SOUTH AFRICAN LAW COMMISSION

DISCUSSION PAPER 88

THE REVIEW OF THE MARRIAGE ACT 25 OF 1961 (PROJECT 109)

SEPTEMBER 1999

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INTRODUCTION

The South African Law Commission was established by the South African Law Commission Act, 1973 (Act 19 of 1973).
The members of the Commission are -

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This discussion paper is also available on the Commission's Web site at:
http://www.law.wits.ac.za/salc/discussn/discussn.html

The project leader responsible for this project is Professor RT Nhlapo.

PREFACE

This Discussion Paper (which reflects information gathered up to the end of May 1999) was prepared to elicit responses and to serve as a basis for the Commission's deliberations, taking into account any responses received. The views, conclusions and recommendations in this paper are accordingly not to be regarded as the Commission's final views. The Discussion Paper is published in full so as to provide persons and bodies wishing to comment or to make suggestions for the reform of this particular branch of he law with sufficient background information to enable them to place focussed submissions before the Commission.

The Commission will assume that respondents agree to the Commission quoting from or referring to comments and attributing comments to respondents, unless representations are marked confidential. Respondents should be aware that the Commission may in any event be required to release information contained in representations under the Constitution of the Republic of South Africa, Act 108 of 1996.

Respondents are requested to submit written comments, representations or requests to the Commission by 30 November 1999 at the address appearing on the previous page. The researcher will endeavour to assist you with particular difficulties you may have. Comment already forwarded to the Commission should not be repeated; in such event respondents should merely indicate that they abide by their previous comment, if this is the position.

The researcher allocated to this project, who may be contacted for further information, is Mr PA van Wyk. The project leader responsible for the project is Professor RT Nhlapo.

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SUMMARY OF RECOMMENDATIONS AND PARTICULAR REQUESTS FOR COMMENT

1. The Court decided in *Santos v Santos* that if the Legislature had intended to accord recognition to foreign embassy or consular marriages in South Africa it would undoubtedly have made provision for it in the Marriage Act, and that there is, equally, no indication that South African law has followed the practice of the United Kingdom and other countries in Western Europe of according recognition to foreign embassy or consular marriages. The question arises whether there is a need to accord recognition to foreign embassy or consular marriages in South Africa in view of the absence of such statutory recognition. The Commission requests comment on this aspect in particular. (See par 2.1.1.7 and 8)

2. The term “Commissioner” is defined as follows in the Marriage Act: “‘Commissioner’ includes an Additional Commissioner, an Assistant Commissioner, a Native Commissioner, an Additional Native Commissioner and an Assistant Native Commissioner”. Enquiries made at the Department of Home Affairs established that there are no marriages presently being celebrated by Commissioners as contemplated in the Marriage Act. It is clear therefore that the Marriage Act does not reflect the present position on the designation of Commissioners and special justices of the peace as marriage officers. The Act should be brought into line with the prevailing position and the definition of “Commissioner” in section 1 and the terms “Commissioner” and “special justice of the peace” in section 2(1) of the Act should be deleted. Section 2 of the Marriage Act should further be amended by providing in section 2(1) that certain persons in the diplomatic and consular service of the Republic, namely Ambassadors, High Commissioners and Consuls should by virtue of their office and as long as they hold such office be *ex officio* marriage officers for the area in which they hold office. (See par 2.1.1.9 - 11)

3. The Marriage Act permits the designation as a marriage officer of any minister of, or person holding a responsible position in, "any religious denomination or organization". It is restrictive in that marriage officers can be designated only for the purpose of conducting marriages according to "Christian, Jewish or Mohammedan rites or the rites of any Indian religion." The Commission considered whether the suggested phrase “according to the rites of the religious denomination or organisation concerned”, will

remedy the situation. The Commission also considered the option suggested by the Department of Home Affairs to grant authority to the Minister of Home Affairs to appoint a person as a marriage officer who has been nominated by a religious denomination or organisation once the Minister is satisfied that the denomination or organisation concerned is a bona fide religious denomination or organisation. The problem with this option is that it suggests no other grounds for the Minister to refuse to appoint the person concerned (eg that he or she is unfit to be a marriage officer) except for a defect in the *bona fides* of the organisation. A third option considered was to empower the Minister to designate by proclamation recognised religious groups or religious organisations. The Marriage Act could then provide that ministers of religion or persons holding responsible positions in religious denominations or religious organisations recognised by the Minister by notice in the *Gazette,* may be designated by the Minister to be marriage officers. The Commission decided to leave the question to respondents and invites comment on these options. Comment is also invited as to whether criteria formulated to guide the Minister in the exercise of his or her powers should be included in the Act. (See par 2.1.2.31 and 2.1.2.32, 2.1.2.38 and 42)

4. The question arises whether there is a need to reconsider the limitation placed on the authority of ministers of religion or persons holding responsible positions in religious organisations or denominations to join parties in marriage. As noted above the Act presently makes provision that such authority may be limited by the Minister to specified areas or specified periods. The Commission considers that there is no apparent reason why the Minister should be prevented from limiting the authority as is presently the case. Comment is, however, invited on this aspect. (See par 2.1.2.39)

5. The Department of Home Affairs propose in their Bill that any decision made by the Minister to designate someone as a marriage officer or to revoke the designation of the marriage officer should be reviewable by any provincial or local division of the High Court of South Africa. The Commission finds the proposal to be persuasive. The Commission is of the view that legal certainty will be one of the benefits should such a review procedure be set out in the Marriage Act. (See par 2.1.2.40 and 42)

6. The present position requiring that marriage officers be designated by written instrument should be retained and there does not seem to be justification for the

deletion of section 4 of the Marriage Act. (See par 2.1.4.3 and 4)

7. The present section 5 of the Marriage Act dealing with marriage officers under laws repealed by the Marriage Act of 1961 should be retained. (See par 2.1.5.4)

8. The Marriage Act provides for the *solemnisation* of marriages. It is clear that a marriage is not necessarily *solemnised*, but the alternative "celebrate" is not without its problems. The Commission considers that the terms "conduct a marriage" or "join parties in marriage" are better substitutes and that words to that effect should be used in place of the terms "solemnize" or "solemnization" where appropriate in sections 3(1) and (2), 5, 6(3) and (5), 9, 10(1) and (2), 11(1) and (2), 12, 22, 23, 24(1), 26(2), 27, 29(1), (2) and (3), 29, 29A(1), 30(1), (2) and (3), 31 and 35. (See par 2.1.6.4)

9. The Commission considers that section 6 dealing with the issue of certain persons who may in certain circumstances be deemed to have been marriage officers, should not be amended. The Commission however considers that the references to the Minister delegating powers to any officer in the civil service should be reconsidered. It is recommended that provision be made in a separate clause 2A that the Minister may, subject to the conditions that he or she may deem necessary, delegate any power conferred on him or her by this Act to a person in the service of the Department, but shall not be divested of any power so delegated and may set aside or amend any decision of the delegate made in the exercise of such a power. (See par 2.1.7.4 and 6)

10. A proposal was made that the joining of parties in marriage should be privatised, ie persons other than those presently appointed should also be able to conduct marriages. The Commission noted that the New Zealand Marriage Act makes provision for the appointment of, *inter alia,* persons of good character as marriage celebrants. In view of the limited requests calling for such a step, the Commission is not convinced that the appointment of marriage officers should be extended to include persons other than the present categories of marriage officers. However, the Commission would appreciate the view of respondents on this matter in particular. (See par 2.1.8.4)

11. The Commission considers that the Marriage Act should be amended to include more

grounds for notifying the Minister of changes in the circumstances of religious denominations and religious organisations, such as changes in their objects and, furthermore, that it should provide for the Minister's power to revoke by notice in the *Gazette* the designation of a person as a marriage officer or the designation of a religious denomination or religious organisation recognised under the Act. (See par 2.1.9.5)

12. The grounds for revoking the appointment of a person as a marriage officer should be set out in more detail in the Marriage Act than is presently the case under section 9. (See par 2.1.10.5)

13. Section 10(1) should be amended to provide that any person who is authorised to conduct any marriage in any country outside the Republic of South Africa, may conduct a marriage between parties at least one of whom is a South African citizen and domiciled in the Republic, and a marriage so conducted must for all purposes be deemed to have been conducted in the Republic. (See par 2.1.11.5)

14. It is recommended in regard to section 11 of the Act that-

- section 11(1) which provides that a marriage may be conducted by a marriage officer only, should remain intact;
- the penalty for not complying with the section, namely where any marriage officer who purports to join parties in marriage which he or she is not authorised under the Act to conduct or which to his or her knowledge is legally prohibited, and any person not being a marriage officer who purports to join parties in marriage, provided for in section 11(2), should be increased to a term of imprisonment not exceeding two years; and
- section 11(3) which makes provision that it shall not constitute an offence if a marriage is conducted in accordance with the rites or formularies of any religion, if such ceremony does not purport to effect a valid marriage, should remain intact. (See par 2.1.12.6 - 11)

15. Section 12 prohibits the joining of parties in marriage without the production of an identity document or the making of the prescribed declaration by the parties. It is clear

that there is a need for prescribing that parties should produce proof of their identity to marriage officers. However, it is also clear that there could be circumstances of non-compliance and the question is raised as to what the consequences should be. The Commission considers that the Marriage Act should be amended to state that failure to comply strictly with the provision does not affect the validity of the marriage provided that such marriage was in every other respect conducted in accordance with the provisions of the Marriage Act, that there were no other lawful impediments to the marriage and that such marriage has not been dissolved or declared invalid by a competent court, and provided further that neither of the parties to such marriage has after such marriage and during the life of the other, lawfully married another. (See par 2.1.13.6 and 7)

16. It is considered that even if section 22 is not retained in the Act in its present form, the Marriage Act should still in future set out specifically what the consequences are if the requirements regarding banns, notices of intention to get married and special licences are not strictly complied with, as the section presently does. (See par 2.1.14.2 and 4)

17. The Department of Home Affairs proposed a provision on the recognition of marriages and the powers of the Minister to obtain information regarding the marriage which is restricted to marriages conducted according to the tenets of a religion. This provision is a transitional provision which deals with marriages concluded according to the tenets of a religion prior to the commencement of the Bill proposed by the Department. Since the question of religious marriages will not be addressed in this investigation, the Commission is of the view that the Bill should not contain a transitional provision dealing specifically with marriages concluded according to the tenets of a religion. (See par 2.1.14.2 and 4)

18. It seems apparent that if the Marriage Act were to require notice to be given to parties intending to get married, they could possibly assist the marriage officer from an earlier stage should the objections be unfounded. Such a requirement, in addition to the present written objection which has to be lodged with the marriage officer, would in all probability also prove to serve as a further deterrent against unfounded objections to a marriage being lodged. It is therefore recommended that section 23(1) should be amended to make provision that the party raising objections against a marriage should

also provide a copy of his or her objection in writing to the parties contemplating marriage. (See par 2.1.15.6 and 7)

19. It is recommended that besides the substitution of the term "conduct" in section 24(1) for the term "solemnize", sections 24(1) and (2) should remain unamended. This section prohibits a marriage officer from conducting the marriage of a minor if the required consent is not furnished to him or her in writing. (See par 2.1.16.8 and 9)

20. In view of the lack of comment on section 24A which regulates the consequences and dissolution of marriage for want of consent of parents or guardian, it would seem that the present provision is satisfactory. It is therefore recommended that the section should not be amended. (See par 2.1.17.4)

21. Section 25 which governs the position when consent of parents and guardians cannot be obtained to the marriage of a minor, seems satisfactory and it would seem that there is no need for amendment, except for the insertion of gender-sensitive terms. (See par 2.1.18.3)

22. The Commission considers, as the Department of Home Affairs does, that the minimum age for marriage (set out in section 26) should be 18 years of age for males and females. (See par 2.1.19.5 and 6)

23. Section 28 should make provision for the provincial or local division of the High Court to have jurisdiction to consent to a marriage between a man or a woman and the direct descendant of his or her deceased spouse if both parties have reached the age of 18 years and they are not related to each other by blood. The Commission considers that this provision should correspond to its provision setting out the minimum age for marriage for males and females to be 18 years of age. It is thought inadvisable to set any higher standard than the proposed age of 18 years for these cases. (See par 2.1.20.11 - 13)

24. Section 29(2) presently sets out the following places for the conducting of marriage ceremonies: churches, other buildings used for religious services, public places and private dwelling-houses *with open doors.* There are two options to be considered. In

terms of the first option the range of places where marriages may be conducted would be less limited than is presently the case although they whould still be limited to some extent. This would require the deletion of the statutory requirement that parties be joined in marriage in a private dwelling with *open doors* and the addition of the words "or in any other building or facility used for conducting marriages". The second option is that there should not be any limitations at all with regard to places where marriages may be conducted. The Commission requests comment on these two options: should the range of places where marriages may be conducted limited or should there be no limitations? Should some limitations still be considered desirable, the Act should also provide for the validity of marriages conducted at places other than the appointed ones. (See par 2.1.21.32 - 33)

25. The suggestions made on the registration of marriages by the Department of Home Affairs (excluding the issue of customary unions) and the administrative procedures to be followed with regard to the registration of marriages seem persuasive and it is recommended that section 29A be amended as suggested by the Department of Home Affairs (although the references in the Department's provisions to customary unions should be deleted). (See par 2.1.22.2 - 4)

26. The marriage formula set out in section 30(1) should be amended by the deletion of the words "and thereupon the parties shall give each other the right hand". The proviso dealing with the validity of marriages where the requirement that the parties shall give each other the right hand has not strictly been complied with should also be deleted. It is considered that the retention of this part of the marriage formula is unwarranted. (See par 2.1.23.6)

27. There is no need to amend section 31 which governs the circumstances under which certain marriage officers may refuse to conduct certain marriages. (See par 2.1.24.6)

28. It is considered that section 32 which governs the payment of fees to marriage officers, should be retained. It is recommended that the section should be amended to refer to marriage officers as being male or female, and the reference to "a fine not exceeding one hundred rand or, in default of payment" should be deleted. The effect of the amendment will be that a contravention of the section will by punishable with

imprisonment not exceeding six months, which is a more effective deterrent than a fine. (See par 2.1.25.5)

29. The question arises as to the need for the inclusion of section 33 in the Marriage Act (which governs the blessing of marriages) in view of section 34 of the Marriage Act (which governs the making of rules or regulations in connection with the religious blessing of a marriage). It can be argued that section 33 is superfluous in view of section 34. On the other hand it can be argued that section 34 merely governs the power of making rules and regulations whereas section 33 sets out the details of when a marriage may be blessed and by whom, and that there is therefore a need for the retention of section 33. The Commission considers that there is no need for the retention of section 33. (See par 2.1.26.3 - 4)

30. Section 34 section seems to be necessary to grant the power to religious denominations and religious organisations for the blessing of marriages and acceptance of fees by them for the blessing of marriages. The retention of this section therefore seems justified. (See par 2.1.27.4 - 5)

31. The question arises whether there is a need for section 35 in view of section 11 of the Marriage Act. Section 35 makes provision for penalties for conducting marriages contrary to the provisions of the Act. Section 11 makes it an offence for a marriage officer to purport to conduct a marriage which he or she is not authorised to conduct or which to his or her knowledge is legally prohibited. Marriages conducted by persons who are not marriage officers are similarly prohibited. It is therefore clear that section 11 is more restricted in its scope than section 35 since section 35 penalises the joining of parties in marriage in contravention of the provisions of the Marriage Act as a whole while the former enumerates only a few grounds of criminality. It would therefore seem that there is a need for retaining section 35 and no amendments are consequently recommended in regard to section 35. (See par 2.1.28.4 - 5)

32. It is recommended that section 36 which makes provision for penalties for false representations or statements should not be amended. (See par 2.1.29.5)

33. Section 37 makes provision for South African courts having jurisdiction to try persons

who contravene the provisions of the Marriage Act in any country outside the Republic of South Africa. The Commission noted that there may be a number of offences parties may commit outside the geographical borders of South Africa in contravention of the provisions of the Marriage Act. One example is where a person who is already a party to a marriage contracts a second marriage in another country without obtaining a prior divorce and thereby committing the offence of bigamy. It should be possible under these circumstances to try the offender in South Africa. The Commission therefore considers that there is no need to amend section 37 besides the substitution of the term “Republic” for the term “Union”. (See par 2.1.30.4 - 6)

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LIST OF CASES REFERRED TO

Ex Parte Dow 1987 3 SA 829 (DCLD)

Ismail v Ismail 1983 1 SA 1006 (A)

Santos v Santos 1987 4 SA 150 (W)

CHAPTER 1

1.1 THE BACKGROUND TO THIS INVESTIGATION

1.1.1 The Department of Home Affairs approached the Commission during 1996 on the issue of the review of the Marriage Act 25 of 1961 (the Marriage Act) with a request to investigate and recommend legislation relating to a new marriage dispensation for South Africa. The request was preceded by the Department of Home Affairs, who are responsible for administering the Marriage Act, reviewing and redrafting the provisions of the Marriage Act with the aim of ensuring its compliance with the Constitution of 1996. Together with its request, the Department of Home Affairs submitted a draft Marriage Bill to the Commission during September 1996. The Department of Home Affairs was of the view that due to the sensitivity of the whole issue of the recognition of different types of marriages, especially with regard to the matrimonial property dispensation, the Commission is regarded the appropriate body to research and give advice on the issue of a new marriage dispensation for South Africa.

1.1.2 In the memorandum attached to its suggested Marriage Bill the Department states that the Bill contains proposals with a view to, inter alia,

- giving full legal recognition to customary unions and marriages solemnised under the tenets of a religion;
- introducing a Marriage Act that will apply throughout the Republic;
- regulating the appointment of marriage officers and the cancellation of such appointments on a proper basis;
- ensuring that all legal marriages and customary unions are recorded in the Population Register; and
- re-regulating prohibitions, age restrictions and consequences of unlawful marriages and customary unions.

1.1.3 The Department of Home Affairs furthermore draws attention to the following problems relating to marriages in the Republic:

- Muslim and Hindu marriages, contracted in the Republic, are not recognised as legal marriages in the Republic, firstly, because they are potentially

polygamous, and, secondly, because they were not solemnised by authorised marriage officers in compliance with the provisions of the Marriage Act. Polygamous civil marriages are, however, being recognised by the Marriage Act of 1978 of Transkei.

- The Marriage Act provides for the appointment of marriage officers for solemnising marriages according to Christian, Jewish and Mohammedan rites and the rites of any Indian religion.
- The Department is increasingly being pressured to rationalise the Marriage Act in order to accommodate customary unions and the hitherto unrecognised religious marriages;
- In terms item 2(1) of Schedule 6 of the Constitution of 1996, all law which was in force when the new Constitution took effect, continues in force, subject to any amendment and consistency with the new Constitution. As a result of this provision the various divergent marriage laws in various parts of the country are still in operation, causing dissatisfaction, confusion and conflict. The guardianship dispensation in the Transkei Marriage Act of 1979, in particular, is causing many couples to go to the nearest office outside the borders of Transkei for the solemnisation of marriages under the Marriage Act of 1961;
- The minority status of women in a customary union is being questioned and perceived as being offensive to women;
- The demands from the gay community for the recognition of gay marriages as valid marriages are ever increasing;
- The prohibition of marriage by a man or a woman and the direct descendant of his or her deceased spouse where they are not related to each other by blood is also being questioned;
- Control over marriage officers solemnising religious marriages and customary unions needs to be regulated for purposes of uniformity throughout the Republic;
- The definition and interpretation of a religious law marriage, especially with regard to Satanism, Rastafarianism and other observances needs to be investigated;
- There is ever increasing pressure on the Department to provide for less formal requirements regarding places where a marriage might take place.

1.1.4 The Commission considered the request at its meeting on 29 and 30 November 1996. The Commission approved the inclusion of the investigation in its programme, noting that the Commission is at present engaged in an investigation into *Customary Marriages* which entails the reform of substantive law and which may also have a direct impact on the proposals for reform contained in the Department of Home Affair's draft Marriage Bill.

1.2 THE COMMISSION'S MEDIA STATEMENT

1.2.1 The Commission issued a media statement on 7 January 1998 the aim of which was to inform the community at large that the Commission had recently included the investigation in its programme and to comment on whether the provisions contained in the Marriage Act are adequate or whether they should be amended and, in that event, the way in which such amendments should be effected. The media statement pointed out that the Marriage Act presently governs the following aspects of contracting marriages in South Africa. The Act -

* designates certain persons in the service of the State and in religious denominations as marriage officers; it also regulates matters such as the revocation or limitation of the authority of marriage officers;
* provides for the solemnisation of marriages outside the Republic and deals with various types of unauthorised solemnisations;
* regulates the documentary requirements of marriage, such as the furnishing of identity books or other prescribed declarations;
* deals with the lodging of objections to any proposed marriage, as well as the issue of minors, proof of age and the granting of consent for minors' marriages by parents or guardians, commissioners of child welfare, judges of the High Court or the Minister of Home Affairs, respectively;
* sets out the requirements for the contracting of a valid marriage, including the prohibition of marriage between people closely related by blood or by affinity; it also mirrors the common law definition of marriage as being a union between one man and one woman;
* sets out the formalities that must be gone through in order to contract a valid marriage and these include the requirements that the parties appear in person with witnesses, that the marriage be solemnised by a marriage officer according to a certain formula in a public building within certain times of the day and that

the parties sign a marriage register.

1.2.2 This discussion paper reflects the proposals contained in the Department of Home Affairs' Marriage Bill, and comments and suggestions received in response to the media statement.

1.3 THE WAY FORWARD

1.3.1 The comments and suggestions made by respondents on this discussion paper will be taken into account for the purposes of drafting final recommendations and a Bill to be included in a report which will be submitted to the Minister of Justice.

1.3.2 The Commission does not deal with issues regarding customary marriages and the recognition of religious marriages in this Discussion Paper. The Commission has recently submitted a Report on Customary Marriages to the Minister of Justice[1], and the Department of Justice is presently involved in initiatives regarding the issue of the recognition of religious marriages. The Commission is of the view that the Marriage Act should ultimately make provision for all marriages, namely civil marriages, religious marriages and customary marriages in order to consolidate the applicable provisions governing the law of marriage in South Africa. However, the Commission is of the view that its recommendation on the appointment of marriage officers may alleviate current problems concerning religious marriages, if the Act were to be amended to provide for the appointment of ministers of religion as marriage officers, and if the religious representatives of the various denominations are indeed appointed. A number of respondents also addressed the recognition of same sex marriages. This issue will be dealt with in a separate Issue Paper dealing with same sex marriages and cohabitation by same sex partners and heterosexual partners[2]. The comments received on the matter of same sex marriages as a result of the Commission's request for comment on the Marriage Act will be reflected in this Issue Paper.

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1 Which resulted in the adoption of the Recognition of Customary Marriages Act, No.120 of 1998.

2 In the Commission's investigation entitled "Domestic Partnerships" (Project 118).

CHAPTER 2

2.1 ASPECTS OF THE MARRIAGE ACT REQUIRING CONSIDERATION

2.1.1 *EX OFFICIO* MARRIAGE OFFICERS AND DESIGNATION OF PERSONS IN THE PUBLIC SERVICE AS MARRIAGE OFFICERS

(a) <u>The provisions contained in the Marriage Act</u>

2.1.1.1 Sections 2 of the Marriage Act provides as follows:

> (1) Every magistrate, every special justice of the peace and every commissioner shall by virtue of his office and so long as he holds such office, be a marriage officer for the district or other area in respect of which he holds office.
> (2) The Minister and any officer in the public service authorized thereto by him may designate any officer or employee in the public service or the diplomatic or consular service of the Republic to be, by virtue of his office and so long as he holds such office, a marriage officer, either generally or for any specified class of persons or country or area.

(b) <u>The Department of Home Affairs' suggested provision</u>

2.1.1.2 The Department of Home Affairs proposed the following provisions:

> (1) Every magistrate shall by virtue of his or her office and so long as he or she holds such office, be a marriage officer for the district in respect of which he or she holds office.
> (2) The Minister may designate any person in the public service or the diplomatic or consular service of the Republic to be, by virtue of his or her office and so long as he holds such office, a marriage officer, either generally or for any specified class of persons or country or area.

(c) <u>Comments by respondents</u>

2.1.1.3 Professor JC Bekker notes that his is concerned about the fact that there are no South African marriage officers abroad, although they may be appointed by the Minister of Home Affairs. He remarks that it has been explained to him that the Minister of Home Affairs will make such appointments only if requested to do so by the Minister of Foreign Affairs. He further remarks that Foreign Affairs officials washed their hands of the issue by saying appointments are made by Home Affairs, and hence, no one was, at least a year ago,

prepared to accept responsibility or to explain what the policy was. Professor Bekker suggests that, in his view, some officials abroad, say the consuls should be *ex officio* marriage officers while posted overseas, and other officers could be appointed where there is a need.

(d) Evaluation

2.1.1.4 The New Zealand Marriage Act makes provision that marriages may be conducted, *inter alia,* by Registrars of Marriages, justices of the peace or other persons of good character.[3] The Act provides that where the Registrar-General is satisfied that for geographical, administrative, or other reasons it would be convenient for the residents of any locality for a Justice of the Peace or other person of good character residing in that locality, who wishes to be a marriage celebrant, to be able to solemnise marriages, the Registrar-General may enter that person's name in the list of marriage celebrants.[4] The New Zealand Act does not make provision for the appointment of New Zealand representatives in foreign countries as marriage officers. It however provides[5] that any New Zealand representative[6] who has attended the marriage of a New Zealand citizen in a country other than New Zealand and is satisfied that the marriage has been solemnised in accordance with the formalities of the law of that country may give a certificate in the prescribed form and shall forward a duplicate copy of the certificate to the registrar-General. The Australian Marriage Act makes provision[7] for the solemnisation in Australia of a marriage by or in the presence of a diplomatic or consular officer. Such marriages are possible if neither of the parties is an Australian citizen, neither of the parties is lawfully married to some other person, and they are not related to each other

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3 See the discussion below on the appointment of ministers of religion as marriage celebrants in New Zealand.

4 Section 7 of the new Zealand Marriage Act makes provision that the Registrar-General must in each year prepare a list of marriage celebrants, he or she must cause the list to be published in the Gazette, it must contain the name of each person entitled under the act to act as a marriage celebrant, it must be corrected or added to as the occasion may require, and he or she must specify in each list published in the Gazette a date on which the list shall come into force.

5 In section 43.

6 Who is defined as any person who is for the time being a head of mission or head of post (within the meaning of section 2 of the Foreign Affairs Act 1988) or a person assigned or reassigned to service overseas under section 6 of the Act.

7 Section 55.

within a prohibited relationship. The Australian Act further makes provision that a marriage solemnized in Australia by or in the presence of a diplomatic or consular officer of a proclaimed overseas country, shall be recognized as valid in Australia if the marriage is recognized as a valid marriage by the law or custom of the overseas country and the marriage has been registered. The Australian Marriage Act further provides[8] that the Minister may appoint as a marriage officer a person appointed to hold or act in any of the following offices (being an office of the Commonwealth) in an overseas country, namely Ambassador, High Commissioner, Counsellor or Secretary at an Embassy, High Commissioner's Office, Legation or other post, and Consul, and any other person qualified under the regulations to be appointed as a marriage officer.

2.1.1.5 The South African case of *Santos v Santos*[9] seems relevant to the present discussion on parties joined in marriage by diplomatic and consular marriage officers. The Court noted that at a marriage ceremony in the Portuguese Consulate in Johannesburg, the vice-consul of Portugal in Johannesburg purported to solemnize a marriage between the parties who were both domiciled in the Republic of South Africa at the time, and further that the vice-consul who solemnized the marriage was not a marriage officer in terms of the provisions of the Marriage Act 25 of 1961. The Court referred to section 11(1) of the Marriage Act which provides that 'a marriage may be solemnized by a marriage officer only' and stated that a marriage which is solemnized in South Africa by a person who is not a marriage officer is, generally speaking, not a valid marriage under our law. The Court considered the plaintiff's submission that the provisions of the Act would not apply to a marriage conducted in an embassy or a consulate of a foreign country in South Africa inasmuch as such place ought to be regarded as an extension of that foreign country's area of jurisdiction. The Court noted that section 10 of our Marriage Act 25 of 1961 also allows the solemnization of a marriage in accordance with the provisions of the Act in a country outside the Republic of South Africa between South African citizens who are domiciled in the Republic and that such a marriage may be solemnized by a diplomatic or consular officer in the service of the Republic of South Africa who has been designated as a marriage officer in terms of the Act. The Court remarked that the Marriage Act 1961, however, has no corresponding provision enabling a foreign diplomatic or consular officer to solemnize a marriage between subjects of that foreign State

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8 In section 62.

9 1987 4 SA 150(W).

in accordance with the laws of that State in its embassy or consulate in South Africa. The Court pointed out that the defendant referred him to the following conclusion of Kahn in his treatise on '*Jurisdiction and Conflict of Laws*' in Hahlo (op cit 4th ed at 592) with regard to the validity of foreign embassy marriages in South Africa:

> 'Thus for the first time, though it be in a restricted form, our law has provided for the so-called embassy marriage, which the laws of so many countries permit. Though there is no assurance that such a union will enjoy recognition in the law of the place of celebration, it is not to be expected that the executive will lightly grant extraterritorial capacity to solemnize marriages which will be invalid by the lex loci celebrationis and so be denied international validity.
> There is no corresponding provision at common law or by statute enabling foreign officials to solemnize marriages in South Africa, whether within the precincts of an embassy or elsewhere. Nor should our Courts recognize the validity of a marriage celebrated in country A in the embassy of country B, even though the marriage would be recognized by the law of country B: it must be recognized by the law of country A.'

2.1.1.6 The Court further noted in *Santos v Santos* that Pålsson *Marriage and Divorce in Comparative Conflict of Laws* (1974) at 274 points out that South Africa and Switzerland are among the few countries which provide for the authorisation of consular marriages by their own representatives abroad, but are opposed to the exercise of any such authority by foreign consuls in their own territory and that Pålsson relies on Kahn as authority for the legal position which applies in South Africa. The Court remarked that according to Pålsson at 273, countries such as Austria, certain Latin American countries and the United States of America preclude foreign consuls from solemnizing marriages in their territory and deny validity to any marriage celebrated in defiance of the prohibition, that those countries usually do not authorise their own consular officers to perform marriages abroad, and that this appears to be the general approach in the United States of America. The Court also remarked that according to Rabel *The Conflict of Laws: A Comparative Study* vol 1 2nd ed (1958) at 237, the position is that where a consular or diplomatic agent is endowed by the State represented by him or her - the sending State - with the power of officiating at marriages, a marriage performed before him or her is valid in the receiving State only if the latter State has agreed to his acting in this capacity. The Court noted that Pålsson at 274 concludes, however, that consular marriages are, to a varying extent, allowed and recognised by most receiving States, thereby admitting an exception to the *locus regit actum* rule.

> 'In most countries recognising consular marriages such recognition is granted by operation of law in the sense that it does not presuppose a previous permission by the receiving State. This system prevails in France. It is also accepted in most other countries in Western Europe and elsewhere whose own consuls are empowered by law

> to perform marriages abroad. To that extent the recognition involves a "bilateralisation" of the approach adopted by the receiving State qua sending State. The same system is followed, however, by certain countries which only provide for individual authorisations of their own consuls abroad, for example West Germany, the Netherlands and the United Kingdom, or which do not provide for such authorisation at all, for example Colombia. The recognition thus afforded, it may be noted, rests very largely on customary law, as deducible from State practice and/or judicial decisions, rather than on statutory law which is relatively scarce on this matter.

2.1.1.7 The Court decided in *Santos v Santos* that if the Legislature had intended to accord recognition to foreign embassy or consular marriages in South Africa it would undoubtedly have made provision for it in the Marriage Act, and that there is, equally, no indication that South African law has followed the practice of the United Kingdom and other countries in Western Europe of according recognition to foreign embassy or consular marriages by custom.

2.1.1.8 The question arises whether there is a need to accord recognition to foreign embassy or consular marriages in South Africa in view of the absence of such statutory recognition. Mr CF Forsyth notes that the judgment was criticised[10] and that it was considered that it should make no difference whether a marriage takes place in a foreign consulate or a foreign country.[11] He however considers that the rejection of the view that foreign embassies and consulates are part of the foreign country's territory implies the rejection of this view too. He states that this matter is frequently regulated by treaty, but to the best of his knowledge South Africa is not party to any such treaties and where a marriage is celebrated outside the ambit of Article 6 of the *Hague Convention* of 1902 to *Regulate the Conflict of Laws in Regard to Marriage* (to which South Africa is not a party) there seems to be wide adherence to the *lex loci celebrationis*, at least for formal validity of the marriage. He further notes the case of *Radwan v Radwan*[12] where it was assumed that a marriage celebrated in the Egyptian Embassy in Paris was formally valid in French law. Forsyth concludes that Mr Justice Grosskopf overstates the case when he remarks in the *Santos* case that embassy marriages are recognised *by custom* in Europe and the United Kingdom. The question is thus whether there is a need to accord recognition to foreign embassy or consular marriages in South Africa. The Commission requests comment on this aspect in particular.

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10 He refers to the article by S Therion in 1985 *De Rebus* at 353.

11 *Private International Law* 2nd edition at 240 note 33.

12 [1973] Fam 24.

2.1.1.9 The term “Commissioner” is defined as follows in the Marriage Act: “‘Commissioner’ includes an Additional Commissioner, an Assistant Commissioner, a Native Commissioner, an Additional Native Commissioner and an Assistant Native Commissioner”. We noted above that the Department of Home Affairs did not include the term Commissioner or special justice of the peace in its Bill. Enquiries made at the Department of Home Affairs established that there are no marriages presently being celebrated by Commissioners as contemplated in the Marriage Act. The Department of Home Affairs is therefore of the view that although the Marriage Act makes provision for Commissioners and justices of the peace to be marriage officers this is not the case at present. It is therefore clear that the Marriage Act does not reflect the present position on Commissioners and special justices of the peace being marriage officers. It seems clear that the Act should be brought into line with the prevailing position and that the terms “Commissioner” and “special justice of the peace” should be deleted from section 2(1) of the Act.

2.1.1.10 It is further not entirely clear to the Commission whether the alleged failure by the Department of Home Affairs to appoint diplomatic and consular marriage officers is merely an administrative oversight which can be remedied by the Department of Home Affairs considering the matter afresh rather than the legislature having to amend the Marriage Act. However, the suggestion made by Professor Bekker seems to simplify the appointment procedure considerably if certain officials representing the Republic of South Africa abroad were to be *ex officio* marriage officers. The Commission therefore recommends that every Ambassador, High Commissioner and Consul should be *ex officio* marriage officers as long as they hold their office. However, the Commission considers that the Minister’s power in terms of the Marriage Act to designate officers or employees in the diplomatic or consular service should remain intact.

(e) Recommendation

2.1.1.11 The Commission's preliminary recommendation is that section 2 of the Marriage Act should be amended-

- by deleting in section 2(1) the terms “Commissioner” and “special justice of the peace”; and
- by providing in section 2(1) that certain persons in the diplomatic and consular

service of the Republic, namely Ambassadors, High Commissioners and Consuls should by virtue of their office and as long as they hold such office be *ex officio* marriage officers for the area in which they hold office.

2.1.2 THE DESIGNATION OF MINISTERS OF RELIGION AND OTHER PERSONS HOLDING RESPONSIBLE POSITIONS IN RELIGIOUS ORGANISATIONS OR DENOMINATIONS AS MARRIAGE OFFICERS

(a) The provisions contained in the Marriage Act

2.1.2.1 The Marriage Act presently defines the term marriage officer as follows: "'marriage officer' means any person who is a marriage officer by virtue of the provisions of this Act". Section 3(1) of the Act sets out as follows which ministers or other persons attached to churches may be designated as marriage officers:

> (1) The Minister and any officer in the public service authorized thereto by him may designate any minister of religion of, or any person holding a responsible position in, any religious denomination or organization to be, so long as he is such a minister or occupies such position, a marriage officer for the purpose of solemnizing marriages according to Christian, Jewish or Mohammedan rites or the rites of any Indian religion.
>
> (2) A designation under sub-section (1) may further limit the authority of any such minister of religion or person to the solemnization of marriages-
>
> (a) within a specified area;
> (b) for a specified period.

(b) The Department of Home Affairs' suggested provision

2.1.2.2 The Department proposed the following provisions:

> (1) The Minister may appoint a Minister of religion or any person holding a responsible position in any religious denomination or organization designated by such denomination or organization in the prescribed form, as a marriage officer.
>
> (2) A designation referred to in subsection (1) must be accepted by the Minister unless it is proven to the satisfaction of him or her that the denomination or organization who made the designation is not a bona fide religious denomination or organization.
>
> (3) Any decision made by the Minister under this section to appoint a marriage officer or to reject a designation shall be reviewable by any provincial or local division of the High Court of South Africa, and the Court-

(a) may call upon the Minister to furnish reasons and to submit such information as the Court deems fit; and
(b) shall have jurisdiction to-

(i) consider the merits of the matter under review; and
(ii) confirm, vary or set aside the decision of the Minister.

(c) Comments by respondents

(i) The Church of Scientology

2.1.2.3 The Church of Scientology favoured the Commission with a very comprehensive submission addressing the issue under consideration. The Church succinctly remarks that while the Marriage Act permits the designation as a marriage officer of any minister of or person holding a responsible position in "any religious denomination or organization," it is restrictive in that marriage officers can be designated only for the purpose of solemnising marriages according to "Christian, Jewish or Mohammedan rites or rites of any Indian religion." Hence, the Church states that, contrary to the Bill of Rights, section 3 discriminates against every religion other than those enumerated by preventing the solemnisation of marriages according to the rites of other religions. The Church therefore suggests that the Constitution and international law require that section 3(1) of the Marriage Act should be amended to remove its discriminatory language and that this can be effected by simply replacing the phrase "according to Christian, Jewish or Mohammedan rites or the rites of any Indian religion" with "according to the rites of the religious denomination or organisation concerned".

2.1.2.4 The Church of Scientology remarks that it is particularly interested in this investigation because relevant provisions of the Marriage Act refer to religions that are theistic and that practise widely-recognised forms of worship, supplication and veneration with respect to their god or gods. The Church remarks that although Scientology is a theistic religion and places the Supreme Being at the apex of its cosmology, Scientology religious practices do not include the same forms of worship, supplication and veneration as practised in religions such as Judaism, Islam and Christianity. The Church notes that Scientology religious practices rather seek to better one's understanding of and relationship with the Supreme Being as well as the entire cosmos, much like many Eastern religions such as Buddhism, Judaism and certain schools of Hinduism, which seek to better one's understanding of and relation to some supernatural principle or power.

2.1.2.5 The Church of Scientology notes that independent and objective religious and legal experts, including the Human Rights Committee,[13] the UN Special Rapporteur,[14] the

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[13] The Church notes the United Nations' Universal Declaration of Human Rights (UDHR), the International Covenant on Economic Social and Cultural Rights (ICESCR), and the International Covenant on Civil and Political Rights (ICCPR) and refers particularly to article 26 of the ICCPR which provides as follows:

> All persons are equal before the law and are entitled without discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, religion, language, political or other opinion, national or social origin, property, birth or other status.

The Church suggests that the Human Rights Committee in its comment on Article 26 defines discrimination as "any exclusion, restriction or preference" whether based on race, sex or religion "which has the purpose or effect of nullifying or impairing" equal treatment. It further notes that UN officials, experts, and UN-treaty-based bodies have consistently found that the expression "religion or belief," as well as the individual terms, "religion" and "belief," must be construed broadly to cover non-traditional religions and all forms of belief. The Church considers that the following comment is the most important finding by the United Nations on the definition of religion:

> Article 18 protects theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief. The terms belief and religion are to be broadly construed. Article 18 is not limited in its application to traditional religions or to religions and beliefs with institutional characteristics or practices analogous to those of traditional religions. The Committee therefore views with concern any tendency to discriminate against any religion or belief for any reason, including the fact that they are newly established, or represent religious minorities that may be the subject of hostility by a predominant religious community.

[14] The Church states that a Special Rapporteur appointed by the Human Rights Committee's Sub-Commission on Prevention and Protection of Minorities in 1989 expressly linked this mandate against discrimination into rites such as the marriage ceremony. The Church remarks that in the study, *Elimination of all forms of intolerance and discrimination based on religion and belief,* the Special Rapporteur found that manifestations of intolerance and discrimination can occur when a collorary freedom to freedom of religion or belief is violated, including the freedom to celebrate holidays and ceremonies in accordance with the precepts of one's religion or belief. The Church notes that in his 1996 report the Special Rapporteur comments as follows:

- All in all, the distinction between a religion and a sect is too contrived to be acceptable. A sect that goes beyond simple belief and appeals to a divinity, or at the very least, to the supernatural, the transendent, the absolute, or the sacred, enters into the religious sphere and should enjoy the protection afforded to religions.
- The term sect seems to have a pejorative connotation. A sect is to be considered different from a religion, and thus not entitled to the same

authors of the major human rights study entitled *Freedom of Religion and Belief: A World Report*[15] Council of Human Rights Centre[16], the European Court of Human Rights[17], the

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protection. This kind of approach is indicative of a propensity to lump things together, to discriminate and to exclude, which is hard to justify and harder still to excuse, so injurious is it to religious freedom.

- Religions cannot be distinguished from sects on the basis of quantative considerations, saying that a sect, unlike a religion, has a small number of followers. This is in fact not always the case. It runs absolutely counter to the principle of respect and protection of minorities, which is upheld by domestic and international law and morality. Besides, following this line of argument, what are the major religions if not successful sects?
- Again, one cannot say that sects should not benefit from the protection given to religion just because they have no chance to demonstrate their durability. History contains many examples of dissident movements, schisms, heresies and reforms that have suddenly given birth to religions or religious movements.

[15] Under the direction of the University of Essex Human Rights Centre in conjunction with religious human rights experts from fifty countries around the globe. The Church remarks that the study finds as follows that new religions must be treated in the same manner as traditional religions and that new religions are a target of discrimination:

- Freedom of religion therefore is not to be interpreted narrowly by states, for example, to mean traditional world religions only. New religions or religious minorities are entitled to equal protection. This principle is of particular importance in light of the evidence reflected in the Country entries, including those of the European section, revealing that new religious movements are a recurring target for discrimination or repression.
- Today new religious ideas, expressed through new religious movements, face a perception that their beliefs expressed are wrong or do not qualify as religious. Although the objection to new religious movements is often expressed in criticism of their methods, it is at bottom a rejection of their freedom of thought which stimulates hostility and restrictions on their organizations and activities. The challenge remains considerable to establish an ethic of tolerance towards those who differ on religious grounds.

[16] The Church says that in its study on religion under Article 9 of the European Convention on Human Rights, the Centre noted that the concept of religion is:

> not confined to widespread and globally recognized religions but also applies to rare and virtually unknown faiths. Religion is thus understood in a broad sense.

[17] The Church remarks that the Court noted in *Manoussakis and Others v Greece* on 26 September 1996 that a fundamental human rights policy of the European Community is to secure true religious pluralism, and that the Court made it clear, in support of this policy, that the European Convention excludes any discretion on the part of the State to determine whether religious beliefs or the means used to express such beliefs are legitimate. The Church further notes that the Court stressed that seemingly innocuous administrative action restricting the rights of minority religions operated as a lethal weapon against the right to freedom of religion. The Church also refers to Article 14

Organisation of Security and Cooperation in Europe[18], the World Congress on Religious

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of the European Convention of Human Rights which provides that the enjoyment of the rights and freedoms set forth in the Convention shall be secured without discrimination on any ground such as sex, race or religion. The Church notes that the European Court of Human Rights decided in *Hoffman v Austria* 17 *EHRR* 293 (1994) that any disparate treatment based essentially on a difference in religion alone is not acceptable.

[18] The Church remarks that the meeting in April 1997 convened by the OSCE in Warsaw gave rise to a report which came to the following conclusion that in arriving at a definition for purposes of determining the scope of freedom of religion clauses, the broad definition adopted by the United nations Human Rights Committee should apply:

> As a practical matter, the approach suggested by the General Comment of the Human Rights Committee is sound and should be followed. In essence, that approach recognizes that the term religion should be broadly construed, and that it extends to nontraditional and unpopular belief systems.

Liberty[19] the Zimbabwe Supreme Court[20], the High Court of Australia[21], the High Court of New

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[19] The Fourth World Congress on Religious Liberty was held in June 1997 in Rio De Janeiro, Brazil by the International Religious Liberty Association, a non-governmental United Nations organisation headquartered in Geneva. The Church states that the participants in the Congress were composed of the foremost experts in the field of religion, including religious representatives from numerous denominations, government officials, and distinguished religious experts from forty countries, including many European countries. The Church notes that at the conclusion of the Congress, the participants issued a Concluding Statement reaffirming certain fundamental human rights principles and particularly Item 3 which states that the participants:

> Accept and affirm the provisions of the United Nations Human Rights Committee's General Comment to Article 18 of the International Covenant on Civiland Political Rights (ICCPR) ... In particular, the Congress participants concur with the General Comment's recognition of the broad scope of religious freedom in its determination that 'Article 18 is not limited in its application to traditional religions or to religions nd beliefs with institutional characteristics or practices analogous to those of traditional religions. The Committee therefore views with concern any tendency to discriminate against any religion or belief for any reasons, including the fact that they are newly established, or represent religious minorities that may be the subject of hostility by a predominant religious community'.

The Church further remarks that, in its Conclusions, the Congress noted that it affirms that the principle of religious liberty applies equally to new religions as to established ones, Government and public officials should exercise caution and sensitivity when characterising religious groups or religious beliefs, so as to avoid stigmatising specific groups or contributing to patterns of intolerance.

[20] In *In Re Chickweche* 1995 4 SA 284 (ZSC) a devout follower of the Rastafari movement lodged an application in the High Court for registration as a legal practitioner. The Court reviewed the evidence of an expert who provided his opinion that the Rastafari movement is a religion and remarked:

> The Court is not concerned with the validity or attraction of the Rastafarian movement, only with their sincerity.

The court relied also on the findings of Dr JN Pandey in *Constitutional Law of India* at 197 were he stated:

> Religion is a matter of faith with individuals or communities and it is not necessarily theistic. A religion has its basis in 'a system of beliefs and doctrines which are regarded by those who profess that religion as conclusive to their spiritual well-being'; but it will not be correct to say that religion is nothing else but a doctrine of belief. A religion may only lay down a code of ethical rules for its followers to accept, it may prescribe rituals and observances, ceremonies and modes of worship which are regarded as integral parts of religion, and those forms and observances might extend even to matters of food and dress. Religion is thus essentially a matter of personal faith and belief. Every person has the right not only to entertain such religious beliefs and ideas as may be approved by his judgment or conscience but also to exhibit his belief and ideas

Zealand[22] and the United States Supreme Court[23] as well as scholars and other experts in the

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by such overt acts which are sanctioned by his religion.

The court decided to adopt a broad approach to defining religion and held that the applicant's dreadlocks were a protected form of religious expression:

> Accepting the status of Rastafarianism as a religion in the wide and non-technical sense referred to, I am satisfied that the applicant's manifestation of his religion by the wearing of dreadlocks falls within the protection afforded by ... [the religious freedom clause of the Zimbabwe] Constitution.

21 The Church remarks that, like the United States, Australia does not require either a theistic belief system or worship services, and that this approach was outlined in three supporting decisions by the High Court of Australia in *Church of the New Faith v Commissioner of Pay-roll Tax (Vict)* (1983) 154 CLR 120, involving a church of Scientology located in that country. The Church states that despite the differences between the three opinions, each emphatically rejected a definition based on exclusively theistic notions. The Church remarks that the first opinion by Mason Acting CJ and Brennan J, approached the definition as warranting some criteria that would result in a guarantee of religious freedom, and, according to them, there are two criteria for a religion, namely firstly, a belief in a supernatural being, thing or principle, and secondly, a system of canons of conduct that would give effect to that belief. The Church notes that the second opinion, by Wilson and Deane JJ, set forth a series of indicia they derived by empirically observing accepted religions, each of varying importance with respect to specific cases, and that, according to them, there are four primary indicia: firstly, a belief in something supernatural, some reality beyond that which can be conceived by the senses, secondly, the belief in question relates to man's nature and place in the universe and his relationship to things supernatural, thirdly, as a result of this belief adherents are required or encouraged to observe particular codes of conduct or engage in particular practices that have supernatural significance, and, fourthly, the adherents comprise an one or more identifiable groups. The Church also notes the third opinion in which Murphy J declined to set forth an exhaustive list of criteria in light of the sheer diversity of religious beliefs and practices throughout the world, stating that there was no single acceptable criterion. The Church however also remarks that Murphy J rejected specific criteria that had been relied on by the court *a quo* to negate a finding of religiosity, including the absence of a belief in a personal God or a Supreme Being and that he held as follows:

> Most religions have a god or gods as the object of worship or reverence. However, many of the great religions have no belief in god or a supreme being in the sense of a personal deity rather than an abstract principle. The Ravadan Buddhism, the Samkhya school of Hinduism and Taoism, are notable examples. Though these religions assert an ultimate principle, reality or power informing the world of matter and energy, this is an abstract conception described as unknown or incomprehensible.

field of religion, such as Professors Bryan Wilson[24], David Chidester[25] and M Darrol Bryant[26]

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[22] The Church notes further that the objective and broad approach to defining religion taken by all three opinions in the Australian case of *Church of the New Faith v Commissioner of Pay-roll Tax (Vict)* was discussed at length and followed by the High Court of Auckland in *Centrepoint Community Growth Trust v Commissioner* [1985] 1 NZLR 673, 694-5 and 697.

[23] The Church says that the theistic notion of religion was dominant until the 1940's when the Supreme Court changed direction in regard to the theistic definition of religion, noting that L Tribe *Constitutional Law* states at 826:

> (A)t least through the nineteenth century, religion was given the same fairly narrow reading in the two clauses: 'religion' referred to theistic notions respecting divinity, morality and worship, and was recognized as legitimate and protected only insofar as it was generally accepted as 'civilized' by Western standards. Courts, moreover, were considered competent forums for making such determination.

The Church further notes that, finally, in 1961, the Court discarded the theistic test. In *Torcaso v Watkins* 367 US 488 (1961) the Court announced its groundbreaking rule that the First Amendment precluded government from aiding "those religions based on a belief in the existence of God as against those religions founded on different beliefs". The Church draws attention to the Court remarking that "[a]mong religions in this country which do not teach what would generally be considered a belief in the existence of God are Buddhism, Taoism, Ethical Culture, Secular Humanism and others". The Church also refers to the fact that decisions from the United States Supreme Court requires that the States act even-handedly in relation to different religions such as the Court noted in *Larson v Valente* 456 US 228, 245 (1982):

> This constitutional prohibition of denominational preferences is inextricably connected with the continuing vitality of the Free Exercise Clause... Madison's vision - freedom for all religion being guaranteed by free competition between religions - naturally assumed that every denomination would be equally at liberty to exercise and propagate its beliefs. But such equality would be impossible in an atmosphere of official denominational preference. Free exercise thus can be guaranteed only when legislators - and voters - are required to accord to their own religions the very same treatment given to small, new, or unpopular denominations.

[24] Reader Emeritus in Sociology at Oxford University. The Church notes that he places this issue squarely in the context of the influence of the Sate on the individual and that only through an objective analysis can a society achieve equality under the law in a manner which embraces the diversity of religious expression known in the modern world. He is quoted as follows by the Church:

- Just as scholars have come to recognize the contemporary diversity among religions in today's society, so, if basic human rights of freedom of belief and practice are to be maintained, it becomes essential that old stereotypes of just what constitutes religion should be relinquished. In a culturally pluralistic world, religion, like other social phenomena, may take many forms. Just what

is a religion cannot be determined by the application of concepts drawn from any particular tradition." ("Religious Toleration & Religious Diversity" Institute for the Study of American Religion April 1995 at 42.)

- If religions are accorded parity by the state, it becomes necessary to adopt abstract definitive terms to encompass the diversity of religious phenomenon.
- As modern scholarship has widened our acquaintance with other cultures, so it has been recognized that what is appropriately designated as 'religion' often departs in many particulars ... from those which characterize Christianity.

The Church states that scholars have had to broaden their view to achieve what Dr Wilson characterises as "ethically neutral definitions" of religion, which consist of "elements [which] came to be recognised as constituting religion, regardless of the substance of the beliefs, the nature of the actual practices, or the formal status of the functionaries in their service".

25 Of the University of Cape Town. The Church states that Professor Chidester notes a historical differentiation between "religion" and "superstition"which often "collapses into a basic opposition between 'us' and 'them'". The Church remarks that he also notes that it is not only the indigenous African religions that have fallen victim to the "us versus them" demarcations between religions, but that new religions have suffered the same discrimination. The Church further quotes him as follows:

- In Southern Africa, this conceptual opposition between religion and superstition has had a long history in European reports about indigenous African beliefs and practices. Throughout the nineteenth century, European observers refused to recognize that these forms of African religious life should count as 'religion'.
- Recalling the Christian missionary's nineteenth-century denial of African religion, [the] denial [in question] ... was based upon a specific Christian assumption about the proper form of worship that is supposedly necessary for beliefs and practices to count as authentic religion.
- Since a religious way of life can be regarded as a way of being human, this denial of the religiosity of others has also been a denial of the full humanity of other human beings. The question of the definition of religion, therefore, is not merely an academic issue. It is as basic as the question: What counts as a human being?
- If religions are to be accorded parity by the state, it becomes necessary to adopt abstract definitive terms to encompass the diversity of religious phenomenon.
- As modern scholarship has widened our acquaintance with other cultures, so it has been recognised that what is appropriately designated as 'religion' often departs in many particulars ... from those which characterize Christianity.

The Church notes that he defines religion more loosely as "a distinctive human experiment in the production of sacred time and sacred space" although he also analyses religion in terms of religious beliefs, ritual, ethics, experience and organisation.

have come to the same precise conclusion, namely that principles of equality and non-discrimination mandate a broad definition of religion which includes new religions and forbids discrimination against them.

2.1.2.6 The Church of Scientology further remarks that although there is no decision concerning the status of non-theistic religions under the Canadian legal concept of religion, the provincial governments have routinely granted authorisation to solemnise marriages as well as exemption from property taxation to their ministers and organisations. The Church considers that Canada's definition of religion would presumably fall between the United Sates' definition on the one hand and England's on the other, but says that at least one case interpreting the guarantee of freedom of religion in the Canadian Charter of Rights indicates that the Supreme Court of Canada would take the broader approach. The Church also notes that in *Regina v Big M Drug Mart* 18 CCC 3d 385 (1985) the Supreme Court addressed the constitutionality of a law that prohibited certain retail sales on Sundays. The Church remarks that in invalidating the law, the majority of the Court made it clear that it would not tolerate sanctioning the religious rites of one religion over another.[27] The Church of Scientology further considers the concurring opinion of Wilson J in the last-mentioned Canadian case in which he harshly criticised the statute for being specific to one religion and thereby inherently discriminatory.[28]

2.1.2.7 The Church of Scientology also considers that despite the fact that religion has

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[26] Of the University of Waterloo, Ontario, Canada who defines, as the Church states, religion as "a community of men and women bound together by a complex of beliefs, practices, behaviours and rituals that seek, through this Way, to relate human to sacred/divine life.

[27] [A] definition of freedom of conscience and religion incorporating freedom from compulsory religious observance is not only in accord with the purpose and traditions underlying the Charter, it is also in line with the definition of that concept as found in the Canadian jurisprudence. ... It [was] urged that the choice of the day of rest adhered to by the Christian majority is the most practical. This submission is really no more than an argument of convenience and expediency and is fundamentally repugnant. ...

[28] [O]ne can agree with the Chief Justice that in enacting the Lord's Day Act '[t]he arm of the state requires all to remember the Lord's day of the Christians and to keep it holy' and that '[t]he protection of one religion and the concomitant nonprotection of others imports disparate impact destructive of the religious freedom of the collectivity'. Accordingly, the Act infringes upon the freedom of conscience and religion guaranteed in s. 2(a) of the Charter.

been an integral part of English law since the adoption of the Statute of Uses two centuries ago, there is no definitive judicial decision by an English court defining religion. The Church notes that the closest such decision is *In Re South Place Ethical Society* [1980] 1 WLR 1565 in which Dillon J held that the objects of the Society which professed a belief in "ethical principles" but no belief in God or "anything supernatural", were not for the advancement of religion because there are two "essential attributes" of religion that it did not have, namely "faith and worship; faith in a god and worship of that god". The Church of Scientology is of the view that the reason why this decision is not definitive is two-fold: first, the beliefs of the Ethical Society specifically excluded anything supernatural, such as a transcendent or spiritual unifying force within the universe, irrespective of the Society's non-belief in a god or other deity. (The Church therefore argues that the Court never reached the question of the significance of a belief in a supernatural principle or thing, as did the high Court of Australia three years earlier.) Secondly, the Church notes that the decision is patently illogical, since under the Court's rule, Buddhism and other non-theistic religions clearly would not qualify. The Church remarks that when confronting the status of Buddhism, Dillon J simply stated that he did "not know enough" about Buddhism and that it may be an "exception" to the rule.[29] The Church notes that Dillon J never explained why Buddhism should be singled out from among all the non-theistic religions and considers that neither the rule nor the "exception" makes sense. The Church draws attention to the decision of the Supreme Court of Italy which rejected a similar definition of religion requiring obedience and reverence of a Supreme Being as illegitimate finding that it was based on philosophical and socio-historical assumptions that are incorrect and that there was manifest illogicality in the reasoning supporting it.

2.1.2.8 The Church of Scientology notes that whatever the breadth of the theistic requirement of the case of the *South Place Ethical Society*, the leading authority on the English law of charity believes that the decision will have diminishing validity.[30] The Church considers that a more imminent and dramatic demise of the rule will be the Human Rights Bill that has been proposed by the Blair government. The Church explains that the purpose of this Bill is

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29 The Church notes *R v Registrar* General *Ex Parte Segerdal* [1970] 2 QB 697 which characterises Buddhism as an "exceptional case" in imposing a theistic and worship requirement in deciding whether a facility could qualify as a "place of worship".

30 The Church quotes Picarda *Law and Practice Relating to Charities* 2nd 1995 at 71:

> Whether this test will prevail after the *Church of the New Faith* case remains to be seen. The fact that the latter case has been followed in New Zealand suggests that it may not.

to enact the broad-ranging and fundamental rights contained in the European Convention on Human Rights into domestic law. The Church considers that when this occurs, England's definition of religion will be as sweeping as that discussed in connection with the European Convention and will cover both theistic and non-theistic religions.

2.1.2.9 The Church of Scientology states that experts in the field of religion have developed a number of approaches to defining religion in an "ethically neutral" way, and that interestingly enough, these approaches have resulted in somewhat functionally equivalent definitions of religion. The Church notes that these definitions include three principal elements that closely parallel the definition of religion enunciated by the High Court of Australia in *Church of the New Faith v Commissioner of Pay-roll Tax* as well as other courts in other countries that have addressed the issue of how the definition of religion should be addressed, namely-

- belief in an Ultimate Reality transcending the here-and-now of the secular world, whether called God, Supreme Being, or simply some supernatural principle such as a belief in the transmigration of one's spirit;
- religious practices directed towards understanding, attaining or communing with, this Ultimate Reality; and
- a community of believers who join together in pursuing this Ultimate Reality.

2.1.2.10 The Church of Scientology considers that there is probably little doubt that a change in the law is long overdue since the law is also inconsistent with the new order which gains its the impetus from the South African Bill of Rights. The Church notes that the statutory language of section 3 of the Marriage Act is a relic of the apartheid past and that the observation was made that although there has been no religious intolerance of Christianity in South Africa, the same cannot be said of other religions.[31] The Church refers to Justice Sach's remark in *S v Lawrence*[32] that religious marginalisation in the past coincided strongly in South Africa with racial discrimination, social exclusion and political disempowerment. The Church suggests that the principles which Justice Sachs in *S v Lawrence* found flowing from the religious freedom clause of the Constitution should be used as the guiding light in amending the Marriage Act.

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31 Van Wyk *et al Rights and Constitutionalism, The New South African Legal Order* Kenwyn: Juta 1994 at 597.

32 1997 4 SA 1176 (CC) at 1229D-E and 1997 (10) BCLR 1348 (CC) at 139C.

> South Africa is an open and democratic society with a non-sectarian state that guarantees freedom of worship; it is respectful of and accommodatory towards, rather than hostile to or walled-off from, religion: acknowledges the multi-faith and multi-belief nature of the country; does not favour one religious creed or doctrinal truth above another; accepts the intensely personal nature of individual conscience and affirms the intrinsically voluntary and non-coerced character of belief; respects the rights of non-believers; and does not impose orthodoxies of thought or require conformity of conduct in terms of any particular world-view. The Constitution, then, is very much about the acknowledgement by the state of different belief systems and their accommodation within a non-hierarchical framework of equality and non-discrimination. It follows that the state does not take sides on questions of religion. It does not impose belief, grant privileges to or impose advantages on adherents of any particular belief, require conformity in matters simply of belief, involve itself in purely religious controversies, or marginalise people who have different beliefs.

2.1.2.11 The Church of Scientology considers that the Constitution implicitly recognises that the most important feature of a definition of religion is that it not be discriminatory and that it treat all religions equally. The Church notes that the Constitutional Court held in *Fraser v Children's Court Pretoria North*[33] that there can be no doubt that equality lies at the very heart of the Constitution, that it permeates and defines the very ethos upon which the Constitution is premised. The Church further considers that the government's constitutional obligation to eradicate discrimination between religions clearly applies to governmental regulation of the solemnisation of marriages. The Church states that as the Court noted in *Ryland v Edros*,[34] the values of equality and tolerance of diversity and the recognition of the plural nature of our society are key values that underlie our Constitution. The Church suggests that in order to remove the anomalies created by many years of discrimination, the Marriage Act must be amended to allow ministers of any religion to solemnise marriages, the new legislative language must be broad and flexible enough to encompass all religions and it must also establish objective criteria for the definition of religion so that the personal opinions, prejudices and predilections of those who apply it are not permitted to undermine the principles of equality and non-discrimination as set forth in the Bill of Rights.

2.1.2.12 Hence, the Church of Scientology suggests that in order to abolish the anomalies created by many years of discrimination, the Marriage Act must now be amended and that reform in the area of marriage rites is necessary to harmonise the law with social changes in South African society and to give effect to the principles of religious freedom and

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33 1997 2 SA 261 (CC) at 272A and 1997 2 BCLR 153 (CC) at 161F-G.

34 1997 1 BCLR 77(C) at 91I-F.

equal treatment contained in the South African Constitution. The Church considers that sections 9 and 15 of the Constitution require that section 3(1) of the Marriage Act be amended by removing its discriminatory language limiting marriage officers to specified religions, namely by replacing the phrase "*according to Christian, Jewish or Mohammedan rites or the rites of any Indian religion*" with the ethically neutral phrase "*according to the rites of the religious denomination or organisation concerned*". The Church suggests that such a change would be fully consistent with the provision of section 15(3)(a) of the Constitution providing that "this section does not prevent legislation recognising ... marriages concluded under any tradition, or a system of religious, personal or family law", since nowhere in that section, or anywhere else in the Constitution for that matter, is there any indication that legal marriage rites should be limited to the four enumerated religions.

2.1.2.13 The Church recommends that in order to meet the constitutional requirement, the amended legislation should provide that the term "religion" be construed broadly, as is provided in the UN Human Rights Committee's General Comment to Article 18 of the International Covenant on Civil and Political Rights. The Church states that historical tests for religiosity derived from Judaeo-Christian concepts no longer have utility since they exclude non-theistic religions, and religions that do not involve practices of worship. The Church considers that the amended legislation should also establish objective criteria such as the elements mentioned above, for application by the Department of Home Affairs. The Church suggests that the adoption of such criteria will ensure the application of "ethically neutral definitions" of religion consistent with sections 9 and 15 of the Constitution. The Church is of the view that only through such a neutral approach which minimises personal prejudices and predilections can the constitutional values of equality under the law, tolerance of diversity and recognition of the plural nature of the South African society be observed.

2.1.2.14 The Church suggests, finally, that the addition of the following subsections to section 3 would accomplish the aim advocated by them:

> 3(a) For the purposes of subsection (1), the term "religious denomination or organization" shall be construed as broadly as possible to include any identifiable group of individuals holding a common belief in some supernatural being, thing or principle concerning man's place in the universe and relationship to the supernatural and who have established practices or codes of conduct giving effect to such common belief.
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> 3(b) Without derogating from the generality of paragraph (a), the term "religious denomination or organization" shall not be construed to exclude religions that are

nontheistic, nontraditional, newly established or lacking institutional characteristics.

(ii) The Pagan Federation of South Africa

2.1.2.15 Bouwer and Cardona, the legal representatives of the Pagan Federation of South Africa (the Federation) note that during the past years after overseeing a suitable constitution and other legal requirements were met, they were requested by the Federation to attend to the designation of the Federation's high priestess as a marriage officer. Bouwer and Cardona state that considerable hurdles were placed before them and on 4 July 1997 they received a letter from the Department of Home Affairs outlining their reasons why their clients could not be afforded the privileges of a marriage officer. Bouwer and Cardona remark that before such decision was made, they forwarded considerable literature outlining Paganism as well as the objects and the responsible attitude of their clients, who despite being distrusted and relatively unknown have a considerable following. They state that the reply they received outlines most specifically the restrictions placed in the Marriage Act in that it states that only the ministers of certain religious organisations as designated may be appointed as marriage officers. Bouwer and Cardona consider this situation to be discriminatory and indicative of an unequal situation in that it excludes their clients who are an established religion nationally and internationally and who they believe qualify in all material respects as marriage officers. They recommend that the Marriage Act should be amended so as to provide that the designation of who may be appointed as marriage officers includes all religions with qualifications as to who in such religion may act as a marriage officer.

2.1.2.16 The beliefs of Paganism are explained as follows:[35]

> Neopagans believe that divinity is both immanent (internal) and transcendent (external), with immanence being far more important for us to pay attention to right now. This principle of immanence is frequently phrased as, 'Thou art God' or 'Thou art Goddess.' Deities can manifest at any point in space or time which They might choose, whether externally (through apparent 'visitations') or internally (through the processes known as 'inspiration,' 'conversation,' 'channelling,' and 'possession'). This belief often develops among neopagans into pantheism ('the physical world is divine'), panentheism ('the Gods are everywhere'), animism ('everything is alive'), or monism ('everything that exist is one being') all of which are concepts accepted by some Neopagans.
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[35] Isaac Bonewits "What Neopagans Believe" as contained in the publication *Pagan Africa* Vol 1 Issue 2 December 1997 at p 11 and 13 - 14 published by the Pagan Federation of South Africa.

> The term 'Pagan' comes from the Latin 'paganus,' which appears to have originally had such meanings as 'country dweller,' 'villager,' or 'hick.' The early Roman Christians used 'pagan,' to refer to everyone who preferred to worship pre-Christian divinities, whom the Christians had decided were all 'really' demons in disguise. Over the centuries, 'pagan' became an insult, applied to the monotheistic followers of Islam by the Christians (and vice versa), and by the Protestants and Catholics towards each other, as it gradually gained the connotation of '(a follower of and/or) a false religion.' By the beginning of the twentieth century, the word's primary meanings became a blend of 'atheist,' 'agnostic,' 'hedonist,' 'religionless,' etc., (when referring to an educated, white, non-Celtic European) and 'ignorant savage' when referring to everyone else on the planet).
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> Today there are many people who proudly call ourselves 'Pagan,' and we use the word differently from the ways that most mainstream Westerners do. To must of us, 'Pagan' is a general term for polytheistic religions old and new, as well as their members. ...
>
> 'Neopaganism' or 'Neo-paganism' refers to those religions created since 1960 or so (though they had literary roots going back to the mid-1800's), that have attempted to blend with what their founders perceived as the best aspects of different types of Paleopaganism with modern 'Aquarian Age' ideals, while consciously striving to eliminate as much as possible of the traditional Western monotheism and dualism.

(iii) The Campus Law Clinic of the University of Natal

2.1.2.17 The Campus Law Clinic of the University of Natal also suggests that the category of marriage officers should be widened to include all religious organisations and all other community leaders who have recognised standing in the community such as Chiefs and Headmen.

(iv) The Union of Orthodox Synagogues of South Africa

2.1.2.18 Chief Rabbi CK Harris states that the Jewish Community would support the recognition of all marriages performed under religious auspices and all marriages conducted by ethnic communities.

(v) The Federal Council of African Indigenous Churches

2.1.2.19 The Federal Council of African Indigenous Churches also proposes that a marriage officer provided by that particular church should officiate at the marriage, the marriage officer should issue the Church's marriage certificate and that the marriage certificates issued by African indigenous churches should be recognised. The Council suggests that queries about marriage certificates issued by African Indigenous Churches should be directed to the church organisation or council concerned.

(vi) The Church of Jesus Christ of the Latter-Day Saints

2.1.2.20 Mr De Wet[36] representing the Church of Jesus Christ of the Latter-Day Saints[37] ("the Church") remarks that the present position regarding the Church is that certain members of the Church in a position of responsibility have been appointed by the Minister of Home Affairs to perform civil marriages, and that other members of the Church in a position of responsibility are appointed by the Church to solemnise Church marriages within the Temple after the civil marriage has taken place. He also states that certain persons appointed by the Church to solemnise Church marriages within the Temple are not South African citizens. Mr De Wet recommends that the Minister of Home Affairs appoint persons, including non-citizens, holding a responsible position in the Church, as designated by the Church, as marriage officers. It should be noted that the Church considers the Temple marriage as the "real" marriage and not the civil one.

(vii) Mrs P Samjhawan on Hindu marriage officers

2.1.2.21 Mrs P Samjhawan states that she was married by a Hindu marriage officer and that she and her husband had all intentions of *legalising* their marriage in the Magistrates' Court. She explains that her husband died recently and she now suffers the consequences of her marriage not being recognised. She notes that she is totally helpless, she cannot attend to legal matters pertaining to her husband's estate, her husband's mother is the executor of the estate, she is not receiving any support from her inlaws, they feel they are in no way responsible for her and they are bound by her late husband's will. She considers that this is so due to the constraint that she and her husband were not *legally* married. Mrs P Samjhawan raises the question why should her marriage not be recognised as legal, noting that they were married by a Hindu marriage officer and in the presence of witnesses. She explains that she has based her marriage on affection and understanding rather than on a legal footing. She further notes that if she took her vows under these pretexts and God's guidance, why should

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36 Of the firm of attorneys D De Wet.

37 The Church of Jesus Christ of the Latter-day Saints was established in the USA on 6 April 1830. As at 31 December 1997 the Church was established in 143 nations worldwide with 24 670 congregations consisting of 10 070 524 members. The Church was established in South Africa in 1853. To date the Church in South Africa has 95 congregations consisting of 25 360 members.

people like her suffer these misgivings.

(viii) The Muslim Assembly

2.1.2.22 The Executive Director of the Muslim Assembly, Mr Moosa Valli Ismail (the "Muslim Assembly"), notes that the Muslim Assembly wishes to stress that every day spouses to Muslim marriages and their children suffer in various forms undue hardship because of the non-recognition of Muslim marriages, despite the fact that the Cape High Court ruled in *Edros v Ryland* that the decision in *Ismail v Ismail* [38] that Muslim marriages are against public policy, no longer reflects the spirit of the new Constitution which demands tolerance and respect for religious systems and cultural institutions. The Muslim Assembly remarks if parties by voluntary association choose to marry according to the laws of the Islamic faith that the Constitutional Court is likely to come to the conclusion that where provisions of the Islamic personal and family law are in conflict with certain provisions of the Bill of Rights, that the limitation clause of the Constitution will be invoked on the basis that respect for a person's religious systems of law is a matter of choice by adherents of the Islamic faith, the recognition of such laws being both necessary and reasonable in an open and democratic society. The Muslim Assembly considers that Roman Dutch Law and the general law of the law has been foisted onto the lives of the Muslims in regard to their private domain, thereby causing a great deal of hardship to Muslim spouses and their children in regard to matters which are of a private and/or personal nature, including property consequences that flow from Muslim marriages. The Muslim Assembly suggests that, like customary marriages, Muslim marriages (although potentially polygamous) should be recognised, subject to specified procedures laid down by Islamic Law. The Muslim Assembly remarks that in any event Muslim marriages are *de facto* monogamous whilst polygamous marriages are an exception.[39]

(ix) Mr Faizel Jacobs on Muslim marriages

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38 1983 1 SA 1006 (AD).

39 Ms Zuleka Adam remarks as follows in her submission on this issue:

> Polygamy is not recommended but only permitted in extraordinary circumstances; the swing towards conservatism however, does not bode well for women's choices when a spouse decides to engage in plural marriages. This will further diminish the survival of monogamous marriages and increase the economic strain on family life and women's self-esteem.

2.1.2.23 Mr Faizel Jacobs[40] remarks that Muslim marriages should not only be recognised, but legalised, but subject to the condition that such a marriage be legal and valid according to the law of Islam.

(d) Evaluation

2.1.2.24 The analysis given by the South African Supreme Court of Appeal in 1983 in the case of *Ismail v Ismail*[41] on the issue of Muslim marriages and their potential polygamous nature will be noted in detail in order to reflect the operation of the Marriage Act on the one hand and, on the other, how the question of the recognition of these marriages was dealt with in the past.[42] Mr Justice Trengove noted in the case that counsel conceded that, statutory exceptions apart, our Courts have persistently refused to give recognition and effect to polygamous unions on the grounds of public policy or as being *contra bonos mores* and that counsel contended, however, that we are living in a constantly changing world, that the attitude of society towards polygamous unions has in recent years become more tolerant, and that we have by statute been extending our recognition of such unions.

2.1.2.25 Mr Justice Trengove further noted in the *Ismail* case that plaintiff's counsel relied, firstly, on the provisions of sections 3(1) and 11 of Act 25 of 1961 which consolidates and amends the laws relating to the solemnisation of marriages and matters incidental thereto. The Court noted that the word "marriage" is not defined in the Act, but considered that it is quite clear from the context of the Act as a whole that it means a marriage under the common law, that is, a marriage which is designed to create a monogamous union. In the Court's view the provisions of sections 3(1) and 11 do not assist plaintiff's case. The Court remarked that referring to section 3(1), counsel contended that the Legislature has taken cognizance of the existence of Muslim marriages by providing for the appointment of marriage officers for the purposes of solemnising marriages according to Mohammedan rites. Mr Justice Trengove said that in the Court's view, the section does not accord any recognition whatever to polygamous unions and, if the purport of counsel's submission is that it does, he cannot accept it. He

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40 BA LLB currently doing articles at the University of Cape Town Law School.

41 1983 1 SA 1006(A).

42 Attention is drawn to the fact that the Minister of Justice has recently appointed the Commission's project committee on Islamic marriages and related matters which will consider, inter alia, the question of the legal recognition of Muslim marriages.

considered that section 3(1) clearly relates only to the form of the marriage ceremony, not to the essentials of the marriage as such. He further stated that the section, for example, enables a Muslim male and a Muslim female to have their marriage solemnised according to Muslim rites by an *Imam* who has been designated a marriage officer; but, if the marriage is intended to be a monogamous marriage, the *Imam*, officiating at such a marriage, will also have to comply with all the prescribed formalities pertaining to the solemnisation of marriages under the Act such as, for example, the provisions of s 29(2) which require, inter alia, that a marriage be solemnised in the presence of the parties themselves.

2.1.2.26 The Court stated also in the *Ismail* case that counsel for plaintiff sought to rely on section 11 as giving "some form of recognition" to the solemnization of a marriage ceremony in accordance with Muslim rites because such a ceremony "does not purport to effect a valid marriage".[43] The Court said that counsel submitted, quite rightly, that the marriage ceremony, in the instant case, fell within the ambit of s 11(3). The Court noted that it follows, as counsel said, that although the *Imam* who officiated at the ceremony was not a marriage officer, he was, nevertheless, not guilty of an offence under s 11 (2) because the ceremony did not purport to effect a valid marriage. Mr Justice Trengove stated that he cannot, however, accept counsel's further submission, namely that in consequence of the aforegoing the polygamous union between the parties and the customs incidental thereto are not to be regarded as being contra bonos mores, or unreasonable, or in conflict with the rules of law which are unalterable by agreement. He considered that the mere fact that the Legislature has not prohibited polygamous unions, recognised as marriages under the tenets of the Muslim faith, does not mean that it also approves of such unions or that the consequences thereof are legally enforceable. Mr Justice Trengove remarked that the effect of the aforementioned section is simply that parties entering into such a union commit no criminal offence, just as a man and a woman commit no crime by agreeing to live together, but that is a far cry from recognising and giving legal effect to such unions and the consequences thereof.

2.1.2.27 The Court further noted that it was also contended on plaintiff's behalf that the Legislature in this country has given increasing recognition to polygamous unions, and certain of the consequences thereof, and that this should be regarded as a spur to the Courts to exercise a formative jurisdiction in respect of related matters. The Court said that a perusal of the various provisions reveals that, whereas the Legislature has extended very wide and

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[43] See the discussion of section 11 below.

comprehensive recognition to Black customary unions (*as they were called then*) it has refrained from doing so in the case of customary polygamous unions of other ethnic or religious groups, such as the Muslim community, and as to the latter groups, the Legislature has, in a number of general statutes, and for specific purposes, recognised polygamous unions, obviously because it was considered expedient to do so. Mr Justice Trengove held that except for Black customary unions, he has not found any indication, in any of the statutory provisions to which the court has been referred, that the Legislature either expressly or impliedly approves of polygamy; or, as Chief Justice Innes said in *Seedat*'s case,[44] the existence of statutes in which such polygamous unions are recognised is no indication of "the tolerance of polygamy as part of the general South African system".

2.1.2.28 The Court stated that having considered all the arguments presented on plaintiff's behalf, it has come to the conclusion that it would not be justified in deviating from the long line of decisions in which our Courts have consistently refused, on grounds of public policy, to recognise, or to give effect to the consequences of, polygamous unions contracted in South Africa, statutory exceptions apart. The Court considered that the concept of marriage as a monogamous union is firmly entrenched in our society and the recognition of polygamy would, undoubtedly, tend to prejudice or undermine the status of marriage as we know it; and from a purely practical point of view it would also be unwise to accord recognition to polygamous unions for the simple reason that all our marriage and family laws - and to some extent also our law of succession - are primarily designed for monogamous relationships. The Court said furthermore, in view of the growing trend in favour of the recognition of complete equality between marriage partners, the recognition of polygamous unions solemnised under the tenets of the Muslim faith may even be regarded as a retrograde step; ex facie the pleadings, a Muslim wife does not participate in the marriage ceremony; and while her husband has the right to terminate their marriage unilaterally by simply issuing three "talaaqi", without having to show good cause, the wife can obtain an annulment of the marriage only if she can satisfy the *Moulana* that her husband has been guilty of misconduct. The Court considered that while this may be consistent with the tenets of the Muslim faith, it is entirely foreign to the South African notion of a conjugal relationship.

2.1.2.29 The Court further mentioned, in passing, that it seems unlikely that the non-recognition of polygamous unions will cause any real hardship to the members of the

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[44] *Seedat's Executors v The Master (Natal)* 1917 AD 302.

Muslim community, except, perhaps, in isolated instances, and that according to the pleadings, only about 2 per cent of all Muslim males in South Africa have more than one wife. This means, the Court noted, that approximately 98 per cent of all Muslim males have either contracted valid civil marriages or de facto monogamous unions, and, in the case of the latter, the parties have for many years had the right to convert their *de facto* monogamous unions into *de jure* monogamous unions. The Court considered that they had the option of doing so under the Indians' Relief Act 22 of 1914 (which was repealed by the General Law Amendment Act 57 of 1975) and they can still do so by entering into valid civil marriages under Act 25 of 1961.

2.1.2.30 The Court held that in the result, it has come to the conclusion that the polygamous union between the parties in the instant case must be regarded as void on the grounds of public policy. The Court further noted that it would not regard a polygamous union solemnised under the tenets of the Muslim faith, and the customs related thereto, as being *contra bonos mores*, in the narrower sense in which the expression is ordinarily used, ie as immoral, but such a union can be regarded as being *contra bonos mores* in the wider sense of the phrase, ie as being contrary to the accepted customs and usages which are regarded as morally binding upon all members of our society or, as Chief Justice Innes said in *Seedat*'s case at 309, "as being fundamentally opposed to our principles and institutions". As recent as 1995 the court states in the case of *Kalla and Another v The Master and Others*[45] that it follows that the reliance upon s 14(1) of the Constitution to validate retrospectively a marriage which was legally invalid in April 1992 when it was terminated by the death of the deceased, is misplaced. Mr Justice Van Dijkhorst remarked that he may mention in passing that the argument that Islamic polygamous marriages are no longer invalid in our law in view of s 14(1) of the Constitution may well flounder on the provisions of s 14(3) as it could be argued that these would not have been necessary had the draftsmen of the Constitution foreseen that s 14(1) would validate such unions and that the draftsmen in fact adopted the approach of *Seedat's Executors v The Master (Natal)* and provided for specified procedures. He further considered that apart from that, the principle of gender equality embodied in ss 8(2) and 119(3) and constitutional principles I, III and V (read with s 232(4)) may well lead to the conclusion that polygamous (and potentially polygamous) marriages are as unacceptable to the mores of the new South Africa as they were to the old.

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[45] 1995 1 SA 261 (T).

2.1.2.31 The Commission agrees with the view held by the Church of Scientology that the matrimonial law should be harmonised with social changes in South African society and that effect should be given to the principles of religious freedom and equal treatment which are contained in the South African Constitution. The first issue to be resolved is whether the Church of Scientology's suggested amendments to section 3(1) of the Marriage Act and specifically the phrase "*according to the rites of the religious denomination or organisation concerned*" will remedy the situation. An example of such a provision is section 402.050 of the Kentucky Revised Statutes[46] which provides as follows:

> (30) Marriage shall be solemnized only by:
> (1) Ministers of the gospel or priests of any denomination in regular communion with any religious society;
> (2) Justices and judges of the Court of Justice, retired justices and judges of the Court of Justice except those removed for cause or convicted of a felony, county judges/executives, and such justices of the peace and fiscal court commissioners as the Governor or the county judge/executive authorizes; or
> (3) A religious society that has no officiating minister or priest and whose usage is to solemnize marriage at the usual place of worship and by consent given in the presence of the society, if either party belongs to the society.

2.1.2.32 Another option would be to take the route the Department of Home Affairs suggested in its Bill in granting authority to the Minister of Home Affairs to designate a person as a marriage officer once the Minister is satisfied that the denomination or organisation concerned is a bona fide religious denomination or organisation. A third possibility would be to designate by proclamation recognised religious groups or religious organisations. The question arises whether the last-mentioned possibility would be constitutional. A feature of a number of the Marriage Acts of other countries is the notion of recognised or approved religions, churches or congregations. The Marriage Act of the Canadian Province of New

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[46] Section 46b-22(a) of the General Statutes of Connecticut contains a similar provision, although it specifies a particular denomination:
All judges and retired judges, either elected or appointed, family support magistrates, state referees and justices of the peace may join persons in marriage in any town in the state and all ordained or licensed clergymen, belonging to this state or any other state, so long as they continue in the work of the ministry may join persons in marriage. All marriages solemnized according to the forms and usages of any religious denomination in this state, including marriages witnessed by a duly constituted Spiritual Assembly of the Baha'is, are valid. All marriages attempted to be celebrated by any other person are void.

Brunswick provides that the Registrar may recognise a church or religious denomination where that church or religious denomination is duly incorporated under the laws of the province, and is, to the satisfaction of the Registrar, permanently established as to the continuity of its existence in accordance with the criteria prescribed by the regulations.[47] The Alaskan Marriage

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[47] Section 2(2). In terms of section 2(3) a decision by the Registrar to recognise, or a refusal to recognise, a church or religious denomination may be reviewed by the Minister of Health and Community Services, and any decision of the Minister to recognise a church or religious denomination shall be deemed to be a recognition under subsection (2). The Marriage Act of the Province of British Columbia contains similar provisions which provide as follows:

2(1) On application, in the form required by the director, the director may register any religious representative as authorized to solemnize marriage.

(2) The application on behalf of a religious representative must be made by the governing authority with jurisdiction in British Columbia over the religious body to which the religious representative belongs.

(3) The wording of the form required by the director may be varied according to the facts, to set out other qualifications for registration recognized by this Act.

(4) The director may

(a) issue to the governing authority one or more certificates of registration in respect of each religious representative registered under this Act, and

(b) include in one certificate the names of any number of registered religious representatives who belong to the same religious body.

(5) The director must keep a register showing

(a) the name of every religious representative registered,

(b) the name of the religious body to which the religious representative belongs, and

(c) the date of the religious representative's registration.

(6) The director must issue a certificate of registration to each religious representative registered under this Act.

(7) The director may register a person as a religious representative if the director is satisfied that

(a) the doctrines of a religious body do not contemplate a religious representative for the religious body, and

(a) the appropriate governing body of the religious body has designated a person to act in the place of a religious representative to perform all the duties imposed by this Act on a person solemnizing a marriage, other than solemnizing the marriage, in respect of marriages performed according to the rites and usages of the religious body.

3 (1) A person must not be registered as a religious representative unless the director is satisfied as follows:

(a) that the person is a religious representative ordained or appointed according to the rites and usages of the religious body to which he or she belongs, or is by the rules of that religious body deemed an ordained or appointed religious representative because of some earlier

Code provides that marriages may be solemnised by a minister, priest, or rabbi of any church or congregation in the State, or by a commissioned officer of the Salvation Army, or by the principal officer or elder of recognised churches or congregations that traditionally do not have regular ministers, priests, or rabbis, anywhere in the State.[48] The Australian Marriage Act provides that the Governor-General may, by Proclamation, declare a religious body or religious organisation to be a recognised denomination for the purposes of that Act.[49] This provision was considered in the case of *Re: Michael William Nelson and: M Fish and R Morgan*[50]. Mr Justice French noted that the applicant was the High Priest of a religious organisation called "Gods Kingdom Managed by his Priest and Lord" (KMP/L) who applied to the Attorney-General's Department under the provisions of the Marriage Act for registration as a minister of religion authorised to solemnise marriages and that registration was refused. The Court further noted that the applicant was advised by the Attorney-General's Department that organisations applying for proclamation as recognised denominations were required to meet certain

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ordination or appointment;

(b) that the person

(i) is, as a religious representative, in charge of or officiating in connection with a congregation, branch or local unit in British Columbia of the religious body to which he or she belongs, or

(ii) is a resident in British Columbia who was formerly in charge of or officiating in connection with a congregation, branch or local unit in British Columbia, has been superannuated or placed on the supernumerary list, or is a retired religious representative in good standing of the religious body to which he or she belongs;

(c) that the person is, as a religious representative, recognized by the religious body to which he or she belongs as authorized to solemnize marriage according to its rites and usages;

(d) that the religious body to which the person belongs is sufficiently well established, both as to continuity of existence and as to recognized rites and usages respecting the solemnization of marriage, to warrant, in the opinion of the director, the registration of its religious representatives as authorized to solemnize marriage.

(2) If a religious representative is in British Columbia temporarily, and, if resident and officiating in British Columbia, might be registered under subsection (1) as authorized to solemnize marriage, the director may register the person as authorized to solemnize marriage during a period to be set by the director.

(3) A certificate of registration issued under subsection (2) must state the period during which the authority to solemnize marriage may be exercised.

48 Alaska Statutes section 25.05.261.

49 Section 26.

50 WA G138 of 1989 Fed No 29 in the Federal Court of Australia.

guidelines which have been approved by successive Attorneys-General and that these guidelines were-

* the applicant organisation should be independent of any other religious body;
* the organisation should have congregations in more than one locality;
* some form of central administration for the organisation should exist to act as a nominating authority; and
* there should be some evidence that the organisation is stable and likely to continue as an entity.

2.1.2.33 The Court stated that the central point of the applicant's argument for damages turns upon the constitutionality of those provisions of the Marriage Act which give a particular status to certain proclaimed religious organisations. The Court noted the following features of the Act: only a person authorised under the Marriage Act may solemnise a marriage and it is an offence for a person not authorised to do so; if two persons are already married to each other they are prohibited from going through another form of ceremony of marriage with each other, nor may an authorised celebrant purport to solemnise such a marriage, although this does not prevent such persons from going through a religious ceremony of marriage provided they produce to the person in whose presence the ceremony is performed a certificate of their existing marriage and a written statement to be witnessed by that person that they have previously gone through a form of marriage with each other, that they are the parties mentioned in the certificate and have no reason to believe that they are not legally married. The Court also remarks that the Act establishes a Register of Ministers of Religion, that a minister who is so registered may solemnise marriages at any place in Australia and that a person is entitled to be registered if the person is-

* a minister of religion of a recognised denomination;
* nominated for registration by that denomination;
* ordinarily resident in Australia; and
* of or over the age of 21 years.

2.1.2.34 The Australian Federal Court further considered whether the legislation is a law

for establishing a religion as contemplated in section 116 of the Australian Constitution.[51] The Church noted that the question whether a law is one for establishing a religion may be one of degree. The Court considered that its judgement cannot be divorced from a consideration of the content of the power under which the impugned legislation is enacted, and that in that regard the scope of the constitutional power of the Commonwealth to make laws with respect to marriage "should receive no narrow or restrictive construction" as the Court noted in *Attorney-General (Vic) v The Commonwealth* (1962) 107 CLR 529 at 543 and as Professor Harrison-Moore observed in a passage quoted by the latter Court "it enables the Commonwealth to determine what marriages shall be recognised in the Commonwealth and the forms for the celebration of marriage." The Court stated that having regard to the constitutional responsibility of the Commonwealth with respect to marriage a provision for the designation of particular religious denominations as bodies whose ministers may be registered to perform marriages could not reasonably be said to constitute the establishment of those bodies as religions within the meaning of section 116. The Court however said that that is not to say that the legislation could validly authorise a monopoly in religious marriages in favour of one particular denomination, although there is nothing in the applicant's complaints to suggest that it is so applied and that the criteria for recognition adverted to in the material submitted by him are evidence to the contrary.

2.1.2.35 The Court also referred to the question whether the prohibition on the performance of marriages by persons other than those authorised under the Act could arguably constitute "a law prohibiting the free exercise of any religion" within the meaning of section 116. The Court noted in that connection that it is relevant to note the provisions of section 113(5) of the Act which enable performance of a religious ceremony of marriage by a person who is not an authorised celebrant where the persons undergoing the ceremony are already legally married to each other and that the freedom guaranteed by section 116 is not absolute. The Court remarked that it is freedom in a society organised under the Constitution and it is subject to limitations which it is the function and duty of the courts to expound, and those limitations are such as are reasonably necessary for the protection of the community and in the interests of social order. The Court referred to *Adelaide Company of Jehovah's Witnesses Incorporated*

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[51] S 116 The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.

v The Commonwealth[52] where Mr Justice Williams said:

> "...the meaning and scope of s.116 must be determined, not as an isolated enactment, but as one of a number of sections intended to provide in their inter-relation a practical instrument of government, within the framework of which laws can be passed for organizing the citizens of the Commonwealth in national affairs into a civilized community, not only enjoying religious tolerance, but also possessing adequate laws relating to those subjects upon which the Constitution recognizes that the Commonwealth Parliament should be empowered to legislate in order to regulate its internal and external affairs."

2.1.2.36 The Court considered that in the light of those principles the statutory scheme for regulating the class of persons who may solemnise marriages does not disclose any basis upon which it could be argued that it interferes with religious freedom in a way that conflicts with section 116. The Court further considered that the provisions of section 113(5) preserve in a way that is consistent with the free exercise of religious observance the right of persons married in the eyes of the law to undergo a religious form of marriage even where the religion concerned is not a recognised denomination and its minister not a registered minister.

2.1.2.37 The New Zealand Act provides similarly to the provisions of the Australian Marriage Act for the appointment of ministers of religion of approved religious bodies to solemnise marriages:

> 8.(1) Subject to the provisions of subsections (2) and (3) of this section, there shall be entered in the list the name of any minister of religion which has been sent to the Registrar-General by any of the religious bodies enumerated in the First Schedule to this Act.[53]
> (2) The name of any minister of religion which has been sent to the Registrar-

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52 (1943) 67 CLR 116 at 159.

53 The First Schedule to the New Zealand Marriage Act provides as follows:
RELIGIOUS BODIES
Baptists.
The Church of the Province of New Zealand, commonly called the Church of England.
Congregational Independents.
The Greek Orthodox Church.
All Hebrew Congregations.
The Lutheran Churches.
The Methodist Church of New Zealand.
The Presbyterian Church of New Zealand.
The Roman Catholic Church.
The Salvation Army.

General as aforesaid shall be accompanied by a certificate to the effect that the minister is recognised by the religious body as a minister of religion of that body.

(3) The certificate shall be signed by the person or persons within New Zealand in whom ecclesiastical authority over the religious body is for the time being vested, or reputed to be vested, or, if there is no such person, by 2 duly recognised office bearers of the religious body.

9.(1) Any organisation may apply to the Registrar-General in the manner hereinafter provided for approval as an organisation which may, pursuant to section 10 of this Act, nominate persons to solemnise marriages, (therein and in this section referred to as an approved organisation).

(2) Every such application shall be accompanied by a statement signed by the chief office bearer and 10 members of the organisation, all being of or over the age of 18 years, each of whom shall append his age and address, setting out:

(a) The objects and beliefs of the organisation; and

(b) The number or, if this cannot accurately be ascertained, the approximate number of members of the organisation of or over the age of 18 years:

Provided that in the case of any organisation the constitution or tenets of which do not recognise any chief office bearer an application signed as aforesaid by 10 members only shall be sufficient.

(3) The signatures of the signatories to every application shall be attested by some other person who shall, by statutory declaration attached to the statement, verify the signatures as the genuine signatures of the persons whose signatures they purport to be.

(4) If the Registrar-General is satisfied that the principal object or one of the principal objects of the organisation is to uphold or promote religious beliefs or philosophical or humanitarian convictions, he may by notice in the Gazette declare the organisation to be an approved organisation.

(4A) If the Registrar-General fails or refuses to declare the organisation an approved organisation, he shall, if required to do so by the organisation, refer the application to the Minister who, if he is satisfied that the principal object or one of the principal objects of the organisation is to uphold or promote beliefs or convictions as aforesaid, may direct the Registrar-General to declare the organisation, by notice in the Gazette, an approved organisation; and in that case the Registrar-General shall forthwith do so.

(5) Repealed.

(6) Repealed.

(6A) ...[54]

(8) Every religious body not enumerated in the First Schedule to this Act of which a member was an officiating minister immediately before the commencement of the Marriage Amendment Act 1976 is hereby declared to be an approved organisation.[55]

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[54] See below the discussion on a change of name of the religious organisation or denomination, amalgamation etc.

[55] The repealed section 9(4) -(6) provided as follows:
(4) The Registrar-General shall forward every application to the Minister of Justice together with either a favourable or an unfavourable recommendation.
(5) The Registrar-General shall not make a favourable recommendation on any application unless he is satisfied that the principal object or one of the principal objects of the organisation is to uphold or promote religious beliefs or philosophical or

10.(1) The name of every adult member of an approved organisation nominated to be a marriage celebrant shall be sent to the Registrar-General together with a certificate from the organisation declaring that it wishes the member to be a marriage celebrant.
(2) The certificate shall be signed and attested in the manner specified in section 9 of this Act for applications for approval.
(3) If the Registrar-General is satisfied that any person so nominated is of good character and otherwise qualified to act as a marriage celebrant, and that the provisions of this Act in respect of the submission of his name have been complied with, he shall enter the name of the person on the list.
(4) If the Registrar-General fails or refuses to enter in the list the name of any person nominated pursuant to this section he shall, if required to do so by any signatory to the certificate accompanying the person's nomination, refer the nomination to the Minister, who may direct the Registrar-General to enter the person's name in the list and in that case the Registrar-General shall forthwith enter the person's name in the list.

2.1.2.38 The Commission notes the efforts taken by the Church of Scientology in drafting a definition on religious denominations and organisations. The question is whether the route taken by jurisdictions such as Australia, Alaska, the Canadian Provinces and New Zealand should be followed in the South African Marriage Act. We noted that the Marriage Act permits the designation as a marriage officer of any minister of or person holding a responsible position in "any religious denomination or organization". It is restrictive in that marriage officers can be designated only for the purpose of conducting marriages according to "Christian, Jewish or Mohammedan rites or the rites of any Indian religion." The Commission considered whether the suggested phrase “according to the rites of the religious denomination or organisation concerned” will remedy the situation. The Commission also considered the option suggested by the Department of Home Affairs to grant authority to the Minister of Home Affairs to appoint a person as a marriage officer who has been nominated by a religious denomination or organisation once the Minister is satisfied that the denomination or organisation concerned is a bona fide religious denomination or organisation. The problem with this option is that it suggests no other grounds for the Minister to refuse to appoint the person concerned (eg that he or she is unfit to be a marriage officer) except for a defect in the *bona fides* of the organisation. A third option considered was to empower the Minister to designate by proclamation recognised religious groups or religious organisations. The Marriage Act could

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humanitarian convictions.
(6) If the Minister is satisfied that the principal object or one of the principal objects of the organisation is to uphold or promote beliefs or convictions as aforesaid, he may by notice in the Gazette declare the organisation an approved organisation.

then provide that ministers of religion or persons holding responsible positions in religious denominations or religious organisations recognised by the Minister by notice in the *Gazette,* may be designated by the Minister to be marriage officers. The Commission decided to leave the question to respondents and invites comment on these options. Comment is also invited as to whether criteria formulated to guide the Minister in the exercise of his or her powers should be included in the Act.

2.1.2.39 The question also arises whether there is a need to reconsider the limitation placed on the authority of ministers of religion or persons holding responsible positions in religious organisations or denominations to join parties in marriage. As noted above the Act presently makes provision that such authority may be limited by the Minister to specified areas or specified periods. The Commission considers that there is no apparent reason why the Minister should be prevented from limiting the authority as is presently the case. Comment is, however, invited on this aspect.

2.1.2.40 The Commission considers the principle suggested by the Department of Home Affairs setting out the powers of the High Court and the procedure of review to be persuasive. The Commission has also noted particularly the provisions contained in the Marriage Act of British Columbia[56] and is of the view that legal certainty will be one of the results should such a review procedure be set out in the Marriage Act. The Commission is further of the view that this section should also make provision for review where the registration of a marriage officer is revoked and that the Department of Home Affairs' suggested clause be amended accordingly. 2.1.2.41 The Commission does not address the issue of customary marriages and

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[56] 5(1) If the director refuses the application made on behalf of a person for registration under this Act as a religious representative authorised to solemnize marriage, or if the director cancels the registration of any religious representative, the person or the religious representative may appeal from the refusal or cancellation on a question of law to the Supreme Court within 3 months after the refusal or cancellation.
(2) On an application by the person or the religious representative, the court may direct the procedure to be followed in the appeal.
(3) The court may
(a) make an order confirming the refusal or cancellation of registration appealed from, or
(b) order the director to grant the application for registration or to reinstate the registration of the religious representative.
(4) An order under subsection (3) is final, and the director must give effect to the order.

the recognition of marriages contracted in terms of Muslim law or Hindu law, because the position on customary marriages was considered in the Commission's Report on Customary Marriages[57], and because religious marriages are due to be dealt with in the Commission's investigation into Islamic marriages and related matters.[58] The Commission is nevertheless of the view that the appointment of religious leaders from the Muslim and Hindu faiths as marriage officers will serve to alleviate the hardships experienced by adherents to these religions.

(e) Recommendation

2.1.2.42 The Commission's preliminary view is that section 3 of the Marriage Act should be amended to provide as follows in subsections (1) and (3):

> (1) The Minister may designate any minister of religion of, or any person holding a responsible position in, any recognised religious denomination or organization recognised by the Minister by notice in the *Gazette* to be, so long as he or she is such a minister or occupies such position, a marriage officer for the purpose of joining parties in[59] marriage according to the tenets of the religious denomination or organization.
> (3) Any decision made by the Minister under this section to appoint a marriage officer or to revoke the designation of any person as a marriage officer under section 9 shall be reviewable by any provincial or local division of the High Court of South Africa, and the Court-
> (a) may call upon the Minister to furnish reasons and to submit such information as the Court deems fit; and
> (b) may-
> (i) consider the merits of the matter under review; and
> (ii) confirm, vary or set aside the decision of the Minister.

2.1.3 MARRIAGE OFFICERS FOR CUSTOMARY MARRIAGES

(a) The Department of Home Affairs' suggested provision

2.1.3.1 The Department of Home Affairs suggested the following clause:

> 10. The Minister may appoint any person he or she considers to be a fit and proper

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57 Which resulted in the adoption of the Recognition of Customary Marriages Act, No.120 of 1998.

58 Project 59. A project committee was recently appointed by the Minister of Justice.

59 It is recommended that the words *join parties in marriage* or *join in marriage* or conduct marriage be substituted for the word *solemnize* where appropriate. See below the comments by Prof Bekker on why marriages are not *solemnized*.

person to solemnize customary marriages, as a marriage officer for customary unions for a particular district or specified area.

(b) Evaluation

2.1.3.2 Customary marriages are not constituted by a marriage officer officiating at the marriage ceremony. A customary marriage is effected by the families of the bride and groom negotiating a relationship between the two kinship groups. The appointment of marriage officers to conduct customary marriages would therefore be a foreign concept to customary traditions and culture and would not constitute a recognised requirement for establishing customary marriages. Moreover, the matter is now covered by the Recognition of Customary Marriages Act, No 120 of 1998.

(c) Recommendation

2.1.3.3 It is recommended that the Department of Home Affairs' suggested clause 10 providing for the appointment of marriage officers to solemnise customary marriages, should not be included in the amended Marriage Act.

2.1.4 HOW DESIGNATION AS MARRIAGE OFFICER TO BE MADE

(a) The provision contained in the Marriage Act

2.1.4.1 The Marriage Act contains the following provision:

> 4. Every designation of a person as a marriage officer shall be by written instrument and the date as from which it shall have effect and any limitation to which it is subject shall be specified in such instrument.

(b) The Department of Home Affairs' suggested Bill

2.1.4.2 The Department of Home Affairs did not include a similar provision in its proposed Bill.

(c) Evaluation

2.1.4.3 No respondent addressed this aspect. The Marriage Act of the Canadian Province of Ontario requires that when a person is registered under the Act as authorised to solemnise marriage, and when any such registration is cancelled, the Minister of Consumer and Commercial Relations shall publish notice thereof in the *Ontario Gazette*.[60] It seems to the Commission that for the sake of legal certainty a provision is needed in the South African Marriage Act setting out the way in which a person is designated a marriage officer. The present provision is quite simple if compared to the system existing in New Zealand where the names of marriage celebrants are put on a list of celebrants which has to be published annually in their Gazette. The New Zealand system therefore serves to effect in all probability more legal certainty than the present South African system does. The Commission does not believe that a system similar to the New Zealand system should be implemented in South Africa, particularly in view of the lack of comments in this regard. The Commission is nevertheless of the view that section 4 of the Marriage Act should be retained.

(d) Recommendation

2.1.4.4 The Commission recommends that the present position requiring that marriage officers be designated by written instrument be retained and that there does not seem to be justification for the deletion of section 4 of the Marriage Act.

2.1.5 MARRIAGE OFFICERS UNDER LAWS REPEALED BY THE MARRIAGE ACT

(a) The provisions contained in the Marriage Act

2.1.5.1 The Marriage Act contains the following provisions:

> 5(1) Any person who, at the commencement of this Act, or of the Marriage Amendment Act, 1970, is under the provisions of any prior law authorized to solemnize any marriages, shall continue to have authority to solemnize such marriages as if such law had not been repealed, but shall exercise such authority in accordance with the provisions of this Act.
> (2) Any person shall be deemed to have been designated as a marriage officer under this Act.

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[60] Section 23.

(3) ... (Deleted)

(b) The Department of Home Affairs' suggested provision

2.1.5.2 The Department of Home Affairs suggested the following provision:

> 5. Any person who is appointed as a marriage officer under a law which is repealed by this Act shall be deemed to be a marriage officer appointed under this Act, for the period and area in which and the conditions subject to which such marriage officer was appointed.

(c) Evaluation

2.1.5.3 The question arises whether the Department of Home Affairs' suggested clause 11 may have a more limited application than section 5 which states, inter alia, that the appointed marriage officer shall exercise such authority in accordance with the provisions of the Act. It seems as if the Department's suggested clause deals only with the aspects of appointment for the period, area and subject to the conditions of appointment. It is considered that the present section 5 should be retained.

(d) Recommendation

2.1.5.4 It is recommended that the present section 5 of the Marriage Act be retained.

2.1.6 THE *SOLEMNISATION* OF MARRIAGES

(a) The provisions contained in the Marriage Act

2.1.6.1 As noted above, the Marriage Act provides in section 3(1) that certain persons may be designated marriage officers for the purpose of *solemnising* marriages. The term is also used in sections 5, 6(3) and (5), 9, 10(1) and (2), 11(1) and (2), 12, 22, 23, 24(1), 26(2), 27, 29(1), (2) and (3), 29A(1), 30(1), (2) and (3), 31, 33 and 35.

(b) Comments by respondents

2.1.6.2 Only Professor JC Bekker addressed this aspect. He suggests that the term "solemnise" seems to be obsolete because it is derived from a performance in the context of religious rites and ceremonies, and as marriages are no longer necessarily religious, one may simply refer to the occasion as a registration. Professor Bekker notes that Ministers do not, after all, appoint officials to register motor vehicles and therefore he poses the question why Ministers should appoint people who register marriages. He considers that the acceptance of the marriage event as a registration should not unduly disturb religious denominations, since they have in any event their rituals. Professor Bekker therefore questions the fact that the Marriage Act appears to equate the registration of a marriage with a solemn occasion.

(b) Evaluation

2.1.6.3 It is noteworthy that the General Statutes of Connecticut uses the terms "join persons in marriage"[61] and "celebrate marriages". The Commission agrees with Professor Bekker's argument that a marriage is not necessarily *solemnised*. However, it seems that the issue is more complicated than would seem at first glance. The question arises whether the term "registration" would necessarily be a suitable substitute under all circumstances. It is not entirely clear whether the term "registration" might lead to confusion in the sense of a marriage being formally recorded as opposed to a marriage ceremony being conducted or the parties being joined in marriage. The Commission therefore considers that the substitution of the term "solemnisation" or "solemnise" needs further consideration and that it may be more appropriate to use the terms "join parties in marriage" or "conduct a marriage ceremony".

(c) Recommendation

2.1.6.4 The Commission recommends that the terms "join parties in marriage" or "conduct a marriage ceremony" be substituted for the terms "solemnize" or "solemnization" where appropriate in sections 3(1) and (2), 5, 6(3) and (5), 9, 10(1) and (2), 11(1) and (2), 12, 22, 23, 24(1), 26(2), 27, 29(1), (2) and (3), 29, 29A(1), 30(1), (2) and (3), 31 and 35.

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[61] Inter alia in sections 46b-22 and 46b-23.

2.1.7 CERTAIN PERSONS MAY IN CERTAIN CIRCUMSTANCES BE DEEMED TO HAVE BEEN MARRIAGE OFFICERS

(a) The provisions contained in the Marriage Act

2.1.7.1 The Marriage Act contains the following provisions:

> 6(1) Whenever any person has acted as a marriage officer during any period or within any area in respect of which he was not a marriage officer under this Act or any prior law, and the Minister or any officer in the public service authorized thereto by the Minister is satisfied that such person did so under the bona fide belief that he was a marriage officer during that period or within that area, he may direct in writing that such person shall for all purposes be deemed to have been a marriage officer during such period or within such area, duly designated as such under this Act or such law, as the case may be.
> (2) Whenever any person acted as a marriage officer in respect of any marriage while he was not a marriage officer and both parties to that marriage bona fide believed that such person was in fact a marriage officer, the Minister or any officer in the public service authorized thereto by him may, after having conducted such inquiry as he may deem fit, in writing direct that such person shall for all purposes be deemed to have been duly designated as a marriage officer in respect of that marriage.
> (3) Any marriage solemnized by any person who is in terms of this section to be deemed to have been duly designated as a marriage officer shall, provided such marriage was in every other respect solemnized in accordance with the provisions of this Act or any prior law, as the case may be, and there was no lawful impediment thereto, be as valid and binding as it would have been if such person had been duly designated as a marriage officer.
> (4) Nothing in this section contained shall be construed as relieving any person in respect of whom a direction has been issued thereunder, from the liability to prosecution for any offence committed by him.
> (5) Any person who acts as a marriage officer in respect of any marriage, shall complete a certificate on the prescribed form in which he shall state that at the time of the solemnization of the marriage he was in terms of this Act or any prior law entitled to solemnize that marriage.

(b) The Department of Home Affairs' suggested provisions

2.1.7.2 The Department of Home Affairs' proposed clause 13 corresponds largely with the present Act, the only differences being the deletion in subsections (1) and (2) respectively of the words "or any officer in the public service authorized thereto by the Minister" and "or any officer in the public service authorized thereto by him", the inclusion of the words or customary union in subsections (2), (3) and (5) after the words marriage and the references to "he" or "she" instead of "he" throughout the section.

(c) Evaluation

2.1.7.3 The Marriage Act of the Province of New Brunswick makes provision that whenever it is made to appear to the Lieutenant-Governor in Council by affidavit that a marriage has been solemnized in the Province in good faith and in ignorance of the requirements of the law by a person who was not at the time duly authorized to solemnize marriage, the Lieutenant-Governor in Council may by order ratify and confirm all marriages performed by that person during a period fixed by such order, or may ratify and confirm any particular marriage or marriages solemnized by that person, and upon such order being made all marriages so ratified and confirmed shall be deemed to be valid from the time of the solemnization thereof, but nothing in the section or in any such order has the effect of confirming or rendering valid a marriage between parties not legally competent to enter into the marriage contract by reason of consanguinity, affinity or otherwise.[62]

2.1.7.4 The Commission considers that there is no need to amend section 6 which makes provision for persons being deemed to have been marriage officers under circumstances where they acted as marriage officers under the *bona fide* belief that they were marriage officers. Furthermore, it would appear that the Department of Home Affairs proposes the deletion in section 6 of the references to "or any officer in the public service authorized

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[62] Section 29(1). The Province of British Columbia's Marriage Act provides likewise in section 11 that the Director of Vital Statistics may sign a written declaration waiving the requirements of the Act as to registration of a religious representative in respect of a marriage if the director is satisfied by an affidavit that the marriage has been solemnised in British Columbia in good faith and intended compliance with the Act by a religious representative who was not registered as authorized to solemnize marriage, and in ignorance of the requirements of this Act, neither of the parties to the marriage was at the time under any legal disqualification to contract the marriage, the parties after that lived together and cohabited as husband and wife, neither of the parties has since contracted valid marriage according to law, and the validity of the marriage has not been questioned by action in any court. Furthermore, when a declaration is signed under section 11(1), the solemnization of the marriage is deemed for all purposes to be and have been lawful and valid from the date of the solemnization. The Ontario Marriage Act provides concisely that if the parties to a marriage solemnized in good faith intended to be in compliance with the Act are not under a legal disqualification to contract such marriage and after such solemnization have lived together and cohabited as man and wife, such marriage shall be deemed a valid marriage, although the person who solemnized the marriage was not authorized to solemnize marriage, and despite the absence of or any irregularity or insufficiency in the publication of banns or the issue of the licence.

thereto by the Minister" and "or any officer in the public service authorized thereto by him" since the Department proposes in its clause 2 that the Minister may, subject to the conditions that he or she may deem necessary, delegate any power conferred on him or her by this Act to a person in the service of the Department, but shall not be divested of any power so delegated and may set aside or amend any decision of the delegate made in the exercise of such a power. The question arises whether the power of the Minister should be limited to the delegation of power only to persons in the service of the Department of Home Affairs and whether it is possible that there may be circumstances where there would be a need to delegate powers to any officer in the civil service as the Act currently provides. It seems, however, hardly likely that the Minister of Home Affairs would delegate powers to persons who are not officers in his Department and who are not accountable to him or her. The Department of Home Affairs' suggested provisions dealing with the delegation of the power of the Minister are therefore considered persuasive.

2.1.7.5 Furthermore, as stated above, the issue of customary marriages is now subject to separate legislation and all mention of them should be deleted from the proposals of the Department of Home Affairs.

(d) <u>Recommendation</u>

2.1.7.6 It is recommended that section 6 should continue to make provision that persons may be deemed to have been marriage officers in circumstances where they acted as marriage officers under the *bona fide* belief that they were marriage officers. It is further recommended that section 6 of the Marriage Act should be amended to reflect the Department of Home Affairs' suggested provisions on the delegation of the powers of the Minister of Home Affairs. It is recommended that a section 2A be inserted in the Act to govern as follows the delegation of the Minister's powers:

> 2A. The Minister may, subject to the conditions he or she may deem necessary, delegate any power conferred on him or her by this Act to a person in the service of the Department, but shall not be divested of any power so delegated and may set aside or amend any decision of the delegate made in the exercise of such power.

2.1.8 PRIVATISATION OF AUTHORITY TO CONDUCT MARRIAGES

(a) <u>Comments by respondents</u>

2.1.8.1 Mrs Olga Kruger suggests that the joining of parties in marriage should be privatised. She notes that many marriages in foreign countries are also conducted by privately registered marriage officers, as this is to the advantage of many members of the public who would like to be married at a venue of their choice.[63] Mrs Kruger suggests that persons appointed in the position of marriage officers should be thoroughly screened and should have passed the written examination. She further suggests that a fee could be charged to prevent persons taking advantage of their positions.

2.1.8.2 Reverend Dr Louis Bosch's suggestion is similar to that of the previous respondent. He remarks that the proliferation of all kinds of groups, both religious and secular, gives rise to new needs and, in order to satisfy these needs, a new approach to the appointment of marriage officers should be adopted. Reverend Bosch makes the following recommendations with regard to the appointment of marriage officers:

- A person desiring to be a marriage officer should not necessarily be subject to a religious institution or authority in order to register and act as an appointed official in this capacity;
- A marriage officer should be appointed upon his or her personal application to the Minister of Home Affairs, subject to his or her satisfying the requirements of the Department, and new criteria should be set to define a bona fide candidate applying for a marriage officer's licence such as that-
  - the persons applying must submit good reasons to be granted a marriage officer's licence according to the discretion implied in the Marriage Act as to who is suitable to be so appointed;
  - applicants must be trained and qualified;
  - that they in fact serve those many people who have objections to their marriages taking place in a church or in a court of law.

(b) <u>Evaluation</u>

2.1.8.3 The Commission noted that the New Zealand Marriage Act makes provision for the appointment of, *inter alia,* persons of good character as marriage celebrants. The question

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[63] Her other suggestions on the present provisions being restrictive in relation to the places of conducting marriages will be considered below.

which comes to mind is whether the case for the appointment of persons other than the existing category of marriage officers under the South African Marriage Act is convincingly argued by the two respondents mentioned above. In view of the limited requests calling for such a step, the Commission is not convinced that the appointment of marriage officers should be extended to include persons other than those in the present categories.

(c) Recommendation

2.1.8.4 The preliminary view of the Commission is that it seems hardly justified to *privatise* the joining of parties in marriage by the appointment of persons other than magistrates, employees in the public service, or the diplomatic or consular service or ministers of religion or other persons holding responsible positions in any religious denomination or organisation. However, the Commission would appreciate the view of respondents on this matter.

2.1.9 CHANGE OF NAME OF RELIGIOUS DENOMINATION OR ORGANISATION AND AMALGAMATION OF RELIGIOUS DENOMINATIONS OR ORGANISATIONS

(a) The provisions contained in the Marriage Act

2.1.9.1 The Marriage Act contains the following provisions:

> 8(1) If a religious denomination or organization changes the name whereby it was known or amalgamates with any other religious denomination or organization, such change in name or amalgamation shall have no effect on the designation of any person as a marriage officer by virtue of his occupying any post or holding any position in any such religious denomination or organization.
>
> 8(2) If a religious denomination or organization in such circumstances as are contemplated in sub-section (1) changes the name whereby it was known or amalgamates with any other religious denomination or organization, it shall immediately advise the Minister thereof.

(b) The Department of Home Affairs' proposed Bill

2.1.9.2 The Department of Home Affairs did not include a similar provision into its proposed Bill.

(c) Evaluation

2.1.9.3 The following provisions of the New Zealand Marriage Act are considered noteworthy for the purposes of the present discussion:

(6A) Where an approved organisation changes its name or any of its objects, it shall forthwith give the Registrar notice in writing, signed in the manner required by subsection (2) of this section for an application under subsection (1) of this section,--
- (a) Of its former and new names; and
- (b) Of whether or not its objects remain unchanged since it last stated them to the Registrar-General under this section; and
- (c) If those objects do not so remain unchanged, stating its present objects.

(6B) Where the Registrar-General is satisfied that an approved organisation has changed its name he shall notify the change by notice in the Gazette specifying that organisation's former and new names.

(6C) Where the Registrar-General--
- (a) Has been notified under subsection (6A) of this section that the objects of an approved organisation have changed; or
- (b) Is satisfied that any of the objects of an approved organisation has changed since that organisation last stated its objects to the Registrar-General under this section,--

he shall recommend to the Minister either-
- (c) That that organisation should continue to be an approved organisation; or
- (d) That the Minister should cancel the approval of that organisation.

(6D) The Registrar-General shall not recommend under subsection (6C) of this section that an organisation should continue to be an approved organisation unless he is satisfied that the principal object or one of the principal objects of that organisation is to uphold or promote religious beliefs or philosophical or humanitarian convictions.

9(7) If--[64]
- (a) At any time, the Minister-
  - (i) Becomes satisfied that, in the light of information not available to him or the Register-General (as the case may be) when an organisation was approved, or by virtue of a change in the circumstances of an approved organisation that organisation should not continue to be an approved organisation; or
  - (ii) Is not satisfied (whether or not as a result of a recommendation

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[64] The repealed s.9 (7) provided as follows:
"(7) If at any time the Minister becomes satisfied that, in the light of information not available to him at the time he approved an organisation or by virtue of a change in the circumstances of an organisation, the organisation should not continue to be an approved organisation, or if for a continuous period of at least 12 months no person nominated by an approved organisation has his name on the list, the Minister may, by notice in the Gazette, withdraw his approval of the organisation; and from the date of the publication of the notice the organisation shall cease to be an approved organisation."

under subsection (6C) of this section) that the principal object or one of the principal objects of an approved organisation is to uphold or promote religious beliefs or philosophical or humanitarian convictions;
or

(b) For a continuous period of at least 12 months no person nominated by an approved organisation has his name on the list,--
the Minister may, by notice in the Gazette, cancel his approval of that organisation; and on the date of the publication of that notice that organisation shall cease to be an approved organisation.

2.1.9.4 It would seem that convincing reasons could be proffered not only for the retention of the existing section 8 of the Marriage Act but for regulating the position of religious organisations and religious denominations to a greater extent as is presently the case and that the provisions of the New Zealand Marriage Act could be considered for this purpose. Firstly it is considered that the Minister of Home Affairs should, as is presently the case, be advised of a change the name by which a religious denomination or organisation is known, and secondly provision should now be made to inform the Minister as well when such denomination or organisation changes its objects. It is further considered that criteria should also be included into the Marriage Act setting out the grounds to be considered by the Minister of Home Affairs for deciding whether or not the designation of a person as a marriage officer or that of a religious organisation or denomination should be revoked.

(d) <u>Recommendation</u>

2.1.9.5 It is recommended that section 8 of the Marriage Act be amended to include more grounds for notifying the Minister of changes in the circumstances of religious denominations and organisations or a change in its objects. The section should also be amended to make provision that the Minister may revoke the designation of a religious denomination or organisation or marriage officer by notice in the *Gazette* in the case of a change of the denomination's circumstances and or objects.

2.1.10 REVOCATION OF DESIGNATION AS, MARRIAGE OFFICER AND LIMITATION OF AUTHORITY OF MARRIAGE OFFICER

(a) <u>The provisions contained in the Marriage Act</u>

2.1.10.1 The Marriage Act contains the following provisions:

9(1) The Minister or any officer in the public service authorized thereto by him may, on the ground of misconduct or for any other good cause, revoke in writing the designation of any person as a marriage officer or the authority of any other person to solemnize marriages under this Act, or in writing limit in such respect as he may deem fit the authority of any marriage officer or class of marriage officers to solemnize marriages under this Act.
9(2) Any steps taken by any officer in the public service under sub-section (1) may be set aside by the Minister.

(b) <u>The Department of Home Affairs' suggested provision</u>

2.1.10.2 The Department of Home Affairs suggested the following provisions:

12(1) The Minister may cancel any appointment as a marriage officer-
(a) if such marriage officer is convicted under the provisions of section 15[65] or 16[66]: or
(b) if it is proved to the satisfaction of him or her that a marriage officer is guilty of conduct which defeats the objects or effective administration of this Act.

12(2) The provisions of section 9(3) shall *mutatis mutandis* apply to a decision made in terms of this section.[67]

(c) <u>Evaluation</u>

2.1.10.3 The following provisions contained in the Australian and New Zealand Marriage Acts are considered noteworthy:

- <u>The Australian Marriage Act</u>

33.(1) Subject to this section, a Registrar shall remove the name of a person from the register kept by that Registrar if he or she is satisfied that:
(a) that person has requested that his or her name be so removed;
(b) that person has died;
(c) the denomination by which that person was nominated for registration, or in respect of which that person is registered, no longer desires that that person be registered under this Division or has ceased to be a recognized denomination;
(d) that person:
(i) has been guilty of such contraventions of this Act or the

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65 The Department's proposed clause 15 deals with the fees payable to marriage officers.

66 The department's proposed clause 16 prohibits the unauthorised solemnisation of marriages and "customary unions".

67 The Department's proposed clause 9(3) deals with the review by the High Court of the Minister's decision to appoint a marriage officer or reject a designation as such.

regulations as to show him or her not to be a fit and proper person to be registered under this Division;

(ii) has been making a business of solemnizing marriages for the purpose of profit or gain; or

(iii) is not a fit and proper person to solemnize marriages; or

(b) that person is, for any other reason, not entitled to registration under this Division.

33(2) A Registrar shall not remove the name of a person from a register under this section on a ground specified in paragraph (1) (d) or (e) unless:

(a) the Registrar has, in accordance with the regulations, served on the person a notice in writing:

(i) stating the Registrar's intention to do so on that ground unless, not later than a date specified in the notice and being not less than 21 days from the date of service of the notice, the person satisfies the Registrar that the person's name should not be removed from the register; and

(ii) informing the person that any representations made to the Registrar before that date will be considered by the Registrar;

(b) the Registrar has considered any representations made by the person before the date specified in the notice; and

(c) the removal takes place within 14 days after the date specified in the notice.

33(3) Where notice is served on a person under subsection (2), that person shall not solemnize a marriage unless and until:

(a) the person is notified by the Registrar that the Registrar has decided not to remove the person's name from the register;

(b) a period of 14 days has elapsed from the date specified in the notice under subsection (2) and the person's name has not been removed from the register; or

(c) the person's name, having been removed from the register, is restored to the register.

34.(1) An application may be made to the Administrative Appeals Tribunal for a review of a decision of a Registrar made on or after 1 July 1976:

(a) refusing to register a person who has applied for registration under this Division; or

(b) removing the name of a person from a register in pursuance of section 33.

34.(3) The reference in subsection (1) to a decision of a Registrar includes a reference to a decision of a Deputy Registrar of Ministers of Religion given in pursuance of subsection 27 (2).

34.(4) Where the Tribunal sets aside a decision refusing to register a person or a decision under section 33 removing the name of a person from a register, the appropriate Registrar shall forthwith register the person, or restore the name of the person to the register, as the case requires.

34.(5) For the purposes of the making of an application under subsection (1) and for the purposes of the operation of the Administrative Appeals Tribunal Act 1975 in relation to such an application, where a person has made application under subsection 30(1) for registration under this Division and, at the expiration of a period of 3 months from the day on which the application was made, the person has not been registered and has not been notified by the Registrar that that person's application has been refused, the Registrar shall be deemed to have decided, on the last day of that period, not to register that person.

35.(1) Where a person registered under this Division:
(a) changes his or her name, address or designation; or
(b) ceases to exercise, or ceases to be entitled to exercise, the functions of a minister of religion of the denomination by which he or she was nominated for registration or in respect of which he or she is registered;
the person shall, within 30 days thereafter, notify the Registrar by whom the register in which the person is registered is kept of that fact in accordance with the regulations.
35.(2) The Registrar may, upon receiving notification of a change of name, address or designation under subsection (1) or if the Registrar is otherwise satisfied that the particulars shown in the register in respect of a person are not correct, amend the register accordingly.

- The New Zealand Marriage Act

13.(1) Where the Registrar-General is satisfied that--
(a) A marriage celebrant has died; or
(b) A marriage celebrant no longer wishes to be a marriage celebrant; or
(c) The organisation or religious body which submitted the name of a marriage celebrant no longer wishes him to be a marriage celebrant; or
(d) The organisation which submitted the name of a marriage celebrant is no longer an approved organisation,--
he shall remove the name of the marriage celebrant from the list and shall publish in the Gazette a correction to that effect.
13(2) If the Minister is satisfied--
(a) That a marriage celebrant has wilfully failed or persistently neglected to register the particulars of any marriages or to forward or return to a Registrar or to the Registrar-General any documents required so to be forwarded or returned by this Act; or
(b) That a marriage celebrant whose name has been entered in the list pursuant to section 11 of this Act should not continue to be a marriage celebrant--
he may direct the Registrar-General to remove the name of that marriage celebrant from the list and the Registrar-General shall remove the name from the list and shall publish in the Gazette a correction to that effect.

2.1.10.4 The Department explains in its memorandum that the Bill contains proposals with a view to regulating, amongst other things, the cancellation of the appointment of marriage officers on a proper basis. The question arises whether the Department's suggested provision succeeds in this aim. It was noted above that the Marriage Act provides presently that the designation of a person may be revoked on the ground of misconduct or for any other good cause, whereas the Department's proposed provision envisages cancellation of a marriage officer's appointment if he or she is convicted of receiving or demanding a fee, gift or reward, for purporting to solemnise a marriage which he or she is not authorised to solemnise or which he or she knows is prohibited or if it is proved that the marriage officer is guilty of conduct which defeats the objects or effective administration of the Act. The question arises whether there is a need to set out the grounds for revoking the designation of a person as a marriage officer

in more detail than is presently the case. The Department of Home Affairs' suggested provision seems to reflect such an aim. It seems that the New Zealand and Australian provisions may serve as good examples for setting out the grounds in more detail. On the issue of the deletion of section 9(2) as the Department of Home Affairs suggested, it was considered above that the Departments' suggested clause 3 deals persuasively with this aspect.

(e) Recommendation

2.1.10.5 It is recommended that the grounds for revoking the appointment of a person as a marriage officer be set out in more detail in the Marriage Act than is presently the case under section 9, and that the section be amended to read as follows-

> 9 The Minister may revoke in writing and by notice in the *Gazette* the designation of any person as a marriage officer or the authority of any other person to join parties in marriage under this Act, or in writing limit in such respect as he or she may deem fit the authority of any marriage officer or class of marriage officers to join parties in marriage under this Act, on the following grounds, namely that -
> (a) a marriage officer has died;
> (b) a marriage officer no longer wishes to be a marriage officer;
> (c) the denomination by which that person was nominated for registration as a marriage officer, or in respect of which that person is registered, no longer desires that that person be registered as a marriage officer;
> (d) the denomination by which a marriage officer was nominated for registration, or in respect of which that person is registered, has ceased to be a recognized denomination;
> (e) the marriage officer has been guilty of such contraventions of the Act or the regulations as to show him or her not to be a fit and proper person to be registered as a marriage officer;
> (f) a marriage officer has been making a business of solemnizing marriages for the purpose of profit or gain;
> (g) a marriage officer is for any other reason, not entitled to registration.

2.1.11 MARRIAGES CONDUCTED IN A FOREIGN COUNTRY

(a) The provisions contained in the Marriage Act

2.1.11.1 Section 10 of the Marriage Act provides as follows:

> (1) Any person who is under the provisions of this Act authorised to solemnize any marriages in any country outside the Union-
> (a) may so solemnize any such marriage only if the parties thereto are both South African citizens domiciled in the Union; and
> (b) shall solemnize any such marriage in accordance with the provisions of

this Act.

(2) Any marriage so solemnized shall for all purposes be deemed to have been solemnized in the province of the Union in which the male party thereto is domiciled.

(b) Comments by respondents

2.1.11.2 The Campus Law Clinic of the University of Natal suggests that section 10(1) should be amended to read " ...may solemnize any such marriage only if one of the parties thereto is a South African citizen domiciled in the Republic." The Campus Law Clinic considers that if one of the parties is not a South African citizen, the marriage should not give him or her automatic right to citizenship, but that all other requirements for the acquisition of citizenship should be fulfilled. The Campus Law Clinic is further of the view that the fine prescribed for not complying with the provisions of the Marriage Act is not of such a nature that it would act as a deterrent and should therefore be increased.

(c) Evaluation

2.1.11.3 The Australian Marriage Act seems noteworthy in this regard. It provides that a marriage between parties one of whom at least is an Australian citizen may be solemnised in an overseas country by or in the presence of a marriage officer. The General Statutes of Connecticut also provide that all marriages in which one or both parties are citizens of Connecticut, celebrated in a foreign country, shall be valid, provided that each party would have legal capacity to contract such marriage in Connecticut and the marriage is celebrated in conformity with the law of that country or the marriage is celebrated, in the presence of the ambassador or minister to that country from the United States or in the presence of a consular officer of the United States accredited to such country, at a place within his consular jurisdiction, by any ordained or licensed clergyman engaged in the work of the ministry in any state of the United States or in any foreign country.[68]

2.1.11.4 The question thus arises in light of the submission made by the Campus Law Clinic whether the Marriage Act should be amended as proposed. The further question which arises but which is not addressed by the Campus Law Clinic is whether the reference to the deemed domicile of the male party should be retained in the Act should the Act be amended as proposed by the Campus Law Clinic. It seems apparent that if the Act were to require that

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[68] Section 46b-28.

marriages may be conducted as long as one party is a citizen domiciled in the Republic, such party would not necessarily be a male. Hence, it seems as if the deeming provision should provide that a marriage so conducted shall for all purposes be deemed to have been a marriage conducted in the Republic.

(d) Recommendation

2.1.11.5 The Commission's preliminary recommendation is that section 10(1) should be amended to provide that any person who is authorised to join parties in marriage in any country outside the Republic of South Africa, may conduct a marriage between parties at least one of whom is a South African citizen domiciled in the Republic. The reference in the Act to "**in the province of the Republic in which the male party thereto is domiciled**" should clearly also be deleted. Furthermore, the act should provide that a marriage so conducted shall for all purposes be deemed to have been conducted in the Republic.

2.1.12 UNAUTHORISED MARRIAGE CEREMONIES

(a) The provisions contained in the Marriage Act

2.1.12.1 The Marriage Act provides as follows in this regard:

> 11(1) A marriage may be solemnized by a marriage officer only.
> (2) Any marriage officer who purports to solemnize a marriage which he is not authorized under this Act to solemnize or which to his knowledge is legally prohibited, and any person not being a marriage officer who purports to solemnize a marriage, shall be guilty of an offence and liable on conviction to a fine not exceeding four hundred rand or, in default of payment, to imprisonment for a period not exceeding twelve months, or to both such a fine and such imprisonment.
> (3) Nothing in sub-section (2) contained shall apply to any marriage ceremony solemnized in accordance with the rites or formularies of any religion, if such ceremony does not purport to effect a valid marriage.

(b) The Department of Home Affairs' suggested provision

2.1.12.2 The Department of Home Affairs proposed the following provisions:

> 16(1) A marriage or customary union may only be solemnized by a marriage officer.
> (2) Any marriage officer who purports to solemnize a marriage or a customary union which he or she is not authorized under this Act to solemnize or which to his or her

> knowledge is legally prohibited, and any person not being appointed as a marriage officer who purports to solemnize a marriage or a customary union, shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding two years, or to both a fine and imprisonment.

(c) Evaluation

2.1.12.3 A similar section of the New Zealand Marriage Act (section 59) provides that every person who falsely pretends to be a marriage celebrant and knowingly and willfully solemnises any marriage, commits an offence and shall be liable on conviction on indictment to imprisonment for a term not exceeding 5 years. It is considered in respect of the English law that it is clearly a major defect of the law that it fails to make the consequences of a number of procedural defects clear, and it is suggested that the minimal requirements relating to both preliminaries and the celebration of a marriage for a valid marriage should be clearly specified.[69] The point of view has also been expressed in regard to the English law of marriage that it is unsatisfactory that the validity or invalidity of a marriage should depend on a subjective test of the parties' knowledge and intent. The English Law Commission has argued as follows in this regard:[70]

> [the law] may come close to leaving it to the option of the parties whether their marriage is to be treated as void or valid, for if they allege that they had knowledge of an irregularity it will be virtually impossible to disprove it, and if they allege that they had not, it will normally be extremely difficult to prove the contrary. As a result the dishonest may be more favoured than the scrupulous ...

2.1.12.4 The Alaska Statutes provide that after a licence has been obtained, a marriage solemnised before a person professing to be a minister, priest, or rabbi of a church or congregation in the state or a judicial officer or marriage commissioner is valid regardless of a lack of power or authority in the person, if the marriage is consummated with a belief on the part of the persons so married, or either of them, that they have been lawfully joined in marriage.[71] Although the Kentucky Revised Statutes provide that marriage is prohibited and void when, inter alia, it is not solemnised or contracted in the presence of an authorised person or society,[72] the Statute provides that no marriage solemnised before any person professing

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69 SM Cretney & JM Masson *Principles of Family Law* at 25.

70 *Ibid.*

71 Section 25.05.281.

72 Section 402.020.

to have authority therefor shall be invalid for the want of such authority, if it is consummated with the belief of the parties, or either of them, that he had authority and that they have been lawfully married.

2.1.12.5 Since in customary law a marriage is not constituted by a marriage officer officiating at a marriage ceremony the draft provision contained in the Department of Home Affairs' Bill needs reconsideration. There is no reference to marriage officers in the Commission's Bill on customary marriages. Furthermore, as noted above since customary marriages are dealt with in separate legislation this paper will not deal further with them.

2.1.12.6 The question arises whether section 11(3) of the Marriage Act needs to be reconsidered. The effect of section 11(3) is that the person conducting a marriage ceremony in accordance with the rites or formularies of any religion, does not commit an offence in terms of subsection (2) if such ceremony does not purport to effect a valid marriage. It seems to the Commission that there might very well be circumstances where the provision is warranted. An example which comes to mind is a ceremony where parties renew their marriage vows. They might have been married to each other for a number of years and do not intend to bring a new marriage into being by participating in the marriage ceremony. Another example is where the religious marriage ceremony constitutes a mere blessing of a marriage contracted by civil rites.[73] It should not constitute an offence to conduct such a religious marriage ceremony. Hence, the Commission recommends that section 11(3) should remain intact.

2.1.12.7 It seems that sections 11(1), (2) and (3) should be retained. However, the Department of Home Affairs' suggested increased penal provision contained in subsection (2) seems persuasive. It seems likely that the possibility of a prison sentence of a term of two years would serve as a strong deterrent than the present term of twelve months.

(d) <u>Recommendation</u>

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[73] See section 33 of the Marriage Act:

> 33 After a marriage has been solemnized by a marriage officer, a minister of religion or a person holding a responsible position in a religious denomination or organization may bless such marriage according to the rites of his religious denomination or organization.

2.1.12.8 It is recommended that-

* section 11(1) and (3) should remain unamended; and
* the maximum term of imprisonment provided for in section 11(2) should be increased to a term of imprisonment not exceeding two years; and

2.1.13 FAILURE TO PRODUCE IDENTITY DOCUMENT OR PRESCRIBED DECLARATION

(a) <u>The provision contained in the Marriage Act</u>

2.1.13.1 The Marriage Act contains the following provision:

12(1) No marriage officer shall solemnize 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, 1986 (Act 72 of 1986); or
(b) each of such parties furnishes to the marriage officer the prescribed affidavit[74]; or
(c) one of such parties produces his or her identity document referred to in paragraph (a) to the marriage officer and the other furnishes to the marriage officer the affidavit referred to in paragraph (b).

(b) <u>The Department of Home Affairs' suggested provision</u>

2.1.13.2 The Department of Home Affairs' suggested clause 17 corresponds largely with section 12 of the Marriage Act, the only difference being that the words customary unions are inserted into the clause after the words "marriage".

(c) <u>Evaluation</u>

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[74] The affidavit must contain the following information:
- that the parties are not related to each other within the prohibited degrees of relationship;
- that there are no legal impediments to the proposed marriage; and
- the necessary consent to the marriage has been obtained, if this is required under the circumstances.

2.1.13.4 The New Zealand Marriage Act provides that except as provided in section 15[75] or in section 21[76] of the Act, no marriage shall be deemed to be void by reason of any error or defect in the notice, declaration, or licence required before solemnisation, or in the registration of the marriage when solemnised where the identity of the parties is not questioned, or on account of any other infringement of the provisions of the Act. The Alaska Statutes also provide that if a marriage is in other respects lawful and is consummated with the full belief on the part of the persons married, or either of them, that they have been lawfully joined in marriage, then the marriage is not voidable for any of the following reasons:[77]

- the licensing officer did not have jurisdiction to issue the licence;
- there was an omission, informality, or irregularity of form in the application for the licence or in the licence itself;
- either or both witnesses to the marriage were incompetent;
- the marriage was solemnised after the expiration date of the licence;
- there were no witnesses to the marriage if the valid licence was issued and if the solemnisation of the marriage can be otherwise proven.

2.1.13.5 Section 12 of the Marriage Act contains one of the prescribed formalities laid down in the Act, and, as a general rule, failure to comply with the requirements of marriage, renders the marriage void *ab initio*. Commenting on the case of *Ex Parte Dow* the authors Cronje and Heaton[78] argue that only a material defect should render a marriage void *ab initio*. Prof Hahlo notes that the question remains whether a marriage is valid if it was solemnised by the marriage officer on the strength of forged or stolen identity documents or stolen identity documents or of false affidavits.[79] He suggests that no question of nullity can arise if the parties were married under their legal names, and there existed no lawful impediment to their marriage. Prof Hahlo considers that whether the same applies where one or both of the parties

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75 Dealing with marriage of persons within prohibited degrees of relationship.

76 Which provides that if any persons knowingly and wilfully marry without a marriage licence where a marriage licence is required by the Act, or in the absence of a marriage celebrant or Registrar where the presence of a marriage celebrant or registrar is required by the Act, the marriage shall be void.

77 Section 25.05.041.

78 *Casebook on the Law of Persons and Family* at 224-225.

79 *The South African Law of Husband and Wife* at 81-82.

were married under false names, is a question which cannot be regarded as settled. He however suggests that where one or both of the parties knowingly misled the marriage officer as to their names, the marriage would still be valid since the marriage officer joins them in matrimony as the persons standing before him, and not as the bearers of certain names. Prof Hahlo further submits that where the marriage officer married the parties although they produced neither identity documents nor affidavits, the marriage would not be invalid. Prof Hahlo states that as long as the parties declare their consent to marry each other in an authorised place, in the presence of no fewer than two competent witnesses and before a competent marriage officer and the marriage officer joins them as husband and wife, there is a valid marriage. Prof Hahlo notes that failure to comply with any of the other formalities prescribed by the Act does not invalidate it, except where the Act, expressly or by necessary intent, so provides.

2.1.13.6 It is therefore clear that there is a need for prescribing that parties should produce proof of their identity to marriage officers. However, it is also clear that there could be circumstances of non-compliance and the question arises as to the question what the consequences should be, and whether the Marriage Act should be amended. The Commission considers that the Marriage Act should be amended to state that failure to comply strictly with this provision does not affect the validity of the marriage provided that such marriage was in every other respect conducted in accordance with the provisions of the Marriage Act, that there were no other lawful impediments to the marriage and that such marriage has not been dissolved or declared invalid by a competent court, and provided further that neither of the parties to such marriage has after such marriage and during the life of the other, lawfully married another.

(d) <u>Recommendation</u>

2.1.13.7 The Commission recommends that section 12 of the Marriage Act should be amended as follows to deal with a failure to comply strictly with the requirement to produce identification or the prescribed affidavit regarding the identification of the party concerned:

> If parties were joined in marriage and the provisions of subsection (1) were not strictly complied with but such marriage was in every other respect conducted in accordance with the provisions of this Act or, as the case may be, a former law, that marriage shall, provided there was no other lawful impediment thereto and provided such marriage has not been dissolved or declared invalid by a competent court, and provided further that neither of the parties to such marriage has after such marriage and during the life of the

other, lawfully married another, be as valid and binding as it would have been if the said provisions had been strictly complied with.

2.1.14 IRREGULARITIES IN PUBLICATION OF BANNS OR NOTICE OF INTENTION TO MARRY OR IN THE ISSUE OF SPECIAL MARRIAGE LICENCES

(a) <u>The provision contained in the Marriage Act</u>

2.1.14.1 The Marriage Act contains the following provision:

> 22. If in the case of any marriage solemnized before the commencement of the Marriage Amendment Act, 1970, the provisions of any law relating to the publication of banns or notice of intention to marry or to the issue of special marriage licences, or the applicable provisions of any law of a country outside the Union relating to the publication of banns or the publication of notice of intention to marry were not strictly complied with but such marriage was in every other respect solemnized in accordance with the provisions of this Act or, as the case may be, a former law, that marriage shall, provided there was no other lawful impediment thereto and provided such marriage has not been dissolved or declared invalid by a competent court, and provided further that neither of the parties to such marriage has after such marriage and during the life of the other, already lawfully married another, be as valid and binding as it would have been if the said provisions had been strictly complied with.

(b) <u>The Department of Home Affairs' Bill</u>

2.1.14.2 The Department of Home Affairs' Bill does not contain this provision. It contains, however, the following general provision providing for the recognition of religious marriages conducted before the commencement of its Bill:

> 30.(1) A marriage solemnised prior to the commencement of this Act shall be deemed to be a marriage solemnized under this Chapter if the Minister is satisfied upon information submitted to him or her in the prescribed form-
>
> (a) that such a marriage has in fact been solemnized under the tenets of a religion;
>
> (b) the person who solemnized the marriage was a duly designated marriage officer by the religious denomination or organization concerned; and
>
> (c) the marriage would have been a valid marriage if it was solemnized after the commencement of this Act.
>
> (2) The Minister may, in addition to any information submitted in terms of subsection (1) or to clarify any information so submitted, call for further information to be submitted to him or her and require or allow such person to give such oral information or produce such other information as in the opinion of the Minister may assist him or her in deciding the matter in question.

(c) Evaluation

2.1.14.3 The preliminary formalities of the publication of banns or notices of intention to get married and the obtaining of special licences were abolished by the Marriage Amendment Act of 1970. However it seems necessary to set out specifically what the consequences should be if the requirements regarding banns notices of intention to get married and special licences were not strictly complied with. Furthermore, the Department's proposed provision on the recognition of marriages and the powers of the Minister to obtain information regarding the marriage is restricted to marriages concluded according to the tenets of a religion. This provision suggested by the Department of Home Affairs is a transitional provision which deals with marriages concluded according to the tenets of a religion prior to the commencement of the Bill they proposed. Since the question of religious marriages will not be addressed in this investigation, the Commission is of the view that the Bill should not contain a specific transitional provision dealing with marriages concluded according to the tenets of a religion.

(d) Recommendation

2.1.14.4 It is recommended that even if section 22 is not retained in the Act in its present form, the Marriage Act should still in future set out specifically what the consequences should be if the requirements regarding banns notices of intention to get married and special licences are not strictly complied with, as the section presently does.

2.1.15 OBJECTIONS TO MARRIAGE

(a) The provision contained in the Marriage Act

2.1.15.1 The Marriage Act contains the following provision:

> 23(1) Any person desiring to raise any objection to any proposed marriage shall lodge such objection in writing with the marriage officer who is to solemnize such marriage.
> (2) Upon receipt of any such objection the marriage officer concerned shall inquire into the grounds of the objection and if he is satisfied that there is no lawful impediment to the proposed marriage, he may solemnize the marriage in accordance with the provisions of this Act.
> (3) If he is not so satisfied he shall refuse to solemnize the marriage.

(b) The Department of Home Affairs' suggested provision

2.1.15.2 The Department of Home Affairs suggested the following provision:

> 23(1) Any person desiring to raise any objection to any proposed marriage or customary union shall lodge such objection in writing with the marriage officer who is to solemnize such marriage or customary union.
> (2) Upon receipt of any such objection the marriage officer concerned shall inquire into the grounds of the objection and if he or she is satisfied that there is no lawful impediment to the proposed marriage, he or she may solemnize the marriage or customary union in accordance with the provisions of this Act.
> (3) If he or she is not so satisfied he or she shall refuse to solemnize the marriage or customary union.

(c) Comments by respondents

2.1.15.3 The Campus Law Clinic of the University of Natal suggests that section 23(1) should read as follows in order to give the parties a chance to respond, namely:

> Any person desiring to raise any objection to any proposed marriage shall lodge such objection in writing with the marriage officer who solemnizing such marriage and also with the parties to the proposed marriage.

(c) Evaluation

2.1.15.4 The suggestion by the Campus Law Clinic seems persuasive since the aim of its provision seems to be the giving of notice to the parties contemplating marriage that someone has objections to their marriage. In English law before a Superintendent Registrar's certificate is issued, the Registrar will seek to satisfy himself on the basis of the information provided by the parties that they are free to marry.[80] The English Marriage Act provides that members of the public may object to an intended marriage and any person may enter a caveat at the Registrar's office. The New Zealand Marriage Act contains the following provisions governing the lodging of objections or so-called *caveats*:

> 25.(1) Any person may lodge with any Registrar a caveat against the marriage of any person named in the caveat on the ground that the marriage is one in respect of which a licence should not be issued under this Act.

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[80] Cretney & Masson *Principles of Family Law* at 12.

25.(2) Every caveat shall be in writing signed by or on behalf of a caveator, and shall state his full name and residential address and the particular grounds of objection on which the caveat is founded.
25.(3) Notice of any caveat may be given to any Registrar other than the Registrar with whom it was lodged. The notice shall be in writing signed by or on behalf of the caveator, and shall state his full name and residential address, the date and place of lodgment of the caveat and the grounds of objection on which the caveat is founded.
25.(4) Until the caveat has been withdrawn by the caveator or has been discharged as provided by section 26 of this Act, no licence in respect of the marriage of the person to whom the caveat relates shall be issued by any Registrar with whom the caveat has been lodged or to whom notice of the caveat has been given in accordance with this section, and no such Registrar shall solemnise the marriage.
26.(1) On receiving notice under section 23 of this Act of an intended marriage against which he is aware that a caveat has been lodged, the Registrar shall submit the caveat to a Family Court Judge or, if a Family Court Judge is not immediately available, to a District Court Judge who shall forthwith inquire into the grounds of objection stated in the caveat, and, if he is of the opinion that those grounds should not prevent the solemnisation of the marriage, he shall discharge the caveat.
26.(2) A caveat shall be deemed to be discharged after the expiration of one year from the date on which it was lodged unless within that time a notice of the intended marriage to which the caveat relates has been given.
26.(3) Where a Family Court Judge (or a District Court Judge) has refused to discharge a caveat, any person may make an application to a Family Court Judge for the discharge of the caveat and the Family Court Judge, if he is of the opinion that there is no longer any reason why the intended marriage should not be solemnised, shall discharge the caveat.

2.1.15.5 The Australian Marriage Act contains the following provisions on objections:

68. (1) Where notice of an intended marriage has been given to a marriage officer under section 66, a person may, on payment of the prescribed fee, enter with the marriage officer a caveat against the solemnization of the marriage.
68.(2) A caveat under subsection (1) shall:
(a) be in accordance with the prescribed form;
(b) be signed by or on behalf of the person entering it; and
(c) state the ground of objection to the solemnization of the marriage.
68.(3) Where a caveat against the solemnization of an intended marriage is duly entered with a marriage officer, the marriage shall not be solemnized by the marriage officer unless:
(a) the marriage officer, having inquired into the ground of objection specified in the caveat, is satisfied that the caveat ought not to prevent the solemnization of the marriage; or
(a) the caveat has been withdrawn by the person who entered it.
68.(4) In case of doubt, the marriage officer may transmit a copy of the caveat, with such statement with respect to the caveat as the marriage officer thinks fit, to the Minister, who shall, after such inquiry, if any, as the Minister thinks fit, give his or her decision in the matter to the marriage officer.
68.(5) The marriage officer shall forthwith inform the person who entered the caveat and the parties to the intended marriage of the decision of the Minister and shall conform to that decision.

2.1.15.6 It seems apparent that if the Marriage Act were to require notice to be given to parties intending to get married that they could possibly assist the marriage officer from an earlier stage should the objections be unfounded. Such a requirement would in all probability also prove to serve as a further deterrent against unfounded objections against a marriage being lodged.

(d) Recommendation

2.1.15.7 It is recommended that section 23(1) should be amended to the effect that the party raising objections against a marriage should also provide a copy his or her objection in writing to the parties contemplating marriage.

2.1.16 MARRIAGE OF MINORS

(a) The provisions contained in the Marriage Act

2.1.16.1 The Marriage Act contains the following provisions:

> 24(1) No marriage officer shall solemnize a marriage between parties of whom one or both are minors unless the consent to the party or parties which is legally required for the purpose of contracting the marriage has been granted and furnished to him in writing.
> (2) For the purposes of subsection (1) a minor does not include a person who is under the age of twenty-one years and previously contracted a valid marriage which has been dissolved by death or divorce.

(b) The provisions suggested by the Department of Home Affairs

2.1.16.2 The Department of Home Affairs proposed the following provisions:

> 23. In this Act, unless the context otherwise indicates-
> ...
> "major" means any person who has attained the age of 21 years or who has under the provisions of section 2 of the Age of Majority Act, 1972 (Act No. 52 of 1972), been declared to be a major, and includes a person under the age of 21 years who has contracted a legal marriage;
>
> 18 No marriage officer shall solemnize a marriage or a customary union between parties of whom one or both are minors unless the consent to the party or parties which is legally required for the purpose of contracting the marriage has been granted and furnished to him in writing.

(c) Evaluation

2.1.16.3 The New Zealand Marriage Act provides that a marriage licence shall not be issued by any Registrar and no marriage shall be solemnised by any Registrar or marriage celebrant if either of the persons intending marriage is under the age of 16 years on the date

of the notice of the intended marriage given under section 23 of the Act. It further provides that no marriage shall be void by reason only of an infringement of the provisions of the section. The New Zealand Marriage Act also provides that if either of the parties to an intended marriage is a minor and has not previously been married, the Registrar shall not issue a licence authorising the marriage or solemnise the marriage unless it has been consented to in accordance with the section. It further provides that subject to the provisions of the section, consent to the marriage of a minor shall be obtained in accordance with the following provisions:

(a) If both the minor's parents are alive and living together, consents shall be obtained from both parents:

(b) If the minor's parents are living apart and he is living with one parent, consent shall be obtained from the parent with whom he is living:

(c) If the parents are living apart and the minor is not living with either, consent shall be obtained:

  (i) From both parents in any case where they are, or have been, married to each other, unless the consent of one parent is dispensed with by a District Court Judge:

  (ii) From the mother in any case where the parents have never been married:

(d) If one of the parents is dead and the parents had at any time been married to each other, consent shall be obtained from the surviving parent and any other person who is the legal guardian of the minor:

(e) If both parents are dead and they had at any time been married to each other, consent shall be obtained from any person who is the legal guardian of the minor:

(f) If the minor's parents had never been married to each other and one or both of them is dead, consent shall be obtained from the mother if she is alive and from any person who is the legal guardian of the minor if she is dead.

2.1.16.4 The New Zealand Marriage Act provides further in section 18 that if any person is the guardian of a minor pursuant to section 5 of the Child Welfare Amendment Act 1948, consent shall be obtained from the guardian and no other consent shall be required. Where a parent whose consent is required or is sufficient is deprived of the guardianship of a minor, the consent of the legal guardian is required or shall be sufficient as the case may be, in place

of the consent of that parent. Consent is not required from any person who cannot be found or is, because of mental incapacity, unable to give consent and, unless the minor requests the consent shall not be required from any person who is not resident in New Zealand. Where there is no person whose consent to the marriage of a minor is required under the other provisions of the section, consent to the marriage must be obtained either from a relative who has been acting in the place of a parent or from a Family Court Judge. The section also provides that no marriage shall be void by reason only of the absence of the consent of any person whose consent is required under the section. Under section 19 where any person whose consent is required to a marriage refuses to give his consent, a Family Court Judge may, on application in that behalf, consent to the marriage and that consent shall have the same effect as if it had been given by the person whose consent has been refused. Where an application is made to a Family Court Judge for consent to a marriage, notice of the application must be served on every person whose consent to the marriage is required under section 18 of the Act. The Family Court Judge may however in his or her discretion dispense with the serving of notice on any such person. The New Zealand Marriage Act also contains comprehensive provisions dealing with consent in general. It provides in section 20 that every consent under section 18 of the Act must be in writing, witnessed by some person who, if resident in New Zealand, shall add his occupation and address, and the consent shall be delivered to the Registrar to whom notice of the intended marriage is given. Any consent given under section 18 of the Act may, by notice in writing signed by the person giving his or her consent, be withdrawn at any time before the Registrar issues the marriage licence or solemnises the marriage, as the case may be.

2.1.16.5 The Australian Marriage Act provides that a person is of marriageable age if the person has attained the age of 18 years.[81] It further provides that a person who has attained the age of 16 years but has not attained the age of 18 years may apply to a Judge or magistrate in a State or Territory for an order authorising him or her to marry a particular person of marriageable age despite the fact that the applicant has not attained the age of 18 years.[82] The General Statutes of Connecticut provide likewise that no marriage licence may be issued to any applicant under sixteen years of age, unless the judge of probate for the district in which the minor resides endorses his written consent on the licence.[83] The Kentucky Revised

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81 Section 11 but subject to section 12.

82 Section 12.

83 Section 46b-30.

Statutes provide that a marriage is prohibited when at the time of marriage the person is under eighteen years of age.

2.1.16.6 Under English law consent to the marriage of a person who is under the age of 18 is required.[84] Consent is a requirement to a marriage after civil preliminaries to a marriage and when a marriage is contracted with a common licence. However, although parents or other parties may object to a intended marriage, consent is not required after the publication of bans. Consent is required as follows:

- From each parent who has parental responsibility for the child and each guardian;
- If a court has made a residence order which is in force with respect to the child, the consent of the person or persons with whom the child is to live under the terms of the order is required in substitution for that of the parents or guardians;
- The consent of the designated local authority is required in addition to the consent of the parents and guardians if the child is the subject of a care order designating the local authority;
- In the case where there is no residence or care order in force, but a residence order was in force immediately before the child reached the age of 16, the consent of the person or persons with whom the child was to live under that residence order is required;
- In the case where the child is a ward of court, the consent of the court is required in addition to that of any person specified above;
- Where the required consent of a prescribed person cannot be obtained by reason of absence or inaccessibility or by reason of him or her being under any disability the superintendent registrar may dispense with the required consent, or the court may consent;
- Where a prescribed person refuses to give consent the High Court and county court have jurisdiction to hear an application.[85]

2.1.16.7 No respondents addressed section 24(1) in particular. Rev Dr Louis Bosch however made the following suggestions in regard to minimum ages:

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84 Cretney & Masson *Principles of Family Law* at 8-9.

85 Although in practice almost all applications are made to magistrates' courts.

- The *acceptable* age for marriage should be 19 years for males and females at which consent is sufficient and that no other consent to marry be required;
- Persons under the age of 19 years must receive consent from the Minister of Home Affairs and not necessarily from their parents;
- The minimum age for marriage should be set at 14 years of age for both males and females, and the consent of the Minister of Home Affairs as well as the consent of their parents should be required;
- the age for consent for having sexual relationships should be 15 years for males and females.

2.1.16.8 It seems in the absence of comments reflecting the opposite point of view, that there is agreement on the question whether written consent should be submitted to a marriage officer in the case of a party or parties intending marriage being a minor or minors. Since, furthermore, the Department of Home Affairs' proposed provision repeats the existing wording of section 24 (with the exception of the addition of the concept of customary unions) it seems apparent that this section should remain unamended. The question however arises from a drafting perspective whether the existing section 24(2) should be retained or whether this aspect should rather be included into section 1 containing the definitions. It is also noteworthy that the definition does not follow the wording of the existing subsection since the words "which has been dissolved by death or divorce" have been omitted. Apart from the apparent change in meaning which the Department of Home Affairs' suggested provision could effect, it would seem as if this aspect forms part of the substantive provisions of Marriage Act which should rather be included into the provisions of the Act and as if it would be expedient to retain the existing subsection.

(d) <u>Recommendation</u>

2.1.16.9 It is recommended that besides the substitution of the term "conduct" in section 24(1) for the term "solemnise", sections 24(1) and (2) should remain unamended.

2.1.17 DISSOLUTION OF MARRIAGE FOR WANT OF CONSENT OF PARENTS OR GUARDIAN AND ITS CONSEQUENCES

(a) <u>The provision contained in the Marriage Act</u>

2.1.17.1 The Marriage Act contains the following provision:

> 24A(1) Notwithstanding anything to the contrary contained in any law or the common law a marriage between persons of whom one or both are minors shall not be void merely because the parents or guardian of the minor, or a commissioner of child welfare whose consent is by law required for the entering into of a marriage, did not consent to the marriage, but may be dissolved by a competent court on the ground of want of consent if application for the dissolution of the marriage is made-
>
> (a) by a parent or guardian of the minor before he attains majority and within six weeks of the date on which the parent or guardian becomes aware of the existence of the marriage; or
> (b) by the minor before he attains majority or within three months thereafter.
>
> 24A(2) A court shall not grant an application in terms of subsection (1) unless it is satisfied that the dissolution of the marriage is in the interest of the minor or minors.

(b) <u>The Department of Home Affairs' suggested provision</u>

2.1.17.2 The Department of Home Affairs' suggested provision is drafted identical to the existing section 24A the only difference being that it was renumbered as clause 19 and that it contains references to customary unions.

(c) <u>Evaluation and recommendation</u>

2.1.17.3 Under English law a marriage is void if either party is under 16.[86] However, if the parties are under 18 and they fail to comply with obtaining the required consent[87] their failure does not affect the validity of the marriage.

2.1.17.4 No respondents addressed this issue. In view of the lack of comment on this section it would seem that the present provision is satisfactory. The Commission therefore recommends that the section not be amended.

2.1.18 WHEN CONSENT OF PARENTS OR GUARDIAN CANNOT BE OBTAINED

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86 Cretney & Masson *Principles of Family Law* at 44.

87 See the discussion on section 24 above where the requirements of the English law is noted.

(a) The provision contained in the Marriage Act

2.1.18.1 The Marriage Act contains the following provisions:

> 25(1) If a commissioner of child welfare defined in section 1 of the Child Care Act, 1983, is after proper inquiry satisfied that a minor who is resident in the district or area in respect of which he holds office has no parent or guardian or is for any good reason unable to obtain the consent of his parents or guardian to enter into a marriage, such commissioner of child welfare may in his discretion grant written consent to such minor to marry a specified person, but such commissioner of child welfare shall not grant his consent if one or other parent of the minor whose consent is required by law or his guardian refuses to grant consent to the marriage.
> 25(2) A commissioner of child welfare shall, before granting his consent to a marriage under sub-section (1), enquire whether it is in the interests of the minor in question that the parties to the proposed marriage should enter into an antenuptial contract, and if he is satisfied that such is the case he shall not grant his consent to the proposed marriage before such contract has been entered into, and shall assist the said minor in the execution of the said contract.
> 25(3) A contract so entered into shall be deemed to have been entered into with the assistance of the parent or guardian of the said minor.
> 25(4) If the parent, guardian or commissioner of child welfare in question refuses to consent to a marriage of a minor, such consent may on application be granted by a judge of the Supreme Court of South Africa: Provided that such a judge shall not grant such consent unless he is of the opinion that such refusal of consent by the parent, guardian or commissioner of child welfare is without adequate reason and contrary to the interests of such minor.

(b) The Department of Home Affairs' suggested provisions

2.1.18.2 The Department of Home Affairs' suggested provision largely corresponds with the existing section 25, the only differences being that it was renumbered to be clause 20, it is drafted with gender sensitivity kept in mind, subsequent references are to the commissioner instead of to the commissioner of welfare throughout the section and that it contains references to customary unions.

(c) Evaluation and recommendation

2.1.18.3 Since no respondents addressed this issue, it seems that the Act governs this aspect satisfactory. The Commission therefore recommends that section 25 not be amended except for the references to he and his should be include she and her as well.

2.1.19 PROHIBITION OF MARRIAGE TO PERSONS UNDER CERTAIN AGES

(a) <u>The provision contained in the Marriage Act</u>

2.1.19.1 The Marriage Act contains the following provisions:

> 26(1) No boy under the age of 18 years and no girl under the age of 15 years shall be capable of contracting a valid marriage except with the written permission of the Minister or any officer in the public service authorized by him, which he may grant in any particular case in which he considers such marriage desirable: Provided that such permission shall not relieve the parties to the proposed marriage from the obligation to comply with all other requirements prescribed by law: Provided further that such permission shall not be necessary if by reason of any such other requirement the consent of a judge or court having jurisdiction in the matter is necessary and has been granted.
> 26(2) If any person referred to in subsection (1) who was not capable of contracting a valid marriage without the written permission of the Minister or any officer in the public service authorized thereto by him, in terms of this Act or a prior law, contracted a marriage without such permission and the Minister or such officer, as the case may be, considers such marriage to be desirable and in the interests of the parties in question, he may, provided such marriage was in every other respect solemnized in accordance with the provisions of this Act, or, as the case may be, any prior law, and there was no other lawful impediment thereto, direct in writing that it shall for all purposes be a valid marriage.
> 26(3) If the Minister or any officer in the public service authorised thereto by him so directs it shall be deemed that he granted written permission to such marriage prior to the solemnization thereof.

(b) <u>The Department of Home Affairs' suggested provisions</u>

2.1.19.2 The Department of Home Affairs suggested the following provisions:

> 21.(1) No person under the age of 18 years shall be capable contracting a valid marriage or customary union except with the written permission of the Minister, which he or she may grant in any particular case in which he or she considers such marriage or customary union desirable: Provided that such permission shall not relieve the parties to the proposed marriage or customary union from the obligation to comply with all other requirements prescribed by law: Provided further that such permission shall not be necessary if by reason of any such other requirement the consent of a judge or court having jurisdiction in the matter is necessary and has been granted.
> 21(2) If any person referred to in subsection (1) who was not capable of contracting a valid marriage or customary union without such permission and the Minister or such officer, as the case may be, considers such marriage or customary union to be desirable and in the interests of the parties concerned, he or she may, provided such marriage or customary union was in every other respect solemnized in accordance with the provisions of this Act, or, as the case may be, any prior law, and there was no other lawful impediment thereto, direct in writing that it shall for all purposes be a valid marriage or customary union.
> 21(3) If the Minister so directs it shall be deemed that he or she granted written permission to such marriage or customary union prior to the solemnization thereof.

(c) Comments by respondents

2.1.19.3 The Campus Law Clinic of the University of Natal suggested that the minimum age for contracting marriage referred to in section 26 should be 18 in order to bring it in line with the provisions of the Constitution. Rev Dr Louis Bosch however proposes the following minimum ages:

- The *acceptable* age for marriage should be 19 years for males and females at which consent is sufficient and that no other consent to marry be required;
- Persons under the age of 19 years must receive consent from the Minister of Home Affairs and not necessarily from their parents;
- The minimum age for marriage should be set at 14 years of age for both males and females, and the consent of the Minister of Home Affairs as well as the consent of their parents should be required;
- the age for consent for having sexual relationships should be 15 years for males and females.

(c) Evaluation

2.1.19.4 The Commission considered the issue of minimum ages for marriage in its Discussion Paper 74 dealing with Customary Marriages. The Commission argued as follows in its Discussion Paper:

> 5.1.6 To ensure that future spouses can formulate a proper consent to marriage and to obviate potential exploitation of children, a minimum age for marriage is now arguably a necessary step to securing individual human rights. The international Convention on Elimination of All Forms of Discrimination against Women (CEDAW) and the Convention on Consent to Marriage both require states parties to take legislative action to specify a uniform minimum age for marriage. However, these treaties do not stipulate what the age should be.
>
> 5.1.7 A straightforward solution would have been to apply the ages laid down in the Marriage Act - 18 for men and 15 for women - to customary marriages. While accepting this general proposal, the **Gender Research Project (CALS)** and the **National Human Rights Trust** said that preserving a difference in age discriminated unfairly on the basis of sex and that one age should now apply to both men and women. If companionship is seen as the only goal of marriage, this argument would be relevant. But it could be argued that the Marriage Act does not constitute an unfair discrimination, in view of the alleged differences in the rates at which boys and girls physically mature.

5.1.8 The **Gender Research Project (CALS)** suggested a minimum age of 18 for both sexes. This proposal would bring South African law into line with international standards, for determining the change from child- to adulthood, since the United Nations Convention on the Rights of the Child, the Constitution and the African Charter on the Rights and Welfare of the Child specify 18. Since South Africa's ratification of the latter Charter is at present under consideration, it is proposed that the minimum age of 18 for marriage should apply to both men and women.

5.1.9 If the individual freedom to marry is to be fully implemented in our law, then a boy or girl who is under age should still, in the appropriate circumstances, be entitled to contract a marriage. The rules in the Marriage Act, which are designed to govern such a situation, could conveniently be extended to customary marriages. Prospective spouses would need to obtain the written permission of the Minister of Home Affairs, together with their guardians' consent.

2.1.19.5 The Commission considers, as the Department of Home Affairs also does, that the minimum age for marriage should be 18 years of age for males and females.

(d) <u>Recommendation</u>

2.1.19.6 It is recommended that section 26 be amended to provide that no boy or girl under the age of 18 shall be capable of contracting a valid marriage.

2.1.20 MARRIAGE BETWEEN PERSON AND RELATIVES OF HIS OR HER DECEASED OR DIVORCED SPOUSE

(a) <u>The provision contained in the Marriage Act</u>

2.1.20.1 The Marriage Act contains the following provision:

28 Any legal provision to the contrary notwithstanding it shall be lawful for-

(1) any widower to marry the sister of his deceased wife or any female related to him through his deceased wife in any more remote degree of affinity than the sister of his deceased wife, other than an ancestor or descendant of such deceased wife;

(2) any widow to marry the brother of her deceased husband or any male related to her through her deceased husband in any more remote degree of affinity than the brother of her deceased husband, other than an ancestor or descendant of such deceased husband;

(3) any man to marry the sister of a person from whom he has been divorced or any female related to him through the said person in any more remote degree of affinity than the sister of such person, other than

an ancestor or descendant of such person; and

(4) any woman to marry the brother of a person from whom she has been divorced or any male related to her through the said person in any more remote degree of affinity than the brother of such person, other than an ancestor or descendant of such person.

(b) The Department of Home Affairs' suggested provisions

2.1.20.2 The Department of Home Affairs' suggested clause 23(1) followed the wording of section 28. The Department explained that the prohibition of marriages between a man and a woman and the direct descendant of his or her deceased spouse where they are not related to each other by blood is questionable and needs to be reconsidered. The Department of Home Affairs therefore added the following subclause:

> 23(2) A provincial or local division of the Supreme Court shall have jurisdiction to consent to a marriage or customary union between a man or a woman and the direct descendant of his or her deceased spouse if both parties have reached the age of majority and are not related to each other by descendancy.

(c) Comments by respondents

2.1.20.3 The Campus Law Clinic of the University of Natal was the only respondent addressing this issue and stated that section 28 should be qualified to include the words "as long as there is informed consent". The Campus Law Clinic further suggested that where a polygamous marriage is involved, the project committee on customary law would need to ensure that safeguards are included into the legislation.

(d) Evaluation

2.1.20.4 The Campus Law Clinic's suggestion on informed consent addresses a problematic aspect involved in polygamy. The Commission remarked in its Discussion Paper 74 as follows on the question of the consent to marriage:

> 4.2.8 Today, no one is likely to dispute the requirement that spouses freely consent to their marriage. This principle rests on the freedom to marry, which is fully accepted in international law as well as in South African public policy. An individual's right to decide his or her marital destiny is clearly a universal human right, and it is endorsed by over a century of precedent and legislation in South Africa. It is more important now to consider the implications of requiring of spousal consent, namely, the most

appropriate means of ensuring that a properly informed consent is given. Colonial courts and legislatures, for instance, paid no attention to the age at which a prospective spouse could formulate consent. (Ages fixed under the Marriage Act were assumed to apply only to civil or Christian unions.) Nor were women released from the need to obtain their guardians' approval in order to marry.

4.2.9 Determining whether a woman genuinely consents to her marriage is still a problem. The **Gender Research Project (CALS)**, for example, said that the process of negotiating marriage demands no more than that a woman acknowledge that she knows the man who is proposing. Her consent is then inferred. Moreover, even in common law, what constitutes duress sufficient to invalidate consent is still not absolutely settled. These problems are not amenable to solution by statute. Legislation would be more effective in fixing a specific age at which individuals may be presumed mature enough to decide when and whom they want to marry.

2.1.20.5 Section 46b-21 of the General Statutes of Connecticut provides that no man may marry his mother, grandmother, daughter, granddaughter, sister, aunt, niece, stepmother or stepdaughter, and no woman may marry her father, grandfather, son, grandson, brother, uncle, nephew, stepfather or stepson. It provides further that any marriage within these degrees is void.[88] In terms of section 402.010(1) of the Kentucky Revised Statutes no marriage shall be contracted between persons who are nearer of kin to each other by consanguinity, whether of the whole or half-blood, than second cousins, and marriages prohibited by subsection (1) are incestuous and void.[89] Furthermore, in terms of section 25.05.021 of the Alaska Statutes marriage is prohibited and void if performed when either party to the proposed marriage has a husband or wife living, or the parties to the proposed marriage are more closely related to each other than the fourth degree of consanguinity, whether of the whole or half-blood, computed according to rules of the civil law. The Utah Code provides in section 30-1-1 as follows:

> (2) The following marriages are incestuous and void from the beginning, whether the relationship is legitimate or illegitimate:
> (a) marriages between parents and children;
> (b) marriages between ancestors and descendants of every degree;
> (c) marriages between brothers and sisters of the half as well as the whole blood;
> (d) marriages between uncles and nieces or aunts and nephews;
> (e) marriages between first cousins, except as provided in Subsection (2); or
> (f) marriages between any persons related to each other within and not

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88 Http://www.cslnet.ctstateu.edu/statutes/title46b/t46b-p4.htm accessed on 12 June 1998.

89 Http://www.law.state.ky.us/Civil/marriageman.htm accessed on 10 June 1998.

including the fifth degree of consanguinity computed according to the rules of the civil law, except as provided in Subsection (2).

(2) First cousins may marry under the following circumstances:

(a) both parties are 65 years of age or older; or

(b) if both parties are 55 years of age or older, upon a finding by the district court, located in the district in which either party resides, that either party is unable to reproduce.

2.1.20.6 The Australian Marriage Act provides in section 23B(1) that a marriage is void if the parties are within a prohibited degree of relationship. Marriages of parties within a prohibited degree of relationship are in terms of subsection (2) those between a person and an ancestor or descendant of the person, or between a brother and a sister (whether of the whole blood or the half-blood. Subsection (3) provides that any relationship specified in subsection (2) includes any relationship traced through, or to, a person who is or was an adopted child, and for that purpose, the relationship between an adopted child and the adoptive parent, or each of the adoptive parents, of the child shall be deemed to be or to have been the natural relationship of child and parent. The Marriage Act provides further that "adopted", in relation to a child, means adopted under the law of any place[90] relating to the adoption of children, and "ancestor", in relation to a person, means any person from whom the first mentioned person is descended including a parent of the first-mentioned person.

2.1.20.7 The New Zealand Marriage Act provides that subject to the provisions of section 15 a marriage which is forbidden by the Second Schedule[91] to the Act shall be void. It further provides that any persons who are not within the degrees of consanguinity but are within the degrees of affinity prohibited by the Second Schedule may apply to the High Court for its consent to their marriage. The Court, if it is satisfied that neither party to the intended marriage has by his or her conduct caused or contributed to the cause of the termination of any previous marriage of the other party, may make an order dispensing with the prohibition contained in the Second Schedule to the Act so far as it relates to the parties to the application. If such an order is made, the prohibition ceases to apply to the parties. The Registrar of the Court where any order is made must send a copy in duplicate of the order to the Registrar-General. The Act further provides in section 15 that no marriage not forbidden by the provisions of the Second Schedule to the Act shall be void only on the ground of consanguinity or affinity.

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90 Whether in or out of Australia.

91 The Second Schedule is considered in the next paragraph.

2.1.20.8 The Second Schedule of the New Zealand Marriage Act provides that a man may not marry his grandmother, grandfather's wife, wife's grandmother, father's sister, mother's sister, mother, stepmother, wife's mother, daughter, wife's daughter, sons' wife, sister, son's daughter, daughter's daughter, sons's son's wife, daughter's son's wife, wife's son's daughter, wife's daughter's daughter, brother's daughter or sister's daughter. The Schedule further provides that a woman may not marry her grandfather, grandmother's husband, husband's grandfather, father's brother, mother's brother, father, stepfather, husband's father, son, husband's son, daughter's husband, brother, son's son, daughter's son, son's daughter's husband, daughter's daughter's husband, husband's son's son, husband's daughter's son, brother's son, sister's son. The Schedule also provides that provisions of the Schedule with respect to any relationship shall apply whether the relationship is by the whole blood or by the half blood. The Schedule defines that, unless the context otherwise requires, the term "wife" means a former wife, whether she is alive or deceased, and whether her marriage was terminated by death or divorce or otherwise, and that the term "husband" has a corresponding meaning.

2.1.20.9 The English law also distinguishes between relationships of consanguinity (those between blood relations) and relationships of affinity (those created by a marriage).[92] The English Marriage Act provides on the prohibited degrees of consanguinity that a man may not marry his mother or his daughter, his grandmother or his granddaughter, his sister, his aunt or his niece. It prohibits in regard of affinity, two classes of degrees, namely first class and second class. The first class deals with step-relations and the second class degrees with daughters-in-law and mothers-in-law. Regarding the first class degree of prohibition, a man may only marry his step-daughter, step-mother, step-grandmother or step-granddaughter. Two conditions, however, have to be satisfied, namely that both the parties must be 21 years or older and the younger party must not at any time before attaining the age of 18 have been a child of the family in relation to the other party which means a person not having lived in the same household as that person and been treated by that person as a child of his family.

2.1.20.10 The English Marriage Act provides in respect of daughters and mothers-in-law that a man may not marry his son’s former wife unless both parties to the intended marriage are 21 or older and both the son and the son’s mother are dead, or conversely if marriage is intended with a mother-in-law, the intending husband’s former wife and the former wife’s father

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92 Cretney & Masson *Principles of Family Law* at 36 *et seq*.

are both dead. It is stated that the policy underlying these complex provisions is reasonably clear, namely a man should not be allowed to marry his step-daughter if there has been a parental relationship between them and that he should not be allowed to marry his daughter-in-law in circumstances where it may be thought that his sexual overtures caused the breakdown of her marriage to his son.[93] However, doubt exists whether these provisions will be wholly effective in all cases and whether there can be any realistic investigation into the parties' declaration that the intended bride has not been a child of the family in relation to the other. It is also suggested that in regard of relationships arising from adoption, natural relationships by consanguity but not affinity should remain a bar to marriage in the English law, and that the child should be regarded for the purpose of the issue of prohibited degrees as the natural child of his adoptive parents. However, it is considered that a discretion should be given to the court to permit marriages where the prohibited relationship arose only from the adoption, it may prevent hardship and also minimise the risk of role confusion within the family.

2.1.20.11 Prof Hahlo notes in respect of the South African law that ascendants and descendants in the direct line, namely father and daughter, mother and son, grandfather and granddaughter etc, may not marry no matter whether the relationship is based on legitimate or illegitimate descent.[94] He further explains that collaterals are prohibited from marrying irrespective whether they are of the whole or half blood, if either of them is related to their common ancestor in the first degree of descent. Marriage is therefore prohibited between brother and sister, half-brother and half-sister, uncle and niece, grand-uncle and grand-niece, but not between cousins, including double first cousins, meaning the children of two brothers and two sisters. The prohibition as regards collaterals by affinity are concerned has been abolished by the Marriage Act, and therefore a man may marry his deceased or divorced wife's sister and any female related to him through his former wife in a more remote degree of affinity than her sister, such as her sister's daughter or aunt. However, marriage by parties in the descending and ascending line are prohibited, and a man may therefore not marry his former daughter-in-law or mother-in-law, his stepmother or his stepdaughter.

2.1.20.12 The Commission's preliminary view is that the Department of Home Affairs' suggestion for adding the additional subsection is persuasive. The Commission considers that this provision should correspond to its provision setting out the minimum age for marriage for

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93 Cretney & Masson *Principles of Family Law* at 41.

94 Hahlo *The South African Law of Husband and Wife* at 70 *et seq*.

males and females to be 18 years of age. It is thought inadvisable to set any higher standard than the proposed age of 18 years for these cases.

(e) Recommendation

2.1.20.13 The Commission recommends that section 28 be renumbered and a subsection (2) be added to make provision for of the provincial or local division of the High Court to have jurisdiction to consent to a marriage between a man or a woman and the direct descendant of his or her deceased spouse if both parties have reached the age of ~~21~~ 18 years and they are not related to each other by blood.

2.1.21 TIME AND PLACE OF WEDDING CEREMONY; PRESENCE OF PARTIES AND WITNESSES

(a) The provisions contained in the Marriage Act

2.1.21.1 Section 29 of the Marriage Act provides as follows:

> (1) A marriage officer may solemnize a marriage at any time on any day of the week but shall not be obliged to solemnize a marriage at any other time than between the hours of eight in the morning and four in the afternoon.
> (2) A marriage officer shall solemnize any marriage in a church or other building used for religious service, or in a public office or private dwelling-house, with open doors and in the presence of the parties themselves and at least two competent witnesses, but the foregoing provisions of this subsection shall not be construed as prohibiting a marriage officer from solemnizing a marriage in any place other than a place mentioned therein if the marriage must be solemnized in such other place by reason of the serious or longstanding illness of, or serious bodily injury to, one or both of the parties.
> (3) Every marriage-
> (a) which was solemnized in the Orange Free State or the Transvaal before the commencement of this Act in any place other than a place appointed by a prior law as a place where for the purposes of such law a marriage shall be solemnized; or
> (b) which by reason of the serious or longstanding illness of, or serious bodily injury to, one or both of the parties was solemnized before the commencement of the Marriage Amendment Act, 1968, in a place other than a place appointed by subsection (2) of this section as a place where for the purposes of this Act a marriage shall be solemnized,
> shall, provided such marriage has not been dissolved or declared invalid by a competent court and provided further that neither of the parties to such marriage has after such marriage and during the life of the other, already lawfully married another, be as valid and binding as it would have been if it had been solemnized in a place

appointed therefor by the applicable provisions of the prior law or, as the case may be, of this Act.
(4) No person shall under the provisions of this Act be capable of contracting a valid marriage through any other person acting as his representative.

(b) The Department of Home Affairs' draft provision

2.1.21.2 The Department of Home Affairs proposed the following provisions:

27(1) A marriage officer may solemnize a marriage at any time on any day of the week but shall not be obliged to solemnize a marriage at any time other than between the hours of eight in the morning and four in the afternoon.
(2) A marriage officer shall solemnize any marriage in a building or in a public office or private dwelling-house, with open doors and in the presence of the parties themselves and at least two competent witnesses, but the foregoing provisions of this subsection shall not be construed as prohibiting a marriage officer from solemnizing a marriage in any place other than a place mentioned therein if the marriage must be solemnized in such other place by reason of the serious or longstanding illness of, or serious bodily injury to, one or both of the parties.
(3) No person shall under the provisions of this Act be capable of contracting a valid marriage through any other person acting as his or her representative.

(c) Comments by respondents

2.1.21.3 A number of respondents are of the view that section 29(2) should be amended. Mr Justice S Selikowitz[95] remarks that in his experience couples regularly marry in various places which do not strictly conform to the currently permitted places, marriage officers do not appear to apply the provisions of the Act strictly and many marriages are therefore conducted outside, wine farms in the Boland and the top of Table Mountain being popular at present. He notes that from time to time these *marriages* become the subject of court evaluation and the ramifications of an order declaring the marriage void are such that the Courts invariably find that they can overlook the defect and treat the marriage as valid, or where necessary declare it to be valid. He therefore considers that the existing situation is undesirable and should be reviewed. Mr DP Kent[96] considers that section 29(2) appears to be archaic and that other than for religious purposes, there appears to be no sound reason why a building or type of building for that matter should play a role in the conclusion of a marriage contract and he therefore

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95 Judge of the High Court of the Cape of Good Hope Provincial Division.

96 Of the firm of attorneys Douglas Kent & Co of Margate.

proposes that these references be deleted. Rev Andre le Roux[97] proposes that the law regarding the place in which marriages are conducted be broadened to include "a building specifically set aside for the purpose of weddings". He motivates this by saying that many people choose to be married at a guest farm where a *wedding chapel* has been set aside for the service and with reception venues on the property. He notes that under present law the couple need to find a *legal* venue to re-do the legal declarations, sometimes requiring a great deal of time and travelling to do so, all this despite the fact that the service was conducted by a marriage officer in what used to be a church or chapel but which is no longer used for religious services, or a chapel constructed for the purpose of weddings.

2.1.21.4 The Campus Law Clinic and Mrs Olga Kruger are of the view that the places where a marriage can take place should not be so restrictive. The Campus Law Clinic further remarks in regard of section 29(4) of the Act that this provision has implications for Islamic marriages which are conducted by proxy and that safeguards should be considered with regard to instances where fraud could be committed. The attorneys Bouwer and Cardona[98] suggest that marriages solemnised outdoors be recognised in their entirety. Ms Donna Vos, the President and High Priestess of the Pagan Association explains that their marriages take place usually in an outside environment, as they are nature based, although marriages may take place within a more sheltered environment at times.

2.1.21.5 Mr D de Wet suggests on behalf of the Church of Jesus Christ of Latter-day Saints that section 29 be amended by the deletion of the words “with open doors” in the section. Mr De Wet points out the following reasons for the proposed amendment:

- The provision that there should be open doors has its historical origin from the canon law and the practise of the Church of England. It is a relic from the past and no longer serves a purpose.
- If it be deemed necessary that there be openness in the solemnisation of marriages or if it is deemed necessary that persons who wish to object to an intended marriage be given an opportunity of doing so, then this can be provided for in some other way.

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97 Of the Trinity United Church which is a congregation of the Methodist Church of Southern Africa.

98 Who act as the legal representatives of the Pagan Association.

- The requirement of open doors is unconstitutional as a result of the provisions of section 9 (equality), section 15 (freedom of religion) and section 31(1) (cultural and religious practices) of the Constitution.

2.1.21.6 Mr De Wet states that the Church has a procedure for the solemnisation of marriages which is in accordance with the provisions of the Marriage Act except section 29(2). He remarks that in terms of Church doctrine a Church marriage is required to take place inside Church buildings set aside and dedicated as Temples[99] which is open only to members of standing[100] of the Church. He further explains that the Church marriage is thus conducted in public and affords objectors an opportunity to object, but the public and objectors are restricted to being Church members. Mr De Wet notes that in order to comply with the open door policy of section 29(2) of the Marriage Act Church members are subjected to undergoing two marriage ceremonies. He considers that it would be fair and just to amend the subsection to accommodate the religious beliefs and practices of the Church and others whose beliefs and practices do not require an open door policy and the present law is unnecessarily onerous in that it requires married couples belonging to the Church to participate in two separate ceremonies. Mr De Wet also states that Church doctrine provides that a Church marriage be witnessed by two witnesses and that only members of the Church who qualify in terms of Church doctrine to enter into a dedicated Temple may attend the marriage ceremony. Mr De Wet remarks that a specific marriage formula is adhered to by the Church officer solemnizing the Church marriage and that the prescribed marriage formula is a material requirement of a Church marriage. Mr De Wet makes the following suggestions in this regard, namely that legislation provides-

- that dedicated Church Temples in South Africa, as designated by the Church, be an acceptable venue for a civil marriage ceremony to be open to all persons holding a valid Temple recommend or certificate in terms of the tenets and doctrines of the Church:
- that the marriage formula of the Church, as prescribed by Church doctrine, be

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99 Fifty Temples are currently in operation in 23 countries worldwide and one such temple is presently in operation in South Africa, situated in Parktown, Johannesburg.

100 He notes these are members of the Church who have been a member of the Church for not less than one year and who obtain a Temple recommend or certificate from a Church officer in a position of responsibility confirming that such persons adhere to the tenets and doctrines of the Church.

an acceptable marriage formula for the purpose of concluding a legally recognised civil marriage in a Church Temple.

2.1.21.7 Mr De Wet considers that the common legislative requirement that marriages be contracted in buildings that are open to the public or with open doors, is a product of history that has existed within the legislative traditions of various legal systems for centuries. He states that historically, "open doors" was a companion requirement to the publication of banns and served the same purpose. He notes that these formalities were specifically developed to provide adequate opportunities for concerned individuals to object to a marriage on the basis of a known impediment, such as a lack of parental consent (if either of the parties had not yet reached the age of majority), consanguinity, or affinity. Mr De Wet remarks that the historical roots of the "open doors" requirement originated in England at a time when communities were small and closely-knit, when these communities were also somewhat immobile and tended to be centered around the local parish. He notes that the "open doors" formality was also developed at a time when clandestine marriages presented serious social, religious, but mostly economic ramifications. He remarks that the policy behind the legislative language was that any member of the community who knew of a lawful impediment to the marriage should have an adequate opportunity to object before the alliance was created.

2.1.21.8 Mr De Wet notes that as the English law developed over time, marriage legislation was a process of consolidation rather than reformation of prior law, and, as a result, the modern application of the open doors requirement to current social-economic conditions is unnecessarily restrictive. He remarks that although sound legal policy at the time of enactment, many subsequent social and legal changes have virtually eliminated the need to perform weddings with "open doors". Mr De Wet considers moreover, that modern compliance with this historic formality no longer provides a practical or effective opportunity to object. Mr De Wet sets out the historical background of the open doors requirement in his submission. He notes that historically, marriages in many cultures were contracted under close community supervision, and, for example, from the time of Constantine, Roman law did not require any formal ceremony or certificate for a valid marriage. He states that legally all that was required was consent and the absence of any prohibition based on such impediments as kinship or social status. He notes that, in Roman culture, a marriage was also a public event that involved the joining of two families, and the long-term consequences of the alliance were understood to have a profound influence upon the wider community.

2.1.21.9 Mr De Wet explains that the primary purpose of marriage was the transferring of family name and property to the next generation, which ensured the continuation not only of the individual family lines but of the Roman state itself. Therefore, he says, Roman law, which was naturally reflective of the culture, required not only the consent of the bride and groom, but also that of the *paterfamilias*, or the male head of each family. Mr De Wet points out that a formal betrothal between family patriarchs followed by arranged marriage was customary among Christians and non-Christians in the Roman empire, and that during medieval times the custom of obtaining patriarchal consent grew obsolete in many legal systems and cultures as social mores changed. He notes that in the Anglican society which was influenced to a considerable degree by Roman law, consent of the parties was eventually the only formality required to contract a valid marriage. He remarks that this formless requirement initially allowed and eventually encouraged clandestine marriages despite the existence of impediments such as infancy or prohibited degrees of consanguinity. He notes that the chief concerns with these clandestine marital alliances were, however, the resulting economic consequences, such as property rights and the determination of an heir at law. Mr De Wet points out that of particular concern was the fact that because a woman's property immediately vested in her husband, a clandestine marriage provided an effective method whereby a man could obtain a rich heiress' property without the knowledge or consent of her parents.

2.1.21.10 Mr De Wet notes that during the Middle Ages clandestine marriages grew commonplace and were a source of much trouble and grief to the Church of England, and that the Church of England consequently promulgated canonical laws that imposed formalities designed to give the public notice of the upcoming ceremony and, most particularly, an adequate opportunity to object. He points out that despite the Church of England's canonical efforts to deter clandestine marriages, it appears that the Church had no power to invalidate them, and finally and as a result to the ineffectiveness of Canon law, Lord Hardwicke's Act was passed in the early part of the 18th century which effectively eliminated the formless common law marriage in England. Mr De Wet remarks that in 1836, the passing of the Marriage Act in England finally made it possible for all religious denominations to marry according to their own rites, and even allowed civil marriage before a superintendent registrar, so long as specified formalities designed to publicise the marriage were met. He states that these formalities were based upon the prior legislation and included requirements such as the publication of banns, posting public notice in the office of the superintendent registrar, and the conducting of a formal ceremony with *open doors*.

2.1.21.11 Mr De Wet considers that historically-based formalities such as the "open doors" requirement meet current social needs as effectively as a suit of medieval armour during a battle where the combatants employ automatic weapons and long-range missiles. He points out that the underlying purpose from bodily harm still exists, but new weapons create new dangers and thus require measures for self-preservation. He considers similarly that the historic marriage formalities tend to make marriage unnecessarily complex and restrictive and reflective of the needs and social conditions of the early nineteenth century rather than those of the late 20th century. Mr De Wet points out that although marriage was once a public, community-supervised event, it is increasingly viewed as a most private, personal matter that is almost completely free from community intervention. He remarks that there continues, however, to be valid social justification for some level of community involvement and that marriage creates a legal status unlike any other, with inherent rights and responsibilities that affect not only the individuals involved, but the society at large.

2.1.21.12 Mr De Wet considers that legislative tradition with respect to marriage reflects a genuine effort to balance the equally but sometimes conflicting principles of the natural right to marry and the social need to marital stability. Mr De Wet notes that there are four basic underlying requirements for a valid marriage which have existed for centuries and continue to reflect sound public policy. First, he points out, there must be certainty that a marriage has in fact been created. He says that this requirement goes primarily to the understanding of the parties themselves - there must be no doubt that a marriage has indeed been formed. Secondly, he remarks, there must be proof of the marriage via public records. He considers that this second requirement is also intended to provide an adequate opportunity to conduct the appropriate pre-marital investigation to assess the soundness of the proposed alliance, ie the capacity of the parties to marry barring lawful impediments. He notes thirdly, that the marriage must be based upon mutual consent and the absence of fraud, and finally, some recognised form of solemnisation is required. He notes that each of these requirements is based upon sound public policy that has existed throughout a rich legislative history and continues to reflect social needs. He however considers that there is no indication that any of these four basic requirements are furthered to any practical degree by the "open doors" language found in the Marriage Act. He is of the view that the original legal basis behind the "open doors" formality and the social conditions which both created its demand and ensured its effectiveness no longer exist.

2.1.21.13 Advocate BW Burman SC was requested by the Church of Jesus Christ of

Latter-Day Saints to consider the constitutionality of section 29(2). He notes that the disadvantaged group are the members of the Church. He points out that it must be considered whether their interests have been unfairly discriminated against, and these interests must be weighed up against the purpose of section 29(2) of the Marriage Act. He remarks that the discrimination is not so much that the Church is treated the same as everybody else - they are as section 29(2) applies to everybody - but that being different to others they are not treated differently. Adv Burman states that the Church is different in that its marriage formalities require a closed door policy- that is that access is not open to the general public but is restricted to Church members. He considers that to require members of the Church to undergo two marriage ceremonies impairs their dignity or affects them in a comparably serious manner. Adv Burman points out that it must be remembered that the guarantee of equality lies at the very heart of the Constitution.[101] Adv Burman considers that the *Mthembu*[102] case can be seen as an example of tolerance and of treating different people differently, that is, recognising their difference. He also notes that section 9(5) of the Constitution provides that religious discrimination is unfair unless it is established that it is fair.

2.1.21.14 Adv Burman considers that regard must be had to the background and purpose of the open door policy and the extent to which the purpose is achieved by requiring an open door. He points out that the policy behind the legislative language was historically that any member of the community who knew of a lawful impediment to the marriage should have an adequate opportunity to object before the marriage was entered into, and although marriage was once a more public community supervised event than it is today and is increasingly viewed as a private personal matter, it is not completely free from community interest. He also considers that there continues however to be a valid social justification for some level of community involvement.

2.1.21.15 Adv Burman considers that it may be said that the open door policy is a system based on a legal fiction of the past. He points out that given the historic purpose of the open door language and its current application to present day society it is apparent that this formality

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101 Adv Burman refers to *Fraser v Children's Court, Pretoria North, and Others* 1997 (2) SA 261 (CC) and *Mtembu v Letsela and Another* 1998 2 SA 675 SA (T) at 688B. He notes that in the latter case the Court refused to declare a customary union rule of succession invalid because it offended western norms.

102 See preceding footnote.

is no longer entirely useful, and that the original legal basis behind the open door formality and the social conditions which both created its effectiveness are diminished. Adv Burman remarks that if this statement is correct and there is presently little requirement or necessity for the policy then it could be shown that the discrimination is fair or that the policy could be justified in terms of section 36(1) of the Constitution. He considers that if there is a requirement for the policy then its purpose may be achieved in various other ways. He suggests that one example is that it could be a requirement that objections be made to the marriage officer an hour before the ceremony. He points out that the present position of the Marriage act is that as bans are not necessary, there is no publicity to the intended marriage. Adv Burman remarks that it is his view that there are prospects that section 29(2) will be found unconstitutional as it offends religious equality.

2.1.21.16 Adv Burman refers to the case of *S v Lawrence*[103] which dealt with the right to sell liquor on a Sunday and which was prohibited by the Liquor Act. It was argued that the closed days provision was inconsistent with the right to freedom of religion as it induced a submission to a sectarian Christian concept of the proper observance of the Christian Sabbath. The Court held that a law which compelled observance of the Christian Sabbath against the religious freedom of those who held other beliefs would be inconsistent with section 14 of the Constitution. The Court held that the essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to manifest religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious beliefs by worship and practice or by teaching and dissemination. Adv Burman notes that the Court held that there might be circumstances in which endorsement of a religion or a religious belief by the State would contravene the freedom of religion provision of section 14 of the Constitution, and that this would be the case if such endorsement has the effect of coercing persons to observe the practices of a particular religion, or of placing constraints on them in which relation to the observance of their own different religion. The Court pointed out that the coercion may be direct or indirect but it must be established to give rise to an infringement of the freedom of religion and that it is for the person who alleges that section 14 has been infringed to show that there has been such coercion or constraint.

2.1.21.17 Adv Burman remarks that the open door policy is a policy which is founded on a practice by the church of england and the canon law, and by making provision for that p[olicy

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[103] 1997 10 BCLR (CC).

in a statute, the legislature is endorsing that religious be;lief and is so curtailing the Church's beliefs. Hence, he argues, it has the effect of coercing the Church to observe the practice of a particular religion. Adv Burman notes that enforcing the open door policy is also compelling persons whose religious beliefs are different to observe that policy. He points out that in the minority judgment of O'Regan J, it was held that the requirements of the Constitution require more of the legislature than it to refrain from coercion and that it was required in addition that the legislature refrain from favouring one religion over others. He notes that fairness and even-handedness in relation to diverse religions is a necessary component of freedom of religion and that the value of equality and tolerance of diversity and the recognition of the plural nature of our society are among the values that underlie the Constitution.

2.1.21.18 Adv Burman considers that it may be said that there is a public requirement that intended marriages be conducted and that this justifies the open door policy. He notes that this view would depend on whether the open door policy is achieving its purpose and whether there is no other way to achieve that purpose. He points out that the historical purpose of the policy does not seem to be effective in present times, and that there are other ways - as he mentioned above- in which the purpose of the policy can be achieved. He considers that another aspect of section 29(2) may also be referred to which prohibits marriages in the open-air or a structure that does not qualify as a building as it requires the marriage to be solemnised in a church or other building with open doors. He considers that if the purpose is openness then there should be no requirement of a marriage being solemnised in a building. Adv Burman notes that this requirement reconfirms the historical origin of the policy. He also states that the requirement of publishing bans which originated from the same historical origin was abolished some years ago. He notes that the effect of that is that publicity is no longer given of the intended marriage and any potential objector would not obtain knowledge of the intended marriage or where it was going to be performed, and so be able to object at the ceremony. Adv Burman refers also to section 31(1) of the Constitution and points out that it provides that persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community to enjoy their culture, practise their religion and use their language. He considers that this provision reinforces the acceptance of religious communities being allowed to practise their religion as they practise it. Adv Burman therefore considers that there is a reasonable prospect that section 29(2) of the Marriage Act[104] will be held to be unconstitutional as a result of the provisions of section 15 of the Constitution.

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[104] Which requires a marriage to be conducted with open doors.

(c) Evaluation

2.1.21.19 The provision contained in the Australian Marriage Act is noteworthy. It provides that a marriage may be solemnised on any day, at any time and at any place, and that a marriage shall not be solemnized unless at least two persons who are, or appear to the person solemnising the marriage to be, over the age of 18 years are present as witnesses.

2.1.21.20 The English Marriage Act requires that a marriage be conducted with open doors in the presence of two or more witnesses and a Registrar or authorised person, and the latter is often the celebrant.[105] An English register office marriage usually takes place in the office serving the district in which both parties reside and the requirement that the ceremony be conducted with open doors means that the doors need not actually be open provided they are not so closed as to prevent persons from entering that part of the building.[106] Places may be registered in England for conducting marriage ceremonies and, in order to qualify for registration, it must be a separate building which is a place of meeting for religious worship. An authorised person who is usually a minister of the religious group concerned may be nominated to celebrate marriages without the presence of the Registrar. The English State therefore licenses both the places where marriages can take place and those who can conduct them. The form of the ceremony is however almost entirely left to the parties and the authorities of the registered building. The prescribed form of a civil marriage requires the statement "I call upon these persons here present to witness that I, A.B., do take thee, C.D., to be my lawful weeded wife (or husband) and that the parties declare that they know of no lawful impediment to the marriage. The Archbishop of Canterbury has the power to licence marriages at any hour of the day or night in any church or chapel or other meet and convenient place whether consecrated or not. However, licences are today usually granted to permit marriages in places such as college chapels at Oxford and Cambridge which fall outside the range of parish church and other authorised Anglican chapels. With the exception of Quaker and Jewish marriages, and marriages by Special or Registrar-General's Licence, it is an offence knowingly and wilfully to celebrate a marriage save between 8 am and 6 pm, although a marriage contracted outside these hours will be valid.

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105 Cretney & Masson *Principles of Family Law* at 20.

106 Cretney & Masson *Principles of Family Law* at 18 *et seq*.

2.1.21.21 The New Zealand Marriage Act provides on the issue of these formalities under discussion that every marriage solemnised by a marriage celebrant shall be solemnized at a place described in the marriage licence issued in respect of that marriage.[107] It also provides that subject to section 31(3) every such marriage shall take place between the persons named in the licence according to such form and ceremony as they may think fit to adopt. The Act also requires that every marriage must be celebrated with open doors in the presence of a marriage celebrant and 2 or more witnesses at any time between 6 a.m. and 10 p.m. The Act prescribes that during the celebration of every marriage each party to it shall say to the other: "... I, A.B., take you C.D., to be my legal wife (or husband)," or words to the same effect.[108]

2.1.21.22 The British Columbia Marriage Act states simply[109] that all marriages solemnised under the Act by a religious representative must be in the presence of 2 or more witnesses besides the religious representative, the ceremony must be performed in a public manner, unless otherwise permitted by licence, and both parties to the marriage must be present at the ceremony. The requirements for a civil marriage are that the marriage may be contracted before and solemnized by a marriage commissioner under a licence under the Act and on payment of the prescribed fee. The Act provides that if the marriage is contracted in a public manner in the presence of the marriage commissioner and 2 or more witnesses-

- each of the parties to the marriage in the presence of the marriage commissioner and the witnesses declares-

  "I solemnly declare that I do not know of any lawful impediment why I, *A.B.,* may not be joined in matrimony to *C.D.*", and
- each of the parties to the marriage says to the other,

  "I call on those present to witness that I, *A.B.,* take *C.D.* to be my lawful wedded wife (or husband)".

2.1.21.23 In the case of *Ex Parte Dow*[110] Mr Justice Broome notes that the question raised by the application in the case is whether the marriage must be declared null and void on

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107 Section 31.

108 Section 31(3).

109 Sections 9(1) - (3).

110 1987 3 SA 829 (DCLD).

account of non-compliance with the provisions of s 29(2) of the Marriage Act 25 of 1961. What happened in the case was that the marriage was solemnised by a minister of the Presbyterian Church (he being a duly designated marriage officer) at a privately owned property on which stood a private dwelling house. In breach of the provisions of s 29(2), the entire ceremony took place in the front garden in the open. The Court notes that this is the only defect alleged. The applicant cited the oft-quoted case of *Sutter v Scheepers*[111] and *Messenger of the Magistrate's Court, Durban v Pillay*[112] in which Van den Heever JA made reference to the use in the Afrikaans version of the categorical imperative 'moet' as does section 29(2). The Court states that Mr Justice Van den Heever contended this was a strong indication that the Legislature intended disobedience to be visited with nullity. The Court further notes that the applicant drew attention to the exception contained in s 29(2) commencing with the word 'but,' which provides that non-compliance on account of serious or long-standing illness or serious bodily injuries to one or both of the parties, 'shall not be construed as prohibiting a marriage officer from solemnizing a marriage in any other place', and this, the applicant contended, was an indication that a marriage officer was prohibited from solemnizing a marriage outside a private dwelling house if, as in this case, there was no question of illness or injury.

2.1.21.24 Mr Justice Broome considers in the *Ex Parte Dow* case that this exception tends to confuse, or render uncertain, the alleged prohibition because it opens up an enquiry into what, for the purposes of the exception, constitutes serious or long-standing illness or serious bodily injury. He poses the question whether this means any illness or injury which renders it impossible or merely inconvenient or difficult to get in to a church, public office or dwelling house. The Court notes that the applicant also relied on the provisions of s 35 which make it an offence for a marriage officer knowingly to solemnise a marriage in contravention of the provisions of the Act, and that the applicant submitted that this was another indication that the Legislature intended the provisions of s 29(2) to be complied with strictly or exactly.

2.1.21.25 The Court notes the history of the move away from the rule that an absolute (peremptory) enactment must be obeyed or fulfilled exactly, and that Colman J traced in *Shalala v Klerksdorp Town Council and Another*[113] that it is sufficient if a directory enactment

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111 1932 AD 165 at 174.

112 1952 (3) SA 678 (A).

113 1969 (1) SA 582 (T) at 587A - H.

be obeyed or fulfilled substantially' where he concluded by quoting the judgment in *Maharaj and Others v C Rampersad*[114]:

> 'The enquiry, I suggest, is not so much whether there has been "exact", "adequate" or "substantial" compliance with this injunction but rather whether there has been compliance therewith. This enquiry postulates an application of the injunction to the facts and a resultant comparison between what the position is and what, according to the requirements of the injunction, it ought to be. It is quite conceivable that a Court might hold that, even though the position as it is is not identical with what it ought to be, the injunction has nevertheless been complied with. In deciding whether there has been a compliance with the injunction, the object sought to be achieved by the injunction and the question of whether this object has been achieved are of importance.'

2.1.21.26 Mr Justice Broome states in the *Ex Parte Dow* case that in considering what the objects sought to be achieved are, it is necessary to trace the changes that have taken place in the formalities required for the conclusion of a valid marriage. He notes that in Roman law marriages were contracted by consent evinced by word or act in any way whatever, and refers to Hahlo's *South African Law of Husband and Wife*[115] who describes how, when in the Middle Ages marriage in Western Europe passed under the jurisdiction of the Church, it became the practice for the parties to declare their consent to marry before a priest who would confer the Church's blessing on the couple, and that "it was the consent of the parties, and not the blessing by the priest, which brought the marriage into existence". Mr Justice Broome notes that as early as 1215 the Fourth Lateran Council prescribed the publication of banns "in order to do away with the evils and abuses inherent in a system that permitted clandestine (ie secret) marriages". He states that a contravention of these rules did not, however, affect the validity of the marriage, and the evil of clandestine marriages continued until the Church Council of Trent in 1563 prescribed that henceforth a marriage was to be invalid unless banns had been published and the parties had declared their consent to marry before a priest and no fewer than two witnesses. Mr Justice Broome notes that this form of marriage before a priest or marriage officer and witnesses became the standard form.

2.1.21.27 Mr Justice Broome states in the *Ex Parte Dow* case that he has not been referred to, nor has he found, any reference to the reason or need for the ceremony to take place indoors. He notes that the Natal Marriage Ordinance 17 of 1846, the Transvaal *Huwelijks*

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114 1964 (4) SA 638 (A) at 646C.

115 Sixth edition at 6 *et seq*.

Ordonnantie 3 of 1871 and the Orange Free State *Huwelijks Wet* 26 of 1899 each provided for the publishing of banns or the issue of a special licence, and, as regards the time and place of the ceremony, the Natal Ordinance stated in s 21 as follows:

> And in order to preserve evidence of marriages, and to make the proof thereof certain and easy, and for the direction of such ministers and marriage officers as aforesaid in the registration thereof, it is hereby further ordered that from and after the passing and taking effect of this Order, all marriages (except marriages by special licence to marry at any time and place where such special licences can be lawfully granted), shall be solemnized with open doors between the hours of eight in the forenoon and four in the afternoon, in the presence of two or more credible witnesses beside the minister or marriage officer who shall solemnize the same....'

2.1.21.28 Mr Justice Broome further notes that section 13 of the Transvaal Law and section 17 of the Orange Free State Law provided respectively as follows:

> 24. No marriage shall be solemnized except between eight o'clock in the morning and four o'clock in the afternoon, and such in any church or other public building (used-Tr.) for religious service, public office or private dwelling house with open doors, and in the presence of at least two persons competent by law to act as witnesses; only in unforeseen circumstances shall it be permitted to solemnize marriages outside the hours provided.'
>
> 17. A marriage may be legally solemnized on a Sunday or on any other day of the week, provided always that no marriage may be solemnized except between the hours of 8 in the morning and 4 in the afternoon, in some church or other public building devoted to divine service, public office or private house with open doors, and in the presence of at least two legally qualified witnesses.'

2.1.21.29 Mr Justice Broome remarks in the *Ex Parte Dow* case that each statute made provision for the keeping of a register which had to be entered immediately after the solemnisation of the marriage, and that, unfortunately, he has not been able to have a sight of the relevant Cape statute. He notes that it is, however, interesting to note that on 29 May 1812 there was published the opinion of the Law Officers in England, dealing with the doubts that arose over the validity of marriages solemnised at the Cape by a Dr Halloran who posed as a clergyman, and that the opinion was "that the marriages solemnised at the Cape by the person officiating as a clergyman, under assumed or forged orders, cannot be vitiated or invalidated in any manner by the defect of the holy orders of priesthood imputed to him". Mr Justice Broome also notes that substantially similar provisions were enacted in the Marriage Act 25 of 1961. He considers that the object of these provisions was essentially to ensure that marriages took place in public, that the public were to be informed of intended marriage so that any objections could be raised, and that a register to which the public had access be kept. He

states that the constant reference to open doors is an indication that the public were to be permitted access to every marriage ceremony, the mischief being clandestine marriages. Mr Justice Broome refers to *Voet* 23.2.3[116] where there is also reference to, "in a private house" in the passage dealing with the dispensation in the need for three public callings of banns in the passage:

> *Marriage in private houses*. It is the same if, when the triple calling has already been completed, ill health of the betrothed man or woman does not at all allow of a journey to the church or court or other place publicly appointed for the entering into of marriages; and for that reason it is requested that it may be allowed to conduct the formalities of marriage in a private house before a meeting of the neighbours. One who calls banns would not act with wisdom in Holland if he thinks that such a course is to be essayed without the consent of the magistracy, as can be gathered from enactments which have been made by the States of Holland.

2.1.21.30 Mr Justice Broome states in the *Ex Parte Dow* case that he has not been able to ascertain the basis for, or object of, the requirement that a marriage must be solemnised in a private dwelling as opposed to at, or in the precincts of, a private dwelling. He remarks that it seems to him that the object of these provisions is to avoid clandestine marriages, and that since its enactment the Marriage Act 25 of 1961 has been amended quite drastically in that the Marriage Act Amendment Act 51 of 1970 repealed ss 13 - 21 inclusive. Mr Justice Broome notes that these were the sections which provided for the publication of banns, proof thereof, the publication of notice of intention to marry, the issue of special licences to marry without the publication of banns or notice of intention to marry, the marriage officer by whom the marriage could be solemnised and the lapse of banns, etc after three months. He remarks that it follows that there has been a complete abolition of the provisions which previously served to inform the public of an intended marriage. He states that a marriage is such an important contract and relationship, and the consequences of a decree of nullity can be so far-reaching, that he does not consider that the Legislature intended non-compliance with the two-letter word "in" to be visited with nullity. He says that indications which support his view are to be found in section 22, for instance, which in its original form provided that if the provisions relating to the publication of banns and notice of intention to marry, or to the issue of a special marriage licence, were not strictly complied with owing to an error committed in good faith by either of the parties, or to an error by the person who made the publication or issued the licence, the marriage shall be as valid and binding as it would have been if the provisions had been strictly complied with.

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[116] Gane's translation vol 1 at 36 - 7.

2.1.21.31 Mr Justice Broome further notes in the *Ex Parte Dow* case that section 24 provides that no marriage officer shall solemnise a marriage to which a minor is party unless the necessary consent is obtained, but that section 24A then provides that the marriage shall not be void, but may be dissolved by a Court on grounds of want of consent if application is made by a parent of the minor before he attains the age of 21 and then only if the Court is satisfied that the dissolution of the marriage is in the interests of the minor or minors. He further notes that section 26 provides, similarly, for the prohibition of marriages of boys under 18 or girls under 15 except with permission from the Minister or consent of a Judge, but that it then proceeds in subsection (2) to provide that, if no such consent has been obtained, the Minister may direct that it shall for all purposes be a valid marriage. He states that the point he is attempting to make is that in cases where there would seem to him to be far more compelling reason to treat a marriage as void *ab initio* the statute does not do so, and he treats this as an indication that the Legislature did not intend strict compliance with the provision that a marriage be solemnised in a private dwelling house, and that where, as in this case, the parties were competent to marry, that is there was no legal impediment to their marriage, the ceremony was performed by a marriage officer and all concerned *bona fide* intended and believed it to be a valid marriage, the objects of the Act have been achieved despite the fact that the marriage was solemnized in the garden outside the house and not inside the house with open doors.

2.1.21.32 The question arises whether it is still practicable to insist that section 29(2) should restrict the places where a marriage can be conducted or whether the example of the Australian Marriage Act should rather be followed. The Commission also noted Advocate Burman's opinion that there is a reasonable prospect that section 29(2) will be held to be unconstitutional as a result of the provisions of section 15 of the Constitution. It seems in any case as if this provision of the Marriage Act is not strictly complied with. Sections 29(2) presently sets out the following places for parties being joined in marriage, namely churches, other buildings used for religious service, public places and private dwelling-houses *with open doors.* The Commission proposes two options in this regard. In terms of the fist option the range of places where parties may be joined in marriage whould be less limited than is presently the case although still limited to some extent. The Commission proposes the deletion of the statutory requirement of marriages having to be performed with *open doors* and the addition in regard to places of marriage "or in any other building or facility used for conducting marriages". The second option the Commission proposes is that there should not be any limitations with regard to places where marriages may be conducted. The Commission

requests comment on these two options: should the places where marriage may be conducted limited or should there be no limitations?

2.1.21.33 Furthermore, the fact that the Department of Home Affairs excluded section 29(3) from their proposal seems to indicate that the Department is of the view that this provision is presently superfluous. It would , however, still seem necessary to make provision for the validity of marriages conducted in places other than the prescribed ones and its deletion would therefore appear to be unwarranted. The question arises whether the scope of section 29(3) should not be extended. The section presently provides for the validity only of marriages in two circumstances, namely those marriages conducted in the Orange Free State and Transvaal before the commencement of the Marriage Act in any place other than a place appointed by prior law as a place where a marriage may be conducted, or which by the reason of the serious or longstanding illness of, or serious bodily injury to, one or both of the parties was conducted before the commencement of the Marriage Amendment Act, 1968, in a place other than an appointed place. If respondents consider that the places where marriages may be conducted should still be limited, then it seems that section 29 should also provide for the validity of marriages conducted at places other than the appointed ones.

(d) <u>Recommendation</u>

2.1.21.34 It is recommended that sections 29(1) and (4) should remain mainly unamended except for the substitution of the term “solemnisation” for “conduct a marriage” but that section 29(2) should be amended to provide either -

- that a marriage officer may conduct a marriage at any place and in the presence of the parties themselves and at least two competent witnesses; or
- that a marriage officer may conduct a marriage not only in the places presently set out in the Act, (which are churches, other buildings used for religious service, public places or private dwelling-houses) but also in any other building or facility used for conducting marriages and in the presence of the parties themselves and at least two competent witnesses.

However, if respondents consider that the places where marriages may be conducted should still be limited, then it seems that the Act should also provide for the validity of marriages conducted at places other than the appointed ones.

2.1.22 REGISTRATION OF MARRIAGES

(a) The provision contained in the Marriage Act

2.1.22.1 The Marriage Act contains the following provision:

> 29A(1) The marriage officer solemnizing any marriage, the parties thereto and two competent witnesses shall sign the marriage register concerned immediately after such marriage has been solemnized.
> (2) The marriage officer shall forthwith transmit the marriage register and records concerned, as the case may be, to a regional or district representative designated as such under section 21(1) of the Identification Act, 1986 (Act 72 of 1986).

(b) The Department of Home Affairs' suggested provision

2.1.22.2 The Department of Home Affairs suggested the following provisions:

> 4(1) Each marriage officer shall keep a record of all marriages or customary unions conducted by him or her.
> (2) A marriage or customary union solemnized under or recognised in terms of the provisions of this Act must be recorded in the prescribed register and the register must be signed by the marriage officer who solemnized the marriage or customary union as well as the parties thereto and two competent witnesses, immediately after such solemnization.
> (3) The marriage officer concerned shall forthwith transmit the marriage register and records concerned, as the case may be, to a regional or district representative of the Department in whose district or region the marriage or customary union was solemnized.
> (4) Upon receipt of the said register and records the regional or district representative, as the case may be, shall cause the particulars of the marriage or customary union concerned to be included in the population register in accordance with the provisions of the Identification Act, 1986 (Act 72 of 1986).

(c) Evaluation

2.1.22.3 The suggestions made on the registration of marriages by the Department of Home Affairs (excluding the issue of customary unions) and the administrative procedures to be followed in regard of the registration of marriages seem persuasive.

(d) Recommendation

2.1.22.4 It is recommended that section 29A of the Marriage Act should be amended as

suggested by the Department of Home Affairs (although the references in the Department's provisions to customary unions should be deleted).

2.1.23 MARRIAGE FORMULA

(a) The provisions contained in the Marriage Act

2.1.23.1 The Marriage Act contains the following provisions:

> 30(1) In solemnizing any marriage any marriage officer designated under section 3 may follow the marriage formula usually observed by his religious denomination or organisation if such marriage formula has been approved by the Minister, but if such marriage formula has not been approved by the Minister, or in the case of any other marriage officer, the marriage officer concerned shall put the following questions to each of the parties separately, each of whom shall reply in the affirmative:
>
> > 'Do you, A.B., declare that as far as you know there is no lawful impediment to your proposed marriage with C.D here present, and that you call all here present to witness that you take C.D. as your lawful wife (or husband)?',
>
> and thereupon the parties shall give each other the right hand and the marriage officer concerned shall declare the marriage solemnized in the following words:
>
> > 'I declare that A.B. and C.D. here present have been lawfully married.".
>
> (2) Subject to the provisions of subsection (1), a marriage officer, if he is a minister of religion or a person holding a responsible position in a religious denomination or organization, may in solemnizing a marriage follow the rites usually observed by his religious denomination or organization.
>
> (3) If the provisions of this section or any former law relating to the questions to be put to each of the parties separately or to the declaration whereby the marriage shall be declared to be solemnized or to the requirement that the parties shall give each other the right hand, have not been strictly complied with owing to-
>
> > (a) an error, omission or oversight committed in good faith by the marriage officer; or
> >
> > (b) an error, omission or oversight committed in good faith by the parties or owing to the physical disability of one or both of the parties,
>
> but the marriage has in every other respect been solemnized in accordance with the provisions of this Act, or as the case may be, a former law, that marriage shall, provided there was no other lawful impediment thereto and provided further that such marriage, if it was solemnized before the commencement of the Marriage Amendment Act, 1970 (Act 51 of 1970), has not been dissolved or declared invalid by a competent court or neither of the parties to such marriage and during the life of the other, already lawfully married another, be as valid and binding as it would have been if the said provisions had been strictly complied with.

(b) The provisions suggested by the Department of Home Affairs

2.1.23.2 The Department of Home Affairs' suggested clause 26 follows the wording of the existing section 29. The only amendment that the Department suggested is the deletion

of the words “if it was solemnized before the commencement of the Marriage Amendment Act, 1970 (Act 51 of 1970)” in subsection (3).

(c) Comments by respondents

2.1.23.3 We noted above that Mr De Wet commenting on behalf of the Church of Jesus Christ of Latter-day Saints suggested that the Church’s marriage formula should be an acceptable marriage formula for the purpose of concluding a legally recognised civil marriage in a Church Temple. However, since the words of the formula may not be said outside the Temple the Commission was not supplied with the words of the formula. Mr De Wet further notes section 34 of the Marriage Act and clause 28 of the Department of Home Affairs’ proposed Bill and states that they already provide for the making of special rules and regulations in terms of Church doctrine.[117]

(d) Evaluation

2.1.23.4 The Australian Marriage Act contains the following provision on the prescribed marriage formula:

> 45. (1) Where a marriage is solemnized by or in the presence of an authorized celebrant, being a minister of religion, it may be solemnized according to any form and ceremony recognized as sufficient for the purpose by the religious body or organization of which he or she is a minister.
>
> 45(2) Where a marriage is solemnized by or in the presence of an authorized celebrant, not being a minister of religion, it is sufficient if each of the parties says to the other, in the presence of the authorized celebrant and the witnesses, the words:
>
> > "I call upon the persons here present to witness that I, A.B. (or C.D.), take thee, C.D. (or A.B.), to be my lawful wedded wife (or husband)";
> > or words to that effect.
>
> 45(2) Where a marriage has been solemnized by or in the presence of an authorized celebrant, a certificate of the marriage prepared and signed in accordance with section 50 is conclusive evidence that the marriage was solemnized in accordance with this section.
>
> 45(3) Nothing in subsection (3) makes a certificate conclusive:
>
> > (1) where the fact that the marriage ceremony took place is in issue-as to

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117 See these provisions below.

that fact; or

(2) where the identity of a party to the marriage is in issue-as to the identity of that party.

46.(1) Subject to subsection (2), before a marriage is solemnized by or in the presence of an authorized celebrant, not being a minister of religion of a recognized denomination, the authorized celebrant shall say to the parties, in the presence of the witnesses, the words:

"I am duly authorized by law to solemnize marriages according to law.

"Before you are joined in marriage in my presence and in the presence of these witnesses, I am to remind you of the solemn and binding nature of the relationship into which you are now about to enter.

"Marriage, according to law in Australia, is the union of a man and a woman to the exclusion of all others, voluntarily entered into for life.";

or words to that effect.

46(2) Where, in the case of a person authorized under subsection 39(2) to solemnize marriages, the Minister is satisfied that the form of ceremony to be used by that person sufficiently states the nature and obligations of marriage, the Minister may, either by the instrument by which that person is so authorized or by a subsequent instrument, exempt that person from compliance with subsection (1) of this section.

2.1.23.5 The question arises whether the present marriage formula, contained in the Marriage Act, meets present demands or whether it should be amended. Since only one respondent addressed this issue it is not entirely clear to the Commission whether there is a need for amending the present marriage formula. The question arises whether it would not be expedient if the words “or words to that effect” were to be added to the present marriage formula since the Marriage Act already envisages that there may be cases where the formula is not strictly complied with. The Commission does not consider that it would be advisable to add these words. The Commission considers, furthermore, that the words "and thereupon the parties shall give each other the right hand" should be critically considered. The Commission is of the view that the retention of these words is unwarranted and recommends their deletion. It is likewise considered that the proviso dealing with the validity of marriages where the requirement that the parties shall give each other the right hand has not strictly been complied with should also be deleted.

(e) <u>Recommendation</u>

2.1.23.6 The Commission recommends that section 30(1) be amended by the deletion of the words "and thereupon the parties shall give each other the right hand" as well as the proviso in section 30(3) regulating the validity of marriages conducted without strictly complying with section 30(1).

2.1.24 CERTAIN MARRIAGE OFFICERS MAY REFUSE TO CONDUCT CERTAIN MARRIAGES

(a) The provision contained in the Marriage Act

2.1.24.1 Section 31 of the Marriage Act contains the following provision:

> 31 Nothing in this Act contained shall be construed so as to compel a marriage officer who is a minister of religion or a person holding a responsible position in a religious denomination or organization to solemnize a marriage which would not conform to the rites, formularies, tenets, doctrines or discipline of his religious denomination or organization.

(b) The Department of Home Affairs' suggested provision

2.1.24.2 The Department of Home Affairs' suggested clause 14 follows the wording of section 31 exactly the only difference being that it refers to clause 9 which governs the appointment of Ministers of religion and persons attached to religious denominations or organisations as marriage officers and it refers to the marriage officers as being male or female.

(b) Comments by respondents

2.1.24.3 Mr De Wet commenting on behalf of the Church of Jesus Christ of Latter-Day Saints remark that the Church proposes and request legislation providing that Church marriage officers be entitled to refuse to conduct a marriage which would not be in accordance with the rites, tenets, doctrine or discipline of the Church.

(c) Evaluation

2.1.24.4 The Australian Marriage Act contains the following provision in this regard:

> 47. Nothing in this Part:
> (a) imposes an obligation on an authorized celebrant, being a minister of religion, to solemnize any marriage; or
> (b) prevents such an authorized celebrant from making it a condition of his or her solemnizing a marriage that:

(i) longer notice of intention to marry than that required by this Act is given; or

(ii) requirements additional to those provided by this Act are observed.

2.1.24.5 It is evident that there is a need for a provision such as is presently contained in the Marriage Act and that it should be retained in the Marriage Act.

(d) Recommendation

2.1.24.6 It is recommended that there is no need to amend section 31 and that it be retained in the Marriage Act.

2.1.25 FEES PAYABLE TO MARRIAGE OFFICERS

(a) The provision contained in the Marriage Act

2.1.25.1 The Marriage Act contains the following provision:

> 32(1) No marriage officer may demand or receive any fee, gift or reward, for or by reason of anything done by him as marriage officer in terms of this Act: Provided that a minister of religion or a person holding a responsible position in a religious denomination or organization may, for or by reason of any such thing done by him, receive-
>
> (a) such fees or payments as were immediately prior to the commencement of this Act ordinarily paid to any such minister of religion or person in terms of the rules and regulations of his religious denomination or organization, for or by reason of any such thing done by him in terms of a prior law; or
>
> (b) such fee as may be prescribed.
>
> 32(2) Any marriage officer who contravenes the provisions of sub-section (1) shall be guilty of an offence and liable on conviction to a fine not exceeding one hundred rand or, in default of payment, to imprisonment for a period not exceeding six months.

(b) The Department of Home Affairs' suggested provision

2.1.25.2 The Department of Home Affairs' suggested clause 15 follows the wording of section 32 of the Marriage Act, the only differences are that clause 15 refers to clause 9 which governs the appointment of Ministers of religion and persons attached to religious

denominations or organisations as marriage officers, it refers to the marriage officers as being male or female, and it further omits the reference to "a fine not exceeding one hundred rand or, in default of payment".

(c) Evaluation

2.1.25.3 The Australian Marriage provides that the parties to a marry solemnized overseas shall pay to the marriage officer the prescribed fee,[118] and that nothing in the Act affects the right of a minister of religion who is an authorised celebrant to require or receive a fee for or in respect of the solemnisation of a marriage.

2.1.25.4 There does not seem to be any apparent reason why this section should be amended especially since the Department of Home Affairs also suggests the retention of the section with minor amendments being made.

(d) Recommendation

2.1.25.5 It is recommended that section 32 which governs the payment of fees to marriage officers, should be retained. It is recommended that the section should be amended to refer to marriage officers as being male or female, and the reference to "a fine not exceeding one hundred rand or, in default of payment" should be deleted to serve as a deterrent against a marriage officer contravening the provisions of the Marriage Act - that is the prohibition that a marriage officer may not demand or receive gifts, fees or rewards for or by reason of him or her doing anything as a marriage officer in terms of the Act. The effect of the amendment will be that a contravention of the section will by punishable with imprisonment not exceeding six months.

2.1.26 BLESSING OF MARRIAGE

(a) The provision contained in the Marriage Act

2.1.26.1 The Marriage Act contains the following provision:

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[118] Section 70.

33 After a marriage has been solemnized by a marriage officer, a minister of religion or a person holding a responsible position in a religious denomination or organization may bless such marriage according to the rites of his religious denomination or organization.

(b) The Department of Home Affairs' Bill

2.1.26.2 The Department of Home Affairs did not include a similar provision in its Bill.

(c) Evaluation

2.1.26.3 The question arises as to the need for the inclusion of this section in the Marriage Act in view of section 34 of the Marriage Act. The latter section governs the making of such rules or regulations in connection with the religious blessing of a marriage as may be in conformity with the religious view of such religious denomination or organisation. It can be argued that section 33 is superfluous in view of section 34. On the other hand it can be argued that section 34 merely governs the power of making rules and regulations whereas section sets out the details of when a marriage may be blessed and by whom, and that there is therefore a need for the retention of section 33. It is clear that the aim of the Marriage Act is to set out the procedure for parties being lawfully joined in marriage. The question arises as to the necessity for setting out that after the parties get married by a marriage officer, the procedure whereby the marriage is blessed. Should provision then not also be made for the blessing of a marriage in whatever form after parties were joined in a customary marriage? The Commission therefore considers that there is no need for the retention of section 33.

(d) Recommendation

2.1.26.4 It is recommended that section 33 be retained in the Marriage Act.

2.1.27 RELIGIOUS RULES AND REGULATIONS

(a) The provision contained in the Marriage Act

2.1.27.1 The Marriage Act contains the following provision:

34 Nothing in this Act contained shall prevent-

(a) the making by any religious denomination or organization of such rules or regulations in connection with the religious blessing of marriages as may be in conformity with the religious views of such denomination or organization or the exercise of church discipline in any such case; or

(b) the acceptance by any person of any fee charged by such religious denomination or organization for the blessing of any marriage,

provided the exercise of such authority is not in conflict with the civil rights and duties of any person.

(b) <u>The Department of Home Affairs' suggested provision</u>

2.1.27.2 The Department of Home Affairs' suggested clause 28 is identical to section 34 of the Marriage Act.

(c) <u>Comments by respondents</u>

2.1.27.3 Mr De Wet commenting on behalf of the Church of Jesus Christ of Latter-Day Saints proposes, inter alia, as was noted above, that the Church's marriage formula be an acceptable marriage formula for the purpose of concluding a legally recognised civil marriage in a Church Temple and notes the Department of Home Affairs' proposed clause 28.

(d) <u>Evaluation</u>

2.1.27.4 This section seems to be necessary to grant the power to religious denominations and religious organisations for the blessing of marriages and acceptance of fees by them for the blessing of marriages. The retention of this section therefore seems justified.

(e) <u>Recommendation</u>

2.1.27.5 It is recommended that section 34 of the Marriage Act not be amended.

2.1.28 PENALTIES FOR CONDUCTING A MARRIAGE CONTRARY TO THE PROVISIONS OF THE ACT

(a) The provision contained in the Marriage Act

2.1.28.1 The Marriage Act contains the following provision:

> 35 Any marriage officer who knowingly solemnizes a marriage in contravention of the provisions of this Act shall be guilty of an offence and liable on conviction to a fine not exceeding one hundred rand or, in default of payment, to imprisonment for a period not exceeding six months.

(b) The Department of Home Affairs' suggested provision

2.1.28.2 The Department of Home Affairs' Bill does not contain this section.

(c) Evaluation

2.1.28.3 The New Zealand Marriage Act contains the following provision:

> 58 Every Registrar who knowingly and wilfully issues any marriage licence or solemnises any marriage contrary to the provisions of this Act, or where there is any other lawful impediment to the marriage, and every [marriage celebrant] who knowingly and wilfully solemnises any marriage contrary to the provisions of this Act, or where there is any other lawful impediment to the marriage, commits an offence and shall be liable on conviction on indictment to imprisonment for a term not exceeding 5 years, or to a fine not exceeding [$600], or to both.

2.1.28.4 The question arises whether there is a need for section 35 in view of section 11 of the Marriage Act. Section 35 makes provision for penalties for conducting marriages contrary to the provisions of the Act. Section 11 makes it an offence for a marriage officer to purport to conduct a marriage which he or she is not authorised to conduct or which to his or her knowledge is legally prohibited. Marriages conducted by persons who are not marriage officers are similarly prohibited. It is therefore clear that section 11 is more restricted in its scope than section 35 since section 35 penalises the joining of parties in marriage in contravention of the provisions of the Marriage Act as a whole while the former enumerates only a few grounds of criminality. It is noteworthy that the New Zealand Marriage Act contains two similar provisions corresponding largely with the provisions of our Marriage Act. It would therefore seem that there is a need for retaining sections 35 and 11 and no amendments are consequently recommended in regard to section 35.

(d) Recommendation

2.1.28.5 It is recommended that section 35 be retained in the Marriage Act unamended.

2.1.29 PENALTIES FOR FALSE REPRESENTATIONS OR STATEMENTS

(a) The provision contained in the Marriage Act

2.1.29.1 The Marriage Act contains the following provision:

> 36 Any person who makes for any of the purposes of this Act, any false representation or false statement knowing it to be false, shall be guilty of an offence and liable on conviction to the penalties prescribed by law for perjury.

(b) The Department of Home Affairs' suggested provision

2.1.29.2 The Department of Home Affairs' clause 38 is identical to section 36 of the Marriage Act.

(c) Evaluation

2.1.29.3 The New Zealand Marriage Act likewise provides that every person commits an offence and shall be liable on conviction on indictment to imprisonment for a term not exceeding 2 years, or to a fine not exceeding $400, or to both, who-

- knowingly and wilfully makes or causes to be made any false declaration for the purposes of the Act; or
- makes or causes to be made, for the purpose of being inserted in any register book, a false statement of any of the particulars required to be known and registered under the provisions of the Act; or
- notifies any Registrar of the lodgment of a *caveat* under section 25 if in fact no such *caveat* has been lodged.[119]

2.1.29.4 In the absence of comments by respondents or the Department of Home Affairs arguing for the amendment of section 36 of the Marriage Act it seems clear that an amendment of this section is unjustified.

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[119] Section 60.

(d) Recommendation

2.1.29.5 It is recommended that section 36 of the Marriage Act should not be amended.

2.1.30 OFFENCES COMMITTED OUTSIDE THE REPUBLIC OF SOUTH AFRICA

(a) The provision contained in the Marriage Act

2.1.30.1 The Marriage Act contains the following provision:

> 37 If any person contravenes any provision of this Act in any country outside the Union the Minister of Justice shall determine which court in the Union shall try such person for the offence committed thereby, and such court shall thereupon be competent so to try such person, and for all purposes incidental to or consequential on the trial of such person, the offence shall be deemed to have been committed within the area of jurisdiction of such court.

(b) The Department of Home Affairs' suggested Bill

2.1.30.2 The Department of Home Affairs did not include a similar provision in its Bill.

(c) Evaluation

2.1.30.3 The question arises whether there is a need for section 37 in view of the provisions of the Criminal Procedure Act of 1977, which provides as follows:

> 110(1) Where an accused does not plead that the court has no jurisdiction and it at any stage-
>
> (a) after the accused has pleaded a plea of guilty or of not guilty; or
> (b) where the accused has pleaded any other plea and the court has determined such plea against the accused,
>
> appears that the court in question does not have jurisdiction, the court shall for the purposes of this Act be deemed to have jurisdiction in respect of the offence in question.
>
> 110(2) Where an accused pleads that the court in question has no jurisdiction and the plea is upheld, the court shall adjourn the case to the court having jurisdiction.

2.1.30.4 Prof Dugard states that generally the laws of a country extend only to acts committed within a country's geographical boundaries as there is a presumption in most legal systems against the extraterritorial operation of laws.[120] However, a sovereign legislature may penalise its citizens as a result of acts committed on foreign soil and they may be tried when they return to their domicile.[121] The former Union of South Africa also gained its power to make provision for legislation conferring extra-territorial jurisdiction under section 3 of the Statute of Westminster and this position was confirmed by subsequent Constitutions.

2.1.30.5 The Commission noted that there may be a number of offences parties may commit outside the geographical borders of South Africa in contravention of the provisions of the Marriage Act. One example is where a person who is already a party to a marriage contracts a second marriage in another country without obtaining a prior divorce and thereby committing the offence of bigamy. It is considered that it should be possible under these circumstances to try the offender in South Africa.

(d) Recommendation

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120 *South African Criminal Procedure Vol IV Introduction to Criminal Procedure* 2nd edition at ???.

121 *Hiemstra Suid-Afrikaanse Strafproses* J Kriegler 5 th edition Durban: Butterworths at 277.

2.1.30.6 The Commission recommends that there is no need to amend section 37 besides the substitution of the term “Republic” for the term “Union”.

ANNEXURE A

THE PROPOSED MARRIAGE AMENDMENT BILL

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 Marriage Act, 1961, so as to further provide for the delegation of the Ministers powers; to further provide for the appointment of marriage officers; to further regulate the consequences of a change of the name or the objects or an amalgamation of a religious denomination or organisation; to further provide for the revocation of the appointment of a person as a marriage officer; to further regulate marriages conducted outside the Republic; to further provide for the consequences for conducting an unauthorised marriage; to further provide for publications of bans; to further provide for objections to marriage; to further provide for the marriage of minors; to further provide for the prohibition of marriage of persons under certain ages; to further regulate marriages between a person and relatives of his or her deceased or divorced spouses; to further provide for the time and place and presence of parties and witnesses at conducting marriages; to further provide for the registration of marriages; to further regulate the marriage formula; to further provide for the penalties for joining parties in marriage contrary to the provisions of the Act; and to provide for matters connected therewith.

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:-

Amendment of section 1 of Act 25 of 1961, as amended by section 1(a) of Act 51 of 1970

1. Section 1 of the Marriage Act, 1961, (hereinafter referred to as the principal Act) is hereby amended by the omission of the following definition:

['Commissioner' includes an Additional Commissioner, an Assistant Commissioner, a Native Commissioner, an Additional Native Commissioner and Assistant Native Commissioner;]

Amendment of section 2 of Act 25 of 1961, as amended by section 2 of Act 51 of 1970 and section 1 (2) of Act 114 of 1991

2. The following section is hereby substituted for subsection (1) of section 2 of the principal Act:

(1) Every magistrate, **[every special justice of the peace and every Commissioner]** every Ambassador, every High Commissioner and every Consul shall by virtue of his or her office and so long as he or she holds such office, be a marriage officer for the district or other area in respect of which he or she holds office.

(2) The Minister **[and any officer in the public service authorized thereto by him]** may designate any officer or employee in the public service or the diplomatic or consular service of the Republic to be, by virtue of his or her office and so long as he or she holds such office, a marriage officer, either generally or for any specified class of persons or country or area.

Insertion of section 2A in Act 25 of 1961

3. The following section is inserted after section 2 of the principal Act:

2A. The Minister may, subject to the conditions he or she may deem necessary, delegate any power conferred on him or her by this Act to a person in the service of the Department, but shall not be divested of any power so delegated and may set aside or amend any decision of the delegate made in the exercise of such power.

Amendment of section 3 of Act 25 of 1961, as amended by section 3 of Act 51 of 1970

4. The following section is substituted for section 3 of the principal Act:

OPTION ONE:

(1) The Minister **[and any officer in the public service authorized thereto by him]** may designate any minister of religion of, or any person holding a responsible position in, any religious denomination or organization to be, so long as he or she is such a minister or occupies such position, a marriage officer for the purpose of **[solemnizing]** joining parties in marriage**[s]** according to **[Christian, Jewish or Mohammedan rites or the rites of any Indian religion]** the tenets of the religious denomination or organization concerned.

(2) A designation under sub-section (1) may further limit the authority of any such minister of religion or person to the **[solemnization]** joining of parties in marriage**[s]**-

(a) within a specified area;

(b) for a specified period.

(3) Any decision made by the Minister under this section to appoint a marriage officer or to revoke the designation of any person as a marriage officer under section 9 shall be reviewable by any provincial or local division of the High Court of South Africa, and the Court-

(a) may call upon the Minister to furnish reasons and to submit such information as the Court deems fit; and

(b) may-

(i) consider the merits of the matter under review; and

(ii) confirm, vary or set aside the decision of the Minister.

OPTION TWO:

(1) The Minister **[and any officer in the public service authorized thereto by him]** may **[designate any]** appoint a minister of religion of, or any person holding a responsible position in, any religious denomination or organization designated by such denomination or organization in the prescribed form to be, so long as he or she is such a minister or occupies such position, a marriage officer for the purpose of **[solemnizing]** joining parties in marriage**[s]** according to **[Christian, Jewish or Mohammedan rites or the rites of any Indian religion]** the tenets of the religious denomination or organization concerned.

(2) A designation under sub-section (1) **[may]**-

(a) must be accepted by the Minister unless it is proven to the satisfaction of him or her that the denomination or organization who made the designation is not a bona fide religious denomination or organization,

(b) may further limit the authority of any such minister of religion or person to the **[solemnization]** joining of parties in marriage**[s]**-

[(a)] (i) within a specified area;

[(b)] (ii) for a specified period.

(4) Any decision made by the Minister under this section to appoint a marriage officer or to revoke the designation of any person as a marriage officer under section 9 shall be reviewable by any provincial or local division of the High Court of South Africa, and the Court-

(a) may call upon the Minister to furnish reasons and to submit such information as the Court deems fit; and

(b) may-

(i) consider the merits of the matter under review; and

(ii) confirm, vary or set aside the decision of the Minister.

OPTION THREE:

(1) The Minister **[and any officer in the public service authorized thereto by him]** may designate any minister of religion of, or any person holding a responsible position in, any religious denomination or organization recognised by the Minister by notice in the *Gazette* to be, so long as he or she is such a minister or occupies such position, a marriage officer for the purpose of **[solemnizing]** joining parties in marriage**[s]**

according to **[Christian, Jewish or Mohammedan rites or the rites of any Indian religion]** the tenets of the religious denomination or organization concerned.

(2) A designation under sub-section (1) may further limit the authority of any such minister of religion or person to the **[solemnization]** joining of parties in marriage**[s]**-

(a) within a specified area;
(b) for a specified period.

(3) Any decision made by the Minister under this section to appoint a marriage officer or to revoke the designation of any person as a marriage officer under section 9 shall be reviewable by any provincial or local division of the High Court of South Africa, and the Court-

(a) may call upon the Minister to furnish reasons and to submit such information as the Court deems fit; and
(b) may-
(i) consider the merits of the matter under review; and
(ii) confirm, vary or set aside the decision of the Minister.

Amendment of section 5 of Act 25 of 1961, as amended by section 4 (a) of Act 51 of 1970 and section 1 of Act 112 of 1990

5. The following section is substituted for section 5(1) of the principal Act:

(1) Any person who, at the commencement of this Act, or of the Marriage Amendment Act, 1970, is under the provisions of any prior law authorized to **[solemnize]** join any party in **[any]** marriage**[s]**, shall continue to have authority to **[solemnize such]** join such parties in marriage**[s]** as if such law had not been repealed, but shall exercise such authority in accordance with the provisions of this Act.

Amendment of section 6 of Act 25 of 1961

6. The following section is substituted for section 6 of the principal Act:

6(1) Whenever any person has acted as a marriage officer during any period or within any area in respect of which he or she was not a marriage officer under this Act or any prior law, and the Minister **[or any officer in the public service authorized thereto by the Minister]** is satisfied that such person did so under the bona fide belief that he or she was a marriage officer during that period or within that area, he or she may direct in writing that such person shall for all purposes be deemed to have been a marriage officer during such period or within such area, duly designated as such under this Act or such law, as the case may be.

(2) Whenever any person acted as a marriage officer in respect of any marriage while he or she was not a marriage officer and both parties to that marriage bona fide believed that such person was in fact a marriage officer, the Minister **[or any officer in the public service authorized thereto by him]** may, after having conducted such inquiry as he or she may deem fit, in writing direct that such person shall for all purposes be deemed to have been duly designated as a marriage officer in respect of that marriage.

(3) Any marriage **[solemnized]** conducted by any person who is in terms of this

section to be deemed to have been duly designated as a marriage officer shall, provided such marriage was in every other respect **[solemnized]** conducted in accordance with the provisions of this Act or any prior law, as the case may be, and there was no lawful impediment thereto, be as valid and binding as it would have been if such person had been duly designated as a marriage officer.

(4) Nothing in this section contained shall be construed as relieving any person in respect of whom a direction has been issued thereunder, from the liability to prosecution for any offence committed by him or her.

(5) Any person who acts as a marriage officer in respect of any marriage, shall complete a certificate on the prescribed form in which he or she shall state that at the time of the **[solemnization]** joining of the parties in marriage he or she was in terms of this Act or any prior law entitled to **[solemnize]** conduct that marriage.

Amendment of section 8 of Act 25 of 1961

7. The following section is substituted for section 8 of the principal Act:

8(1) If a religious denomination or organization changes the name whereby it was known or amalgamates with any other religious denomination or organization or changes its objects or there is a material change in its circumstances, **[such change in name or amalgamation shall have no effect on the designation of any person as a marriage officer by virtue of his occupying any post or holding any position in any such religious denomination or organization.**

(2) If a religious denomination or organization in such circumstances as are contemplated in sub-section (1) changes the name whereby it was known or amalgamates with any other religious denomination or organization or changes its objects or there are a material change in its circumstances,] it shall immediately advise the Minister thereof.

(2) The Minister may revoke the designation of a religious denomination or organization if it changes its name by which it was known or amalgamates with any other religious denomination or organization or changes its objects or if there is a material change in its circumstances.

Amendment of section 9 of Act 25 of 1961

8. The following section is substituted for section 9 of the principal Act:

9(1) The Minister **[or any officer in the public service authorized thereto by him]** may **[,on the ground of misconduct or for any other good cause,]** revoke in writing and by notice in the *Gazette* the designation of any person as a marriage officer or the authority of any other person to **[solemnize]** join parties in marriage**[s]** under this Act, or in writing limit in such respect as he or she may deem fit the authority of any marriage officer or class of marriage officers to **[solemnize]** conduct marriages under this Act, on the following grounds namely that .

(a) a marriage officer has died;

(b) a marriage officer no longer wishes to be a marriage officer;

(c) the denomination by which that person was nominated for registration as a marriage officer, or in respect of which that person is registered, no longer desires that that person be registered as a marriage officer;

(d) the denomination by which a marriage officer was nominated for registration, or

in respect of which that person is registered, has ceased to be a recognized denomination;

(e) the marriage officer has been guilty of such contraventions of the Act or the regulations as to show him or her not to be a fit and proper person to be registered as a marriage officer;

(f) a marriage officer has been making a business of joining parties in marriage for the purpose of profit or gain;

(g) a marriage officer is for any other reason, not entitled to registration.

[(2) Any steps taken by any officer in the public service under sub-section (1) may be set aside by the Minister.]

Amendment of section 10 of Act 25 of 1961

9. Section 10 of the principal Act is amended by-

(a) the substitution for subsection (1) of the following subsection:

(1) Any person who is under the provisions of this Act authorized to **[solemnize]** join any party in marriage**[s]** in any country outside the Republic-

(a) may so **[solemnize]** join any parties in such marriage only if at least one of the parties thereto **[are both]** is a South African citizen**[s]** domiciled in the **[Union]** Republic ; and

(b) any marriage so **[solemnized]** conducted shall for all purposes be deemed to have been **[solemnized]** conducted in the **[province of the Union]** Republic **[in which the male party thereto is domiciled]**.

Amendment of section 11 of Act 25 of 1961

10. Section 11 of the principal Act is amended by-

(a) the substitution for the following subsection for subsection (2):

(2) Any marriage officer who purports to **[solemnize]** conduct a marriage which he or she is not authorized under this Act to **[solemnize]** conduct or which to his or her knowledge is legally prohibited, and any person not being a marriage officer who purports to **[solemnize]** join parties in a marriage, shall be guilty of an offence and liable on conviction to a fine **[not exceeding four hundred rand]** or, in default of payment, to imprisonment for a period not exceeding **[twelve]** two years, or to both **[such]** a fine and **[such]** imprisonment.

(b) the substitution for subsection (3) of the following subsection:

(3) Nothing in sub-section (2) contained shall apply to any marriage ceremony **[solemnized]** conducted in accordance with the rites or formularies of any religion, if such ceremony does not purport to effect a valid marriage.

Amendment of section 12 of Act 25 of 1961, as amended by section 1(1) of Act 11 of 1964,

section 5 of Act 51 of 1970, section 1 of Act 112 of 1990 and section 1(2) of Act 114 of 1991

11. The following section is substituted for section 12 of the principal Act-

12.(1) No marriage officer shall **[solemnize]** join any parties in marriage unless-

3. each of the parties in question produces to the marriage officer his or her identity document issued under the provisions of the Identification Act, **[1986 (Act 72 of 1986)]** 1997 (Act 68 of 1997); or

4. each of such parties furnishes to the marriage officer the prescribed affidavit; or

5. one of such parties produces his or her identity document referred to in paragraph (a) to the marriage officer and the other furnishes to the marriage officer the affidavit referred to in paragraph (b).

(2) If parties were joined in marriage and the provisions of subsection (1) were not strictly complied with but such marriage was in every other respect conducted in accordance with the provisions of this Act or, as the case may be, a former law, that marriage shall, provided there was no other lawful impediment thereto and provided such marriage has not been dissolved or declared invalid by a competent court, and provided further that neither of the parties to such marriage has after such marriage and during the life of the other, lawfully married another, be as valid and binding as it would have been if the said provisions had been strictly complied with.

Amendment of section 22 as substituted by section 3 of Act 19 of 1968, amended by section 7 of Act 51 of 1970 and substituted by section 1 of Act 26 of 1972

12. The following section is substituted for section 22 of the principal Act:

If in the case of any marriage **[solemnized]** conducted before the commencement of the Marriage Amendment Act, 1970, the provisions of any law relating to the publication of banns or notice of intention to marry or to the issue of special marriage licences, or the applicable provisions of any law of a country outside the **[Union]** Republic relating to the publication of banns or the publication of notice of intention to marry were not strictly complied with but such marriage was in every other respect **[solemnized]** conducted in accordance with the provisions of this Act or, as the case may be, a former law, that marriage shall, provided there was no other lawful impediment thereto and provided such marriage has not been dissolved or declared invalid by a competent court, and provided further that neither of the parties to such marriage has after such marriage and during the life of the other, already lawfully married another, be as valid and binding as it would have been if the said provisions had been strictly complied with.

Amendment of section 23 of act 25 of 1961 as amended by section 8 of Act 51 of 1970

13. The following section is substituted for section 23 of the principal Act:

(1) Any person desiring to raise any objection to any proposed marriage shall lodge such objection in writing with the marriage officer who is to **[solemnize]** conduct such marriage and with the parties contemplating marriage .

(2) Upon receipt of any such objection the marriage officer concerned shall inquire into the grounds of the objection and if he or she is satisfied that there is no lawful impediment to the proposed marriage, he or she may **[solemnize]** conduct the marriage in accordance with the provisions of this Act.

(3) If he or she is not so satisfied he or she shall refuse to **[solemnize]** conduct the marriage.

Amendment of section 24 of Act 25 of 1961

14. Section 24 of the principal Act is amended by the substitution of the following subsection for subsection (1):

(1) No marriage officer shall **[solemnize]** conduct a marriage between parties of whom one or both are minors unless the consent to the party or parties which is legally required for the purpose of contracting the marriage has been granted and furnished to him or her in writing.

Amendment of section 24A of Act 25 of 1961

15. Section 24A of the principal Act is amended by the substitution for paragraphs (a) and (b) of the following paragraphs:

(a) by a parent or guardian of the minor before he or she attains majority and within six weeks of the date on which the parent or guardian becomes aware of the existence of the marriage; or

(b) by the minor before he or she attains majority or within three months thereafter.

Amendment of section 25 of Act 25 of 1961 as amended by section 62 of Act 74 of 1983

16. Section 25 of the principal Act is amended by-

(a) the substitution of the following subsection for subsection (1):

(1) If a commissioner of child welfare defined in section 1 of the Child Care Act, 1983, is after proper inquiry satisfied that a minor who is resident in the district or area in respect of which he or she holds office has no parent or guardian or is for any good reason unable to obtain the consent of his or her parents or guardian to enter into a marriage, such commissioner of child welfare may in his or her discretion grant written consent to such minor to marry a specified person, but such commissioner of child welfare shall not grant his or her consent if one or other parent of the minor whose consent is required by law or his or her guardian refuses to grant consent to the marriage.

(b) by the substitution of the following subsection for subsection (2):

(2) A commissioner of child welfare shall, before granting his or her consent to a marriage under sub-section (1), enquire whether it is in the interests of the

minor in question that the parties to the proposed marriage should enter into an antenuptial contract, and if he or she is satisfied that such is the case he or she shall not grant his or her consent to the proposed marriage before such contract has been entered into, and shall assist the said minor in the execution of the said contract.

(c) by the substitution of the following subsection for subsection (4):

(4) If the parent, guardian or commissioner of child welfare in question refuses to consent to a marriage of a minor, such consent may on application be granted by a judge of the **[Supreme]** High Court of South Africa: Provided that such a judge shall not grant such consent unless he or she is of the opinion that such refusal of consent by the parent, guardian or commissioner of child welfare is without adequate reason and contrary to the interests of such minor.

Amendment of section 26 of Act 25 of 1961

17. Section 26 is amended by-

(a) the substitution of the following subsection for subsection (1):

(1) No boy or girl under the age of 18 years **[and no girl under the age of 15 years]** shall be capable of contracting a valid marriage except with the written permission of the Minister **[or any officer in the public service authorized thereto by him,]** which he or she may grant in any particular case in which he or she considers such marriage desirable: Provided that such permission shall not relieve the parties to the proposed marriage from the obligation to comply with all other requirements prescribed by law: Provided further that such permission shall not be necessary if by reason of any such other requirement the consent of a judge or court having jurisdiction in the matter is necessary and has been granted.

(b) by the substitution of the following subsection for subsection (2):

(2) If any person referred to in subsection (1) who was not capable of contracting a valid marriage without the written permission of the Minister **[or any officer in the public service authorized thereto by him or her,]** in terms of this Act or a prior law, contracted a marriage without such permission and the Minister **[or such officer,]** as the case may be, considers such marriage to be desirable and in the interests of the parties in question, he or she may, provided such marriage was in every other respect **[solemnized]** conducted in accordance with the provisions of this Act, or, as the case may be, any prior law, and there was no other lawful impediment thereto, direct in writing that it shall for all purposes be a valid marriage.

(c) by the substitution of the following subsection for subsection (3):

(3) If the Minister **[or any officer in the public service authorized thereto by him]** so directs it shall be deemed that he or she granted written permission to such marriage prior to the **[solemnization]** conducting thereof.

Amendment of section 27 of Act 25 of 1961

18. The following subsection is substituted in the principal Act for subsection (3):

(3) If parties appear before a marriage officer for the purpose of contracting a marriage with each other and such marriage officer reasonably suspects that either of them is of an age which debars him or her from contracting a valid marriage without the consent or permission of some other person, he or she may refuse to **[solemnize]** conduct a marriage between them unless he or she is furnished with such consent or permission in writing or with satisfactory proof showing that the party in question is entitled to contract a marriage without such consent or permission.

Amendment of section 28 of Act 25 of 1961

19. The following section is hereby substituted for section 28 of the principal Act:

(1) Any legal provision to the contrary notwithstanding it shall be lawful for-

(a) any widower to marry the sister of his deceased wife or any female related to him through his deceased wife in any more remote degree of affinity than the sister of his deceased wife, other than an ancestor or descendant of such deceased wife;
(b) any widow to marry the brother of her deceased husband or any male related to her through her deceased husband in any more remote degree of affinity than the brother of her deceased husband, other than an ancestor or descendant of such deceased husband;
(c) any man to marry the sister of a person from whom he has been divorced or any female related to him through the said person in any more remote degree of affinity than the sister of such person, other than an ancestor or descendant of such person; and
(d) any woman to marry the brother of a person from whom she has been divorced or any male related to her through the said person in any more remote degree of affinity than the brother of such person, other than an ancestor or descendant of such person.

(2) A Provincial or Local Division of the High Court shall have jurisdiction to consent to a marriage between a man or a women and the direct descendant of his or her deceased spouse if both parties have reached the age of 18 years and they are not related to each other by blood.

Amendment of section 29 of Act 25 of 1961, as amended by section 4 of Act 19 of 1968

20. The following section is substituted for section 29 of the principal Act:

(1) A marriage officer may **[solemnize]** conduct a marriage at any time on any day of the week but shall not be obliged to **[solemnize]** conduct a marriage at any other time than between the hours of eight in the morning and four in the afternoon.

SUBSECTION (2) OPTION ONE:
(2) A marriage officer **[shall]** may **[solemnize]** conduct any marriage **[in a church**

or other building used for religious service, or in a public office or private dwelling-house, with open doors] at any place and in the presence of the parties themselves and at least two competent witnesses **[, but the foregoing provisions of this subsection shall not be construed as prohibiting a marriage officer from solemnizing a marriage in any place other than a place mentioned therein if the marriage must be solemnized in such other place by reason of the serious or longstanding illness of, or serious bodily injury to, one or both of the parties]**.

SUBSECTION (2) OPTION TWO:

(2) A marriage officer **[shall]** may **[solemnize]** conduct any marriage in a church or other building used for religious service, or in a public office or private dwelling-house, or in any other building or facility used for conducting marriages **[with open doors]** and in the presence of the parties themselves and at least two competent witnesses, but the foregoing provisions of this subsection shall not be construed as prohibiting a marriage officer from **[solemnizing]** conducting a marriage in any place other than a place mentioned therein if the marriage must be **[solemnized]** conducted in such other place by reason of the serious or longstanding illness of, or serious bodily injury to, one or both of the parties.

(3) Every marriage-

(a) which was **[solemnized]** conducted in the Orange Free State or the Transvaal before the commencement of this Act in any place other than a place appointed by a prior law as a place where for the purposes of such law a marriage shall be **[solemnized]** conducted; or

(b) which by reason of the serious or longstanding illness of, or serious bodily injury to, one or both of the parties was **[solemnized]** conducted before the commencement of the Marriage Amendment Act, 1968, in a place other than a place appointed by subsection (2) of this section as a place where for the purposes of this Act a marriage shall be **[solemnized]** conducted,

shall, provided such marriage has not been dissolved or declared invalid by a competent court and provided further that neither of the parties to such marriage has after such marriage and during the life of the other, already lawfully married another, be as valid and binding as it would have been if it had been **[solemnized]** conducted in a place appointed therefor by the applicable provisions of the prior law or, as the case may be, of this Act.

(3) No person shall under the provisions of this Act be capable of contracting a valid marriage through any other person acting as his or her representative.

Amendment of section 29A of Act 25 of 1961

21. The following section is substituted for section 29A of the principal Act:

(1) **[The]** Each marriage officer shall keep a record of all marriages conducted by him or her.

(2) A marriage conducted under or recognised in terms of the provisions of this Act must be recorded in the prescribed register and the register must be signed by the marriage officer who **[solemnized]** conducted **[any]** the marriage, as well as the parties

thereto and two competent witnesses **[shall sign the marriage register concerned]** immediately after such marriage has been **[solemnized]** conducted.

[(2)] (3) The marriage officer concerned shall forthwith transmit the marriage register and records concerned, as the case may be, to a regional or district representative **[designated as such under section 21 (1) of the Identification Act, 1986 (Act 72 of 1986)]** of the department in whose district or region the marriage was conducted.

(4) Upon receipt of the said register and records the regional or district representative, as the case may be, shall cause the particulars of the marriage concerned to be included in the population register in accordance with the provisions of the Identification Act, 1997 (Act 68 of 1997).

Amendment of section 30 of act 25 of 1961 as amended by section 10 of Act 51 of 1970, section 2 of Act 26 of 1972 and section 1 of Act 12 of 1973

22. The following section is substituted for section 30 of the principal Act:

30(1) In **[solemnizing]** conducting any marriage any marriage officer designated under section 3 may follow the marriage formula usually observed by his or her religious denomination or organisation if such marriage formula has been approved by the Minister, but if such marriage formula has not been approved by the Minister, or in the case of any other marriage officer, the marriage officer concerned shall put the following questions to each of the parties separately, each of whom shall reply in the affirmative:

> 'Do you, A.B., declare that as far as you know there is no lawful impediment to your proposed marriage with C.D here present, and that you call all here present to witness that you take C.D. as your lawful wife (or husband)?',

[and thereupon the parties shall give each other the right hand] and the marriage officer concerned shall declare the marriage **[solemnized]** conducted in the following words:

> 'I declare that A.B. and C.D. here present have been lawfully married.".

(2) Subject to the provisions o subsection (1), a marriage officer, if he or she is a minister of religion or a person holding a responsible position in a religious denomination or organization, may in **[solemnizing]** conducting a marriage follow the rites usually observed by his or her religious denomination or organization.

(3) Subject to the provisions of this section or any former law relating to the questions to be put to each of the parties separately or to the declaration whereby the **[marriage]** parties shall be declared to be **[solemnized]** joined in marriage **[or to the requirement that the parties shall give each other the right hand,]** have not been strictly complied with owing to-

(a) an error, omission or oversight committed in good faith by the marriage officer, or

(b) an error, omission or oversight committed in good faith by the parties or owing to the physical disability of one or both of the parties,

but such marriage has in every other respect been **[solemnized]** conducted in accordance with the provisions of this Act or, as the case may be a former law, that marriage shall, provided there was no other lawful impediment thereto and provided such marriage, if it was **[solemnized]** conducted before the commencement of the Marriage Amendment Act, 1970, (Act 51 of 1970), has not been dissolved or declared

invalid by a competent court, and provided further that neither of the parties to such marriage has after such marriage and during the life of the other, already lawfully married another, be as valid and binding as it would have been if the said provisions had been strictly complied with.

Amendment of section 31 of Act 25 of 1961

23. The following section is substituted for section 31 of the principal Act:

31 Nothing in this Act contained shall be construed so as to compel a marriage officer who is a minister of religion or a person holding a responsible position in a religious denomination or organization to **[solemnize]** conduct a marriage which would not conform to the rites, formularies, tenets, doctrines or discipline of his or her religious denomination or organization.

Amendment of section 32 of Act 25 of 1961

24. Section 32 is amended by-

(a) the substitution of the following subsection for subsection (1):

32(1) No marriage officer may demand or receive any fee, gift or reward, for or by reason of anything done by him or her as marriage officer in terms of this Act: Provided that a minister of religion or a person holding a responsible position in a religious denomination or organization may, for or by reason of any such thing done by him or her , receive-

(a) such fees or payments as were immediately prior to the commencement of this Act ordinarily paid to any such minister of religion or person in terms of the rules and regulations of his or her religious denomination or organization, for or by reason of any such thing done by him or her in terms of a prior law; or

(b) such fee as may be prescribed.

(b) the substitution of the following subsection for subsection (2):

32(2) Any marriage officer who contravenes the provisions of sub-section (1) shall be guilty of an offence and liable on conviction to a fine **[not exceeding one hundred rand]** or **[, in default of payment,]** to imprisonment for a period not exceeding six months.

Amendment of section 33 of Act 25 of 1961

25. Section 33 of the principal Act is omitted:

[33 After a marriage has been solemnized by a marriage officer, a minister of religion or a person holding a responsible position in a religious denomination or organization may bless such marriage according to the rites of his religious denomination or organization.]

Amendment of section 35 of Act 25 of 1961

26. The following section is substituted for section 35 of the principal Act:

35 Any marriage officer who knowingly **[solemnizes]** conducts a marriage in contravention of the provisions of this Act shall be guilty of an offence and liable on conviction to a fine **[not exceeding one hundred rand or, in default of payment,]** or to imprisonment for a period not exceeding six months.

Amendment of section 37 of Act 25 of 1961

27. The following section is substituted for section 37 of the principal Act:

37 If any person contravenes any provision of this Act in any country outside the **[Union]** Republic the Minister of Justice shall determine which court in the **[Union]** Republic shall try such person for the offence committed thereby, and such court shall thereupon be competent so to try such person, and for all purposes incidental to or consequential on the trial of such person, the offence shall be deemed to have been committed within the area of jurisdiction of such court.

Short title and commencement

28. This Act shall be called the Marriage Amendment Act, 19... and will come into operation on a date fixed by the President by proclamation in the *Gazette*.

ANNEXURE B

RESPONDENTS WHO RESPONDED TO THE COMMISSION'S MEDIA STATEMENT[122]

Judiciary

1. Mr Justice S Selikowitz of the Cape of Good Hope High Provincial Division

Attorneys

2. Mr D De Wet on behalf of the Church of Jesus Christ of the Latter-Day Saints
3. Mr T Bouwer, of Bouwer and Cardona on behalf of the Pagan Federation of South Africa
4. Mr DP Kent of Douglas Kent and Co

Religious organisations or denominations

5. Mr Moosa Valli Ismail, the Muslim Assembly
6. Chief Rabbi CK Harris of the Union of Orthodox Synagogues of South Africa
7. Rev K Mofokeng, Federal Council of Indigenous Churches
8. Rev Andre le Roux of the Trinity United Church
9. Rev Ryan Hogarth, Church of Scientology in South Africa

Universities

10. The Gender Research Project: Centre for Applied Legal Studies, University of the Witwatersrand
11. The Campus Law Clinic of the University of Natal

Individuals

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[122] As explained in Chapter one, the comments of the respondents who commented on partnerships and the recognition or not of same sex marriages will be reflected and considered in the Issue Paper dealing with "Domestic Partnerships" (Project 118). Hence, these respondents are not reflected here.

12. Rev DR Loius Bosch
13. Faizal Jacobs
14. Zuleka Adam
15. Mrs P Samjhawan
16. Prof JC Bekker
17. Mrs Olga Kruger