Matrimonial Property Act, 1984 (Act 88 of 1984), [or] under section 7 of the Recognition of Customary Marriages Act, 1998, <u>or under sections.. or .. of the Muslim Marriages Act 20</u>., as the case may be, in terms of which the property, lease or bond is</p>

Act No and year	Short title	Extent of repeal or amendment
		awarded to both spouses in undivided shares;”
Act 27 of 1990	Maintenance of Surviving Spouses Act, 1990	<p>1. Amendment of section 1 by the insertion after the definition of “executor” of the following definition:</p> <p style="padding-left: 40px;">“ ‘marriage’ includes a <u>Muslim Marriage recognised in terms of the Muslim Marriages Act, 20..</u>, and <u>otherwise includes a union recognised as a marriage in accordance with the tenets of any religion.</u>”.</p>

004 - HISTORICAL BACKGROUND OF THE MUSLIM COMMUNITY IN

SOUTH AFRICA

Muslim contribution to South Africa is aptly captured in the following words of former President Nelson Mandela: "Our country can proudly claim Muslims as brothers and sisters, compatriots, freedom fighters and leaders, revered by our nation. They have written their names on the roll of honour with blood, sweat and tears."

The first group of Muslims came to the shores of South Africa at the Cape of Storms (Cape Town) as political exiles on 2 April 1694 under the leadership of Shaikh Yusuf of Macassar. They were settled in a place called Zandvliet which is near Somerset West approximately 50 kilometres from Cape Town. Shaikh Yusuf is regarded by many historians as the founder of the Islamic faith in South Africa. The place where he was confined to in Zandvliet became the first rallying point for other Muslims to assemble there for religious purposes.

Muslims prisoners and soldiers who arrived at the Cape were not permitted to publicly practice their religion. An edict issued on 2nd August 1657 read: "No one shall trouble the Mardyekers (free Muslims) about their religion or annoy them so long as they do not practice in public or venture to propagate it amongst the Christians..."

Other political prisoners followed. In 1744, Sayed Alawi, also known as Tuang Said, and Shaikh Mutarim, a Muslim Priest, were banished to the Cape from Yemen. They were imprisoned on Robben Island. They were amongst the first political prisoners

held on the Island, They were later followed by political prisoners from the Eastern Cape, who had opposed the British Rule and much later by political prisoners who had opposed the Apartheid regime, like Nelson Mandela. Shaikh Mutarim died on Robben Island and was buried on the Island. His tomb (Kramat) on Robben Island, which is situated on the far corner of the Island, is regularly visited by Muslims who pay homage to him for his extraordinary leadership and courage. His companion, Tuang Said, was released from Robben Island after 11 year and served as the Imam (Priest) of the Muslims in the Cape.

One of the most popular leaders of the Muslim in the Cape was known as Tuan Guru who was exiled to Cape Town in 1780. Upon his release he formed part of the free black community. He was instrumental in consolidating the Muslim community in the Cape. It is recorded in the annals of history that: "Indeed within a year of his release Tuang Guru had brought about a veritable revolution in the nature of social relations within the Muslim community in Cape Town. Apart from having played a crucial role in the establishment of a mosque in Dorp Street, he had opened a school for the education of the of Cape Town's under classes, established Jumu'a prayers at a quarry on the edge of the town, and made significant inroads towards creating the rudimentary political apparatus of an Islamic society."

The Rajah of Tambora, while living in isolation with his family at Vergelegen, wrote from memory the holy Qur'an which was given as a gift to the Governor, Simon van

der Stel. This Qur'an, the first written in the Cape Colony, probably never passed out of Vergelegen.

These Muslim political prisoners were later joined in South Africa by other political prisoners from India. In addition thereto, Muslims were also brought to South Africa as slaves and indentured labourers from India, Malay Archipelago, Madagascar etc. They were later followed by traders from other countries of the British Colonies.

These Muslim traders settled in different parts of South Africa.

The offspring of the former political prisoners and exiles, the former slaves and indentured labourers, immigrant traders and refugees and political exiles from Africa of Muslim origin constitute the present-day Muslim community of South Africa.

During the colonial tenure at the Cape, the prevailing attitude of the colonialists was hostile to Muslims. They were severely handicapped by legislative measures imposed on them and their religious practices were severely curtailed. Despite such restrictive measure, the Islamic faith had made significant inroads and strides amongst the slaves and the free black community. Muslims established themselves as an entrenched community with a complex social and judicial structure operating in their own exclusive jurisdiction. Muslims of South Africa are of diverse geographical, cultural and ethnic background. They have despite oppressive legislation over centuries managed to preserve their religious identity, practices, rituals and institutions. They also managed to preserve their culture, art and literature. Muslims, today form an integral part of the landscape of South Africa.

005- THE HISTORICAL DEVELOPMENT OF MUSLIM PERSONAL LAW IN SOUTH AFRICA

With the advent of democracy, recognition of Muslim Personal Law ("MPL") became part of the search for a just dispensation. The political transformation in the country, served as a the catalyst for renewed attempts at the legal recognition and enforcement of aspects of Muslim Personal Law, since both the Interim and Final Constitutions created the legal space for the recognition of systems of personal and family law,

In the previous regime, Muslim marriages were not recognized as legitimate marriages and children born of such marriages were regarded illegitimate. The child was elated to the mother or to her relative but not to the natural father or his relative. Parental powers such as guardianship, etc. were also vested with the mother. As a result great hardship visited on Muslim women and children.

Historically, a marriage contracted according to Islamic Law was regarded as null and void. This however changed in the landmark Supreme Court decision in *Amod v Multilateral Motor Vehicle Accident Fund* in 1999, which led to the recognition of a monogamous Muslim marriage for the purpose of support in the case of dealing with a widow's claim for loss of support.

It is interesting to note that during the colonial times slaves were not entitled to contract a valid civil marriage. The authorities, however, turned a blind eye to slaves forming permanent conjugal unions. In the case of Muslim slaves, they turned to their religious

leaders to conduct marriage ceremonies in accordance with the tenets of their faith. These ceremonies were conducted on a regular basis. It appears that the authorities were aware of these practices and raised no objection to these practices. The religious leaders also acted as arbitrators in the event of marital disputes. It seems that these practices continued even after the black slaves were set free and/or slavery was abolished. It is argued that the authorities had given tacit approval to the practice of Muslim Personal Law, although it was not legally recognized. These practices had continued in the Muslim community to the present time. The proposed Muslim Marriages Bill is an attempt to legalize such practices in the interest of the Muslim community.

The final Constitution which was adopted in 1996 makes provision for freedom of religion, belief, conscience and opinion and provides for religious observances to be conducted at state and state-aided institutions. Section 15(3) stipulates:

“(a) This section does not prevent legislation recognizing –

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

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

The plain reading of this section makes it clear the Constitution entrenches and guarantees the recognition of Muslim marriages and Muslim personal law.

Arising from the constitutional imperatives, the first President of the democratic South Africa, Nelson Mandela, instructed his then Minister of Justice, the late Dullah Omar, to prepare legislation for the recognition of Muslim marriages and/or Muslim personal law. The vision of the late Minister Dullah Omar was to give priority to the recognition of the Muslim marriages in the short term and to work on Muslim personal and family law on the longer term. In March 1998, he appointed Judge Mohamed Navsa to spearhead the project under the auspices of the South African Law Reformed Commission ("SALRC"). The terms of reference of the project committee were *"to investigate Islamic marriages and related matters."*

After extensive consultations with the broader community generally and the Muslim community in particular, the Project Committee produced a draft Bill known as the Muslim Marriages Bill ("MMB"). In July 2003 the MMB was handed to Dr PM Maduna, the then Minister of Justice and Constitutional Development by Justice Y Mokgoro, the then Chairperson of the SALRC. Further objections were received from certain elements within the Muslim community to the effect that the Bill was making inroads into the right of the Muslim community to practice their faith in a manner that they considered to be in accordance with their religion.

The Project Committee 59 reconvened to address such concerns. In March 2009, Minister of Justice and Constitutional Development submitted the Bill to the Cabinet for their approval. The Cabinet met and considered the Bill on 15 April 2009 and requested a detailed briefing on a number of issues. In November 2009 the Department of Justice and Constitutional Development prepared a detailed briefing documents on the issues raised by Cabinet and presented it to Dr J T Radebe, the present Minister of Justice and

Constitutional Development for submission to the Cabinet. The Cabinet approved the Bill as adapted and advertised for public comment in the Government Gazette. These submissions therefore speak to the Bill.