

SA LAW REFORM COMMISSION: ISSUE PAPER 35: PROJECT 144: INVESTIGATION INTO A SINGLE MARRIAGE STATUTE: QUESTIONS

A. Questions about a single or omnibus marriage or unmarried intimate relationship statute

1.46 In the late 1990s the SALRC considered that a compromise on the issue of unification of marriage legislation was required by ss 30 and 31 of the Bill of Rights. If fundamental rights required separate statutes at that time, what do respondents consider has changed in the mean time?¹

1.47 Should South Africa continue with different regulatory regimes for different forms of marriages?

1.48 What would be the advantages and disadvantages of a single or unified statute setting out a unified set of requirements for all marriages?

1.49 What would be the advantages and disadvantages of an omnibus statute containing all the different requirements for all marriages?

1.50 If either a unified or omnibus statute is adopted, should the statute only cover marriages and a separate statute on unmarried partnerships be adopted, or should the statute cover both marriages and unmarried partnerships? What would be the advantages and disadvantages of these options?

1.51 If either a unified or omnibus statute is adopted, should it only set out the requirements for valid marriages and/or unmarried intimate partnerships, or should it also cover the legal consequences of such relationships for the period of their duration and when they end? What would be the advantages and disadvantages of each option?

B. Questions about the definition of marriage

2.3 How should the proposed legislation define marriage?

2.4 The Recognition of Customary Marriages Act permits polygynous marriages and the draft Muslim Marriages Act provided likewise for polygynous marriages. Should the envisaged legislation make provision for polygynous marriages, and if so, how?

2.5 What constitutes an unmarried intimate partnership which would qualify partners to share in legal protections in terms of the omnibus statute?

C. Questions regarding consent and capacity to marry

2.17 Is the common law test and the statutory requirement which is applied to determine capacity to marry which requires that both parties be present when concluding a marriage adequate or is there a need for reform in South African law?

¹ The paragraph numbers indicate the corresponding paragraph numbers in Issue Paper 35.

2.18 Do respondents consider a proxy should be allowed to represent a party to a marriage?

2.19 Is there support for legislative measures which adequately take into account autonomy and informed consent to take decisions about marriage?

2.20 Should the envisaged legislation require specifically that parties should have mental capacity to enter into marriage as the Australian Marriage Act does in this regard?

2.21 Should the consent of the first wife be required if the husband wishes to conclude a second marriage?

D. Questions on minimum age for marriage

2.28 Do stakeholders agree that the discrepancies between the Marriage Act, Recognition of Customary Marriages and the Civil Union Act as regards the minimum age for marriage must be remedied?

2.29 Do respondents agree South Africa has a duty to comply with international and regional instruments to set a uniform minimum age for marriage of 18 without any exceptions for third party consent by parents, courts, or any other official to prevent children being married or to enter into unmarried intimate relationships?

E. Questions on the giving of notice or marriage licence requirements

2.32 Do respondents agree with the re-introduction of the giving of notice and the issue of marriage licences in South Africa?

2.33 Do respondents think the giving of notice or the issue of a marriage licence will contribute towards safeguarding government interests in marriages being concluded?

2.34 If the answer is in the affirmative what information should the notice contain?

F. Questions about the role of marriage officers

2.41 We note that the Marriage Act and other legislation refer to officials and functionaries in relation to the conclusion of marriages. Do respondents support marriage officers and other functionaries being involved in the solemnisation and registration of any or all forms of marriages? If not, do respondents propose any alternatives?

2.42 If respondents support the involvement of marriage officers what should be the requirements for their involvement?

2.43 If marriage officers should still be involved in solemnising marriages what should their function be: recording the marriage, assisting with registration of the marriage or anything else to provide evidence of the marriage for official purposes?

G. Questions about registration of marriage

2.63 We have noted above that the DHA supports the registration of all marriages. Do respondents support registration of marriages?

2.64 Should failure to register affect the validity of a marriage?

2.65 If a marriage can still be valid without registration, should there be alternative ways to prove the existence of a marriage? What would those alternatives be?

2.66 Should it be necessary for both parties to a marriage to register a marriage or should one party be able to register? If one party can register a marriage, what information and processes would be necessary to prevent the registration of bogus marriages?

2.67 Should parties be able to register marriages at any stage after their conclusion? What would be the benefits and disadvantages to allowing registration at any time before the end of the marriage?

2.68 Should unmarried intimate relationships be registered to afford the partners legal rights or should registration merely serve to prove the existence of such relationships? Or should registration not be required at all for unmarried intimate relationships?

2.69 If unmarried intimate relationships should be registered, what information should be required and what would the best registration process be?

2.70 If registration of unmarried intimate relationship merely serves as evidence of the relationship, what other ways should there be to prove the existence of such relationships and what evidence should be considered as proof of such relationships?

2.71 Are there any other issues regarding registration of marriages respondents wish to highlight which need further consideration?

H. Questions about marriage ceremonies and a prescribed or approved marriage formula

2.77 In the DHA request for this investigation it is said that the state should have no interest in how the religious or cultural rituals are conducted in a marriage ceremony. The Marriage Act and Civil Union Act prescribe the formulae to be used during certain marriage ceremonies. Do respondents agree and if not why?

2.78 Do respondents consider that a prescribed marriage formula contributes in any way towards effecting legal certainty as to a marriage having been conducted, and if so how?

I. Questions about matrimonial consequences of marriages

2.86 If there is support for a single marriage statute or omnibus legislation, what should it provide for in regard to matrimonial property and what would its impact be on existing legislation?

2.87 What are the views of respondents in relation to the matrimonial consequences of all marriages and intimate unmarried relationships being regulated by a single marriage statute or omnibus legislation?

2.88 Respondents are requested to once again indicate whether there are any others matters

regarding matrimonial property which should be considered by the SALRC.

J. Questions about spousal support

2.100 Calls have been made in the past to recognise spousal support also in circumstances where there is no valid marriage and no duty presently recognised by law imposing a duty for the payment of support. Should the law recognise a statutory duty of support between unmarried partners?

2.101 Should the duty of support also extend to circumstances where one of the unmarried partners is also in an unmarried partnership or a spouse in a marriage? The SALRC will see to it that comment by respondents gets considered in the relevant investigation, be it the review of maintenance or the law of matrimonial property.

K. Question about ante-nuptial agreements and discretion of the court in making fair orders

2.107 Should the single marriage statute make provision for the conclusion, registration and enforcement of antenuptial agreements?

L. Question about extra-judicial dissolution of relationships and alternative dispute resolution in family matters

2.114 Since the SALRC is conducting focussed investigations into dispute resolution regarding family disputes it is clear that the SALRC ought not to duplicate its efforts but should rather make use of its resources in an optimal way. If respondents have views how alternative dispute resolution mechanisms could be applied to resolve family law disputes, they are requested to submit their views to the SALRC in order that they be taken into account as part of the other investigations already being conducted by the SALRC. Comments will be taken into account in those investigations in taking forward respondent comment.

M. Question about bogus or sham marriages

2.120 Respondents are requested to suggest suggestions how to best prevent bogus marriages and to deal with them after they have been concluded?