

DEPARTMENT OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT

NOTICE 188 OF 2018

**INVITATION FOR PUBLIC COMMENTS
PROPOSED AMENDMENTS TO THE RECOGNITION OF CUSTOMARY MARRIAGES ACT,
1998 (ACT NO. 120 OF 1998)**

1. The Department of Justice and Constitutional Development invites interested parties to submit written comments on the proposed draft Recognition of Customary Marriages Amendment Bill (the Bill).
2. On 30 November 2017 the Constitutional Court handed down judgment in *Ramuhovhi and Others v President of the Republic of South Africa and Others* [2017] ZACC 41 (the Ramuhovhi-case). An application for confirmation in terms of section 172(2)(a) of the Constitution of the order made by the High Court of South Africa, Limpopo Local Division, was brought by the applicants to declare that section 7(1) of the Recognition of Customary Marriages Act, 1998 (Act No. 120 of 1998) (the RCMA), is inconsistent with the Constitution and invalid in that it discriminates unfairly against women in polygamous customary marriages entered into before the commencement of the RCMA (pre-Act marriages), on the basis of gender, race and ethnic or social origin.
3. The declaration of constitutional invalidity of section 7(1) of the RCMA by the High Court of South Africa, Limpopo Local Division was confirmed. The declaration of constitutional invalidity is suspended for 24 months to afford Parliament an opportunity to correct the defect giving rise to the constitutional invalidity.
4. A draft Bill to give effect to the judgment in the Ramuhovhi-case was prepared and a copy of the draft Bill is available on the website of the Department at <http://www.justice.gov.za>.
5. The comments on the draft Bill must be submitted to Ms A Van der Walt, on or before 15 June 2018. The contact details are:
 - (a) Postal address:
The Director-General: Justice and Constitutional Development
Private Bag X 81
Pretoria
0001;
 - (b) e-mail address:
alvanderwalt@justice.gov.za
 - (c) Fax nr:
0866480963
6. Further information can be obtained from Ms A van der Walt at 012 406 4767 or Mr LG Bassett at 012 406 4753.

REPUBLIC OF SOUTH AFRICA

RECOGNITION OF CUSTOMARY MARRIAGES AMENDMENT BILL, 2018

*(As introduced in the National Assembly (proposed section 76); explanatory summary of Bill
published in Government Gazette No. of)
(The English text is the official text of the Bill)*

(DRAFT)

(MINISTER OF JUSTICE AND CORRECTIONAL SERVICES)

[B - 2018]

GENERAL EXPLANATORY NOTE:

[] Words in bold type in square brackets indicate omissions from existing enactments

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

BILL

To amend the Recognition of Customary Marriages Act, 1998 so as further regulate the proprietary consequences of customary marriages entered into before the commencement of the principal Act; and to provide for matters connected therewith.

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

Amendment of section 7 of Act 120 of 1998

1. Section 7 of the Recognition of Customary Marriages Act, 1998 is hereby amended by the substitution for subsection (1) of the following subsection:

"(1) (a) The proprietary consequences of a customary marriage, whether polygamous, or not, entered into before the commencement of this Act **[continue to be governed by customary law.]** are that the spouses in such a marriage have joint and equal—

- (i) ownership and other rights; and
- (ii) rights of management and control,
over marital property.

(b) The rights contemplated in paragraph (a), must be exercised—

- (i) in respect of all house property, by the husband and wife of the house concerned, jointly and in the best interests of the family unit constituted by the house concerned; and
- (ii) in respect of all family property, by the husband and all the wives, jointly and in the best interests of the whole family constituted by the various houses.

(c) Each spouse retains exclusive rights over his or her personal property.

(d) For purposes of this subsection the terms “marital property”, “house property”, “family property” and “personal property” have the meaning ascribed to them in customary law.

Transitional provisions

2. (1) The provisions of section 1 of this Act do not invalidate—
- (a) the winding up of a deceased estate that was finalised; or
 - (b) the transfer of marital property that was effected,
- before the commencement of this Act.

(2) The provisions of subsection (1) do not apply to the transfer of marital property where, at the time of such transfer, the person to whom the marital property was to be transferred, was aware that the marital property in question was subject to a legal challenge.”.

Short title

3. This Act shall be called the Recognition of Customary Marriages Amendment Act, 2018.



planning, monitoring & evaluation

Department:
Planning, Monitoring and Evaluation
REPUBLIC OF SOUTH AFRICA

SOCIO-ECONOMIC IMPACT ASSESSMENT SYSTEM (SEIAS)

INITIAL IMPACT ASSESSMENT TEMPLATE (PHASE 1)

JULY 2016

The Initial Impact Assessment of the Recognition of Customary Marriages Amendment Bill, 2018

The Initial Impact Assessment aims to ensure that the policy is on the right track by requiring evaluation of alternative approaches. It should help drafters avoid finalising an inappropriate solution because they moved too quickly to select a strategy without adequately analysing the roots of the problem and considering alternative measures. It should facilitate a brainstorm about issues involved in the problem and full range of alternatives to deal with them.

1. The problem/ Theory of Change

1.1. What is the **social or economic problem** that you are trying to solve?

On 30 November 2017 the Constitutional Court handed down judgment in *Ramuhovhi and Others v President of the Republic of South Africa and Others* [2017] ZACC 41 (the *Ramuhovhi*-case). An application for confirmation in terms of section 172(2)(a) of the Constitution of the order made by the High Court of South Africa, Limpopo Local Division, was brought by the applicants to declare that section 7(1) of the Recognition of Customary Marriages Act, 1998 (Act No. 120 of 1998) (the RCMA), is inconsistent with the Constitution and invalid in that it discriminates unfairly against women in polygamous customary marriages entered into before the commencement of the RCMA, on the basis of gender, race and ethnic or social origin.

The declaration of constitutional invalidity of section 7(1) of the RCMA by the High Court of South Africa, Limpopo Local Division was confirmed by the Constitutional Court. The declaration of constitutional invalidity is suspended for 24 months to afford Parliament an opportunity to correct the defect giving rise to the constitutional invalidity.

Women in monogamous marriages entered before the commencement of the RCMA enjoy the following proprietary rights:

- (a) Each spouse retains exclusive rights over his or her personal property;
- (b) Spouses in such a marriage have joint and equal ownership and rights of management and control over marital property.

Women in polygamous marriages entered before the commencement of the RCMA do not enjoy the same rights since proprietary rights in these marriages are dictated by customary law.

For purposes of this SEIA "marital property" will include exclusive rights over personal property.

A draft Bill to give effect to the judgment in the *Ramuhovhi*-case was prepared.

1.2. What are the main causes of the problem? That is why the problem arise and why does it persist?

Identified Problem	Main Causes of the Problem	Why the problem arises and why does it persist?
<p>1. Unequal treatment of women based on whether they had entered into a monogamous or polygamous customary marriage before the RCMA came into operation.</p>	<p>Section 7(1) of the RCMA is discriminatory on the basis of gender and equality. It limits the right to human dignity and the right not to be discriminated against unfairly. The infringement of these rights was found not to be justifiable in terms of section 36 of the Constitution.</p>	<p>Section 7(1) of the RCMA provides that the proprietary consequences of customary marriages entered into before the commencement of the RCMA continue to be governed by customary law. In <i>Gumede (born Shange) v President of the Republic of South Africa</i>, [2008] ZACC 23; 2009 (3) SA 152 (CC); 2009 (3) BCLR 243 (CC) (the <i>Gumede</i>-case), the Constitutional Court declared the section invalid insofar as it</p>

Identified Problem	Main Causes of the Problem	Why the problem arises and why does it persist?
<p>2. Discrimination on the basis of gender as husbands in polygamous customary marriages entered before the commencement of the RCMA have exclusive proprietary rights on marital property to the detriment of their wives.</p>	<p>Section 7(1) of the RCMA is discriminatory on the basis of gender.</p>	<p>relates to de facto monogamous customary marriages, but left open whether section 7(1) was constitutionally valid insofar as it applies to polygamous customary marriages. The effect of this was that polygamous marriages concluded before the RCMA came into operation (pre-Act), continued to be governed by customary law, while post-Act polygamous marriages would automatically be out of community of property. Section 7(1)'s differential treatment of the proprietary consequences of pre- and post-Act marriages is unconstitutional.</p> <p>Section 7(1) of the RCMA provides that the proprietary consequences of customary marriages entered into before the commencement of the RCMA continue to be governed by customary law.</p>

1.3. Whose behaviours give rise to the problem, and why does that behaviour arise?

Remember that several groups including some in government may contribute to the identified problem. Their behaviour may arise amongst others because the current rules are inappropriate; because they gain economically from the behaviour; or because they are convinced that they are doing the right thing. Identifying behaviours that cause the problem should point to the behaviours that must be changed in order to achieve the desired solution.

Identified Problem	Behaviour giving rise to the identified problem	Groups whose behaviour give rise to the identified problem?	Why does the behaviour arise?
<p>Unconstitutionality of section 7(1) of the RCMA in respect of unequal treatment of women who entered into a monogamous or polygamous customary marriage before the RCMA came into operation and discrimination on the basis of gender as husbands in a polygamous customary marriage entered before the commencement of</p>	<p>Section 7(1)'s differential treatment of the proprietary consequences of pre- and post-Act marriages. Section 7(1) was found to limit the right to human dignity and the right not to be discriminated against unfairly. The infringement of these rights was found not be justifiable in terms of section 36 of the Constitution.</p>	<ul style="list-style-type: none"> • Constitutional Court for not addressing pre-Act polygamous marriages in the <i>Gumede</i> case as well. • Government's failure to rectify the discrimination with regards to women's proprietary rights in pre-Act polygamous marriages in terms of section 7(1) of the RCMA. 	<p>Section 7(1) of the RCMA is discriminatory on the basis of equality and gender as the proprietary consequences of women in polygamous pre-Act customary marriages differ from women in monogamous pre-Act customary marriages.</p>

Identified Problem	Behaviour giving rise to the identified problem	Groups whose behaviour give rise to the identified problem?	Why does the behaviour arise?
the RCMA have exclusive proprietary rights on marital property to the detriment of their wives.			

1.4. Identify the major social and economic groups affected by the problem, and how are they affected. Who benefits and who loses from the current situation?

Identified Problem	Groups (Social/Economic)	How are they affected by the identified problem?	Are they benefitting or losing from the current situation?
Unequal treatment of women who entered into a monogamous or polygamous customary marriage before the RCMA came into operation and discrimination on the basis of gender as husbands in a polygamous customary marriage entered before the	Women in pre-Act polygamous customary marriages	<ul style="list-style-type: none"> Women in pre-Act monogamous customary marriages are deemed to be automatically married out of community of property, whilst the customary law is still applicable to women in pre-Act polygamous marriages. This 	They are losing.

Identified Problem	Groups (Social/ Economic)	How are they affected by the identified problem?	Are they benefitting or losing from the current situation?
<p>commencement of the RCMA have exclusive proprietary rights on marital property to the detriment of their wives.</p>	<ul style="list-style-type: none"> • Children of women in pre-Act polygamous customary marriages. 	<p>means that for instance in Venda customary law ownership and control of marital property is reserved solely for husbands. This will cause these women to be destitute upon the dissolution of such a marriage.</p> <ul style="list-style-type: none"> • Ownership and control of marital property have an effect on the children who may inherit from these women. 	<p>They are losing.</p>

1.5. Which of the five top priorities of the State- that is , Social Cohesion, Security, Economic Growth, Economic Inclusion (Job Creation and Equality) and a Sustainable Environment is/ are negatively affected by the identified problem?

National Priority	How is the priority negatively affected by the identified problem?
1. Social Cohesion	The discrimination between women in pre-Act monogamous and women in polygamous customary marriages causes discord and disharmony in families and in communities.
2. Security (Safety, Financial, Food, Energy and etc.)	<p>Women in pre-Act polygamous customary marriages don't enjoy the security of having ownership and control over marital property. They are left destitute in the event of the marriage being dissolved or their children are left destitute in the event of their death as such children won't be able to inherit from them.</p> <p>Women who have ownership and control over marital property can contribute to the economic growth of the country, whilst women with no ownership and control over marital property cannot contribute and that will also have the negative effect that in the event of a dissolution of the marriage or upon death of the women, they and or their children will become a financial burden to either other relatives or society.</p>
3. Economic Growth	Not applicable
4. Economic Inclusion (Job Creation and Equality)	N/A
5. Environmental Sustainability	N/A

2. Options

2.1. List at least three options for addressing the identified problem, including (a) your preferred proposal, and (b) an option that does not involve new or changed regulation (baseline or existing option)

There are only two alternatives in this situation:

- a) Amend section 7(1) of the RCMA to grant assistance to the vulnerable group of women in pre-Act polygamous customary marriages.
- b) Leave legislation as it is (this will, however, be in contempt of court as the Constitutional Court has instructed Parliament to rectify the position within 24 months of the date of the judgment which was 30 November 2017).

2.2. What social groups would gain and which would lose most from the each of the three or above options? Consider specifically the implications for the households earning under R 7000 a month; micro and small business; black people, youth and women; and rural development.

Option	Main Beneficiaries	Main Cost bearers
a) Amend section 7(1) of the RCMA to grant assistance to the vulnerable group of women in pre-Act polygamous customary marriages.	<ul style="list-style-type: none"> • Women in pre-Act polygamous customary marriages. • Children of women in pre-Act polygamous customary marriages. 	The State (DOJ&CD) for promoting and publishing the amendment to section 7(1) of the RCMA.
b) Leave legislation as it is.	Husbands of women in pre-Act polygamous customary marriages as they will retain ownership and control over marital property.	The State: liable for contempt of Court as the Constitutional Court ordered an amendment of section 7(1) of the RCMA within 24 months of the date of the judgment.

2.3. For each option, describe the possible implementation costs, compliance costs and the desired outcomes, listing who would bear the costs or, in case of the outcomes, enjoy the benefits.

Option	Implementation costs	Compliance costs	Desired Outcomes (Benefits)
a) Amend section 7(1) of the RCMA to grant assistance to the vulnerable group of women in pre-Act polygamous customary marriages.	<ul style="list-style-type: none"> • DoJ&CD: The cost of promoting and publication of the amendment to section 7(1) of the RCMA. It is necessary for the proposed amendments to be promoted in order to bring the provisions of the RCMA in line with the judgment of the Constitutional Court. • DOJ&CD: Bringing the new legislation to the attention of the public. 	None.	Equal treatment of women in pre-Act monogamous and polygamous customary marriages Elimination of discrimination on the basis of gender (as husbands in a polygamous customary marriage entered before the commencement of the RCMA will no longer have exclusive proprietary rights on marital property to the detriment of their wives).
b) Leave legislation as it is.	None	None	None.

2.4. Based on the above table on costs and benefits, describe how different options would contribute to or detract from the national priorities. Remember this is a think-tool, so explore the issues freely.

Priority	Option 1	Option 2	Option 3
1. Social Cohesion	Will promote social cohesion as harmony will prevail amongst family members and within communities as a result of women being treated equally and fairly.	Families and communities will remain divided due to the unequal treatment of women as well as unfair discrimination against women purely on the basis of gender	N/A.
2. Security (Safety, Financial, Food, Energy and etc.)	<p>Women in pre-Act polygamous customary marriages will enjoy the security of having ownership and control over marital property. They will not be left destitute in the event of the marriage being dissolved and their children will not be left destitute in the event of their death.</p> <p>Women who have ownership and control over marital property can contribute to the economic growth of the country and it is less likely that these women or their children will become a financial burden to family or society.</p>	Women in pre-Act polygamous customary marriages will still have no financial security as opposed to their counterparts in pre-Act monogamous customary marriages.	N/A
3. Economic Growth	N/A	N/A	N/A
4. Economic	N/A	N/A	N/A

Priority	Option 1	Option 2	Option 3
Inclusion (Job Creation and Equality)			
5. Environmental Sustainability	N/A	N/A	N/A

2.5. Describe the potential risks that could threaten implementation of each option and indicate what can be done to mitigate the identified risks.

Option	Potential Risks	Mitigation Measures	Comments
a) Amend section 7(1) of the RCMA to grant assistance to the vulnerable group of women in pre-Act polygamous customary marriages.	None.	N/A	
b) Leave legislation as it is.	The DOJ&CD will be in contempt of court as the Constitutional Court instructed Parliament to rectify the position, by amending section 7(1) of the RCMA within 24 months of the date of the judgment which was 30 November 2017.	None.	

At this point, if you think the analysis points to a more useful or stimulating set of options, revise the SEIAS. You may find that you would like to combine some of the options, or that the process of discussion around the options has generated ideas that are better than your

original ideas. Ideally, the three options considered should all be good ideas-that provides the best test for the final strategy adopted.

3. Summary

3.1. Based on your analysis, as reflected in the discussion of the three options above, summarise which option seems more desirable and explain?

Amend section 7(1) of the RCMA to grant assistance to the vulnerable group of women in pre-Act polygamous customary marriages. This option will remove the current discrimination and disparity and will be in compliance with a Constitutional Court Order.

3.2. What specific measures can you propose to minimise the implementation and the compliance costs of your preferred option, to maximise the benefits?

There will implementation costs for the DOJ&CD, but will be minimal especially compared to costs associated with a finding of contempt of court.

3.3. What are the main risks associated with your preferred option, and how can they best be managed?

There are no risks.

3.4. What additional research should you do to improve your understanding of the costs and benefits of the option adopted?

None.

For the purpose of building SEIAS body of knowledge please complete the following:

Name of Official/s	A van der Walt
---------------------------	-----------------------

Designation	State Law Advisor
Unit	Legislative Development
Contact Details	012 406 4767
Email address	alvanderwalt@justice.gov.za