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GENERAL NOTICE

NOTICE 37 OF 2011

DEPARTMENT OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT

INVITATION TO COMMENT ON THE OF MUSLIM MARRIAGES BILL

The Minister of Justice and Constitutional Development invites interested parties to comment on the Muslim Marriages Bill. Any person wishing to comment on the Bill is invited to submit written comments to the Minister of Justice and Constitutional Development not later than 15 March 2011. Comments should be marked for the attention of **Mr T N Matibe** and -

- (a) if it is forwarded by post, be addressed to -
The Director-General: Justice and Constitutional Development
Private Bag X81
Pretoria
0001
- (b) if delivered by hand, be delivered at -
Momentum Building
329 Pretorius Street
Pretoria
- (c) if it is delivered by E-mail, it be delivered to TMatibe@justice.gov.za
- (d) if it is faxed, it be faxed to **086 648 7766**

Background:

The Bill emanates from an investigation by the South African Law Reform Commission (the SALRC) on Islamic Marriages and Related Matters. Its report on the matter contains legislative proposals in the form of a Muslim Marriages Bill. The aim of these legislative proposals is to provide statutory recognition of Muslim marriages in order to redress inequities and hardships arising from the non-recognition of these marriages.

The Bill is applicable to persons who adhere to the Muslim faith and who elect to be bound by its provisions. In other words, it contains an opting out provision for persons who do not wish to be bound by it. The need for this legislation finds support in section 15(3) of the Constitution. This section provides that the right to freedom of religion, belief and opinion does not preclude legislation recognising –

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

The Bill sets out a statutory framework for the legal recognition of Muslim marriages and their consequences.

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REPUBLIC OF SOUTH AFRICA

MUSLIM MARRIAGES BILL

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BILL

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

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

Definitions

1. In this Act, unless the context otherwise indicates—
 - “**court**” means a High Court of South Africa, or a court for a regional division as provided for in section 29(1B) of the Magistrates’ Courts Act, 1944 (Act No. 32 of 1944);
 - “**Deeds Registries Act**” means the Deeds Registries Act, 1937 (Act No. 47 of 1937);
 - “**deferred dower**” means the dower or part thereof which is payable on an agreed future date but which, in any event, becomes due and payable upon the dissolution of a marriage by divorce or death;
 - “**dispute**” means a dispute or an alleged dispute relating to the interpretation or application of any provision of this Act or any applicable law;
 - “**Divorce Act**” means the Divorce Act, 1979 (Act No. 70 of 1979);
 - “**dower**” (*mahr*) means the money, property or anything of value, including benefits which must be payable by the husband to the wife as an *ex lege* consequence of the marriage itself in order to establish a family and lay the foundations for affection and companionship;
 - “**existing civil marriage**” means an existing marriage concluded according to Islamic law which has also been registered and solemnised in terms of the Marriage Act before

the commencement of this Act ;

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

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

“Faskh” means a decree of dissolution of a marriage granted by a court, upon the application of a husband or wife, on any ground or basis permitted by Islamic law, including, in the case of a wife, any one or more of the following grounds, namely where

- (a) the husband is missing, or his whereabouts are not known, for a substantial period of time (*Maḥqūd al-Khabar*);
- (b) the husband fails to maintain his wife (*Adam al-Infāq*);
- (c) the husband has been sentenced to imprisonment for a period of three years or more, provided that the wife is entitled to apply for a decree of the dissolution of the marriage within a period of one year as from the date of sentencing;
- (d) the husband is mentally ill, or in a state of continued unconsciousness as provided for in section 5 of the Divorce Act, which provisions apply with the changes required by the context (*Junūn*);
- (e) the husband suffers from impotence or a serious disease which renders cohabitation intolerable (*Ayb*);
- (f) the husband treats his wife with cruelty in any form, which renders cohabitation intolerable (*Dharar*);
- (g) the husband has failed, without valid reason, to perform his marital obligations for an unreasonable period (*Dharar*);
- (h) the husband is a spouse in more than one Muslim marriage and fails to treat his wife justly in accordance with the injunctions of the *Qur'an* and *Sunnah* (*Dharar*);
- (i) the husband commits harm against his wife, as recognised by Islamic law (*Dharar*); or
- (j) discord between the spouses has undermined the objects of marriage, including the foundational values of mutual love, affection, companionship and

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understanding, with the result that the dissolution of the marriage is an option in the circumstances (*Shiqāq*);

“Iddah” means the mandatory waiting period arising from the dissolution of the marriage by *Talāq*, *Faskh* or death during which period the wife may not remarry:

- (a) Provided that the *Iddah* of a divorced woman who -
 - (i) menstruates, is three menstrual cycles;
 - (ii) is not able to menstruate due to advanced age or for any other valid reason, is three lunar months; or
 - (iii) is pregnant, extends until the time of delivery;
- (b) Provided further that the *Iddah* of a widowed woman -
 - (i) if she is not pregnant, is 130 days or four lunar months and ten days;
 - (ii) if she is pregnant, extends until the time of delivery.

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

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

“Islamic Law” means the law as derived from the *Holy Qur'an*, the *Sunnah* (Prophetic model), the consensus of Muslim Jurists (*Isma*) and analogical deductions based on the primary sources (*Qiyas*);

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

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

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

“marriage officer” means any Muslim person with knowledge of Islamic law appointed as marriage officer for purposes of this Act by the Cabinet member responsible for home affairs or an officer acting under that Cabinet member's written authorisation;

“Muslim” means a person who believes in the oneness of Allah and who believes in the Holy Messenger Muhammad as the final prophet and who has faith in all the essentials of

Islam (*Daruriyyat Al-Din*);

“Muslim marriage” means a marriage between a man and a woman contracted in accordance with Islamic law only;

“prescribed” means prescribed by regulation made under section 14;

“prompt dower” means the dower or part thereof which is payable at the time of the conclusion of a marriage or immediately thereafter upon demand by the wife;

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

“revocable *Talāq*” means a *Talāq Raj’i* which does not terminate the marriage before the completion of the *Iddah*, and in terms of which the husband may, for the purposes of reconciliation, resume conjugation before the expiry of the *Iddah* only;

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

“*Talāq*” means the dissolution of a Muslim marriage, immediately or at a later stage, by a husband or his agent by using the word *Talāq* or a synonym or derivative thereof in any language; and

“this Act” includes the regulations.

Application of Act

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

(2) The provisions of this Act apply to Muslim marriages concluded before the commencement of this Act, unless the parties, within a period of 36 months or such longer period as may be prescribed, as from the date of the commencement of this Act, jointly to elect, in the prescribed manner, not to be bound by the provisions of this Act, in which event the provisions of this Act do not apply to such a marriage.

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

(4) The provisions of this Act –

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

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

Equal status and capacity of spouses

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

Disputes

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

(2) (a) Where a dispute arises between a husband in a polygamous

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

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

Requirements for validity of Muslim marriages

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

- (a) The prospective spouses must both have consented to be married to each other;
- (b) the marriage officer must have ascertained from a proxy, if any, whether the parties to the prospective marriage have consented to be married to each other;
- (c) witnesses must have been present as required by Islamic law at the time of the conclusion of the marriage;
- (d) the prospective bride and groom must, subject to subsections (4) and (5), have been 18 years old or older; and
- (e) the provisions of this section and sections 6 and 7 must have been complied with.

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

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

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

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

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

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

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

Registration of Muslim marriages

6. (1) A Muslim marriage -

- (a) concluded before the commencement of this Act, unless the parties have elected not to be bound by the provisions of this Act as provided for in section 2(2), must be registered in the prescribed manner within a period of two years after the commencement of this Act or within such longer period as the Cabinet member responsible for home affairs may, from time to time, determine by notice in the *Gazette*; or
- (b) concluded after the commencement of this Act, where the parties have elected to be bound by the provisions of this Act as provided for in section 2(1), must be registered as prescribed at the time of the conclusion of the marriage or within any longer period as the Cabinet member responsible for home affairs may, from time to time, determine by notice in the *Gazette*.

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

- (a) each of the parties in question produces to the marriage officer his or her identity document issued under the provisions of the Identification Act, 1997 (Act No. 68

- of 1997), or his or her birth certificate issued under the provisions of the Birth and Deaths Registration Act, 1992 (Act No. 51 of 1992) ;
- (b) each of the parties furnishes to the marriage officer proof of application for either an identity document or a birth certificate referred to in paragraph (a), together with the prescribed affidavit sworn to before an authorised officer of the Department of Home Affairs;
 - (c) one of the parties produces his or her identity document or a birth certificate referred to in paragraph (a) or furnishes proof of his or her application for any of these documents to the marriage officer and the other furnishes to the marriage officer the affidavit referred to in paragraph (b);
 - (d) one of the parties, who is a foreign national, furnishes the marriage officer with proof of his or her lawful sojourn in the Republic, together with his or her original passport or travel document and a prescribed affidavit sworn to before an officer of the Department of Home Affairs, or, in cases of refugees, an original copy of his or her Refugee Identity Document issued in terms of the provisions of the Refugees Act, 1998 (Act No.130 of 1998); or
 - (e) each of the parties, who is a widow or widower, as the case may be, furnishes the marriage officer with a copy of his or her deceased spouse's death certificate issued under the provisions of the Birth and Deaths Registration Act, 1992, or any other law applicable to a foreign national.

(3) The marriage officer must –

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

- (d) issue to the spouses a certificate of registration, bearing the prescribed particulars; and
- (e) immediately, in the prescribed manner, submit the relevant records to the nearest office of the Department of Home Affairs.

(4) A Muslim marriage must be concluded in accordance with the formulae prescribed in Islamic law, including *zawwajtuka* and *ankahtuka* ("I marry you (to)...").

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

- (6) A court may, upon the application any of the spouses, order -
- (a) the registration of any Muslim marriage; or
 - (b) the cancellation or rectification of any registration of a Muslim marriage effected by a marriage officer.

(7) A certificate of registration of a Muslim marriage issued under this section or any other law providing for the registration of Muslim marriages constitutes *prima facie* proof of the existence of the Muslim marriage and of the particulars contained in the certificate.

(8) Any marriage officer who knowingly registers a marriage in contravention of the provisions of this Act, is guilty of an offence and liable on conviction to a fine not exceeding R20 000.

(9) (a) Any person who facilitates the conclusion of a Muslim marriage, irrespective of whether that person is a marriage officer or not, must inform the prospective spouses that they have a choice whether or not to be bound by the provisions of this Act.

(b) If the parties to a proposed marriage elect to be bound by the provisions of this Act as provided for in section 2(1), the person facilitating the marriage referred to in paragraph (a) must direct the parties to a marriage officer for purposes of registering the Muslim marriage so facilitated.

(c) The person facilitating the marriage referred to in paragraph (a) who fails to comply with the provisions of paragraph (b), is guilty of an offence and liable upon conviction to a fine not exceeding R20 000.

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

Proof of age of parties to proposed marriage

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

Proprietary consequences of Muslim marriages and contractual capacity of spouses

8. (1) A Muslim marriage to which this Act applies is deemed to be a marriage out of community of property excluding the accrual system, unless the proprietary consequences governing the marriage are regulated by mutual agreement of the spouses, in an antenuptial contract which must be registered in the Deeds Registry –

- (a) in the case of a marriage concluded before the commencement of this Act, and if at the time of the conclusion thereof a written agreement regulating the proprietary consequences of the marriage existed between the spouses, within 12 months from the date of commencement of this Act; and
 - (b) in the case of a marriage concluded after the commencement of this Act, within three months from the date of execution of the contract,
- or within any extended period as the court may, on application, allow.

(2) Subject to subsection (1), the provisions of the Deeds Registries Act apply, with the changes required by the context, to the registration of an antenuptial contract referred to in that subsection.

(3) Spouses in a Muslim marriage to which this Act applies may

jointly apply to a court for leave to change the matrimonial property system, which applies to their marriage or marriages and the court may, if it is satisfied that -

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

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

(4) In the case of a husband who is a spouse in more than one Muslim marriage, all persons having a sufficient interest in the matter, and in particular the husband's existing spouses, must be joined in the proceedings.

(5) Where the husband is a spouse in an existing civil marriage, and in a Muslim marriage, all his existing spouses must be joined in those proceedings.

(6) A husband in a Muslim marriage, to which this Act applies, who wishes to conclude a further Muslim marriage with another woman after the commencement of this Act must apply to court -

- (a) for approval to conclude a further Muslim marriage in terms of subsection (7); and
- (b) for approval of a written contract which will regulate the future matrimonial property system of his marriages.

(7) (a) When considering the application in terms of subsection (6), the court must grant approval if it is satisfied that the husband is able to maintain equality between his spouses as is prescribed by the Holy Qur'an.

(b) If a court grants approval for a husband to conclude a further Muslim marriage as provided for in paragraph (a) it may, in the case of an existing marriage which is in community of property or which is subject to the accrual

system or other contractual arrangement, terminate the matrimonial property system which is applicable to that marriage and may -

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

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

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

(9) If a court grants an application as provided for in subsection (3) or (6), the registrar or clerk of the court, as the case may be, must furnish each spouse with an order of the court including a certified copy of the contract and must cause the order and a certified copy of the contract to be sent to each Registrar of Deeds of the area in which the court is situated for the purposes of recording the agreement in terms of section 3(1)(w) of the Deeds Registries Act.

(10) No marriage officer may register a second or subsequent Muslim marriage, unless the husband provides the marriage officer with the order of the court granting the required approval in terms of subsection (7).

(11) A husband who concludes a further Muslim marriage while he is already married, without the permission of the court, in contravention of subsection (6), is guilty of an offence and liable on conviction to a fine not exceeding R20 000.

(12) Any person who intentionally prevents another person from exercising any right conferred under this Act, is guilty of an offence and liable upon conviction to a fine or to imprisonment for a period not exceeding one year.

Termination of Muslim marriages

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

(2) Notwithstanding the provisions of section 3(a) of the Divorce Act or anything to the contrary contained in any law or the common law, a Muslim marriage may be dissolved by a court on any ground permitted by Islamic law and the provisions of this section also apply, with the changes required by the context, to an existing civil marriage insofar as the parties have, in the prescribed manner, elected to make the provisions of this Act applicable to the consequences of their marriage.

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

- (a) The husband must register an irrevocable *Talāq* (which takes effect as from the time of pronouncement thereof) immediately, but in any event, not later than 30 days after its pronouncement, with a marriage officer in the magisterial district closest to his wife's residence, in the presence of two competent witnesses, and after due notice to the wife.
- (b) The marriage officer may register the irrevocable *Talāq* only if the husband satisfies the marriage officer that due notice in the prescribed form of the intended registration was served upon the wife by the sheriff or by substituted service.
- (c) The provisions of paragraphs (a) and (b) apply, with the changes required by the context, where the husband has delegated to the wife the right of pronouncing a *Talāq*, and the wife has pronounced an irrevocable *Talāq* (*Tafwīd al-Talāq*), according to the terms of the delegation.
- (d) If a spouse disputes the validity of the irrevocable *Talāq*, according to Islamic Law, the marriage officer may not register it, until the dispute is resolved by the court or pursuant to a written settlement between the spouses.
- (e) A spouse must, within 14 days as from the date of the registration of the irrevocable *Talāq*, institute an action in a competent court for a decree confirming the dissolution of the marriage by way of *Talāq* and the action so instituted must be in accordance with the procedures provided for by the applicable rules of court.

- (f) A copy of the certificate of registration of the irrevocable *Talāq* must be annexed to the summons initiating the action referred to in paragraph (e).
- (g) The registration of an irrevocable *Talaq* and the institution of an action referred to in paragraph (e) does not preclude a spouse from seeking the following interim relief:
- (i) An application *pendente lite* for an interdict or for the interim custody of, or access to, a minor child of the marriage concerned or for the payment of maintenance;
 - (ii) an application for a contribution towards the costs of the action or to institute the action, or make the application, *in forma pauperis*, or for the substituted service of process in, or the edictal citation of a party to, the action or the application; or
 - (iii) an application for maintenance during the *'Iddah* period.
- (h) An irrevocable *Talāq* taking effect before the commencement of this Act is not required to be registered in terms of the provisions of this Act.

(4) (a) Any husband who knowingly and wilfully fails to register an irrevocable *Talāq* in accordance with subsection (3) is guilty of an offence and is liable on conviction to a fine not exceeding R20 000.

(b) Where an irrevocable *Talāq* has not been registered in accordance with subsection (3), it is nonetheless effective as from the time of its pronouncement.

(5) (a) A court must grant a decree of divorce in the form of a *Faskh* on any ground which is recognised as valid for the dissolution of marriages under Islamic law, including the grounds set out in the definition of *Faskh* in section 1.

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

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

(d) The granting of a *Faskh* by a court, including a *Faskh*

granted upon the application of the husband, has the effect of terminating the marriage, in accordance with Islamic Law.

(6) (a) Spouses who have effected a *Khula'* must personally and jointly appear before a marriage officer and cause it to be registered in the presence of two competent witnesses.

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

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

(8) A court granting or confirming a decree for the dissolution of a Muslim marriage -

- (a) has the powers referred to in section 7(1), (7) and (8) of the Divorce Act and section 24(1) of the Matrimonial Property Act, 1984 (Act No. 88 of 1984);
- (b) must, if it deems it just and equitable, in the absence of any agreement between the parties to the marriage regarding the division of their assets, order that the assets be divided equitably between the parties, where-
 - (i) a party has in fact assisted, or has otherwise rendered services, in the operation or conduct of the family business or businesses during the subsistence of the marriage; or
 - (ii) the parties have actually contributed, during the subsistence of the marriage, to the maintenance or increase of the estate of each other, or any one of them, to the extent that it is not practically feasible or otherwise possible to accurately quantify the separate contributions of each party;
- (c) must, in the case of a husband who is a spouse in more than one Muslim marriage, take into consideration all relevant factors, including the sequence of the marriages and, any contract, agreement or order made in terms of section 8(3) or (7);

- (d) may order that any person who in the court's opinion has a sufficient interest in the matter, be joined in the proceedings;
- (e) may make an order with regard to the custody or guardianship of, or access to, any minor child of the marriage, having regard to the provisions of section 10;
- (f) must, when making an order for the payment of maintenance, including past maintenance, take into account all relevant factors; and
- (g) may make an order for a conciliatory gift (*mut'ah al-Talāq*) in defined circumstances permitted by Islamic law.

(9) Upon the termination of a marriage by death, the surviving spouse is entitled to lodge a claim against the deceased estate in respect of any unpaid dower, or otherwise in respect of any tangible contribution recognised by Islamic law.

Custody of and access to minor children

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

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

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

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

(b) If an enquiry is instituted by the Family Advocate in terms of section 4(1)(b) of the Mediation in Certain Divorce Matters Act, 1987, the court must

consider the report and recommendations of the Family Advocate concerning the welfare of minor children in accordance with Islamic Law before making an order referred to in paragraph (a).

Maintenance

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

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

- (a) that a husband is obliged to maintain his wife during the subsistence of a Muslim marriage according to his means and her reasonable needs;
- (b) that a father is obliged to maintain his –
 - (i) female children until they are married; and
 - (ii) male children until they reach the age of majority or otherwise for the period that they are in need of support;
- (c) in the case of the dissolution of a Muslim marriage by divorce –
 - (i) that a husband is obliged to maintain his wife for the mandatory waiting period of *'Iddah*;
 - (ii) where the wife has custody of any children as provided for in section 10, that the husband is, after the expiry of *'Iddah*, obliged to remunerate his wife, including for the provision of a separate residence for his wife if she is unable to provide a residence, for the period of custody only;
 - (iii) that the wife is entitled to be remunerated (*ujrah al-hadānah*) separately in relation to a breastfeeding period not exceeding two years, calculated from the date of birth of an infant, provided she has in fact breast-fed the child; and
 - (iv) that a husband's duty to support a child born of the marriage includes the

provision of food, clothing, separate accommodation, medical care and education.

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

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

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

Compulsory mediation

12. (1) In the event of a dispute arising during the subsistence of a Muslim marriage or otherwise arising from such a marriage, any party to the marriage may refer the dispute, at any time, whether before or after the institution of legal proceedings as provided for in section 9(3)(e) or (5)(b), but before the adjudication thereof by a court, to a prescribed accredited mediation council.

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

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

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

Dissolution of existing civil marriage

13. (1) In the event of a spouse to an existing civil marriage instituting a

divorce action in terms of the Divorce Act after the commencement of this Act, the court may not dissolve the civil marriage by granting a decree of divorce until the court is satisfied that the accompanying Muslim marriage has been dissolved.

(2) In the event of the husband, for any reason, refusing to pronounce an irrevocable *Talāq*, the wife to the accompanying Muslim marriage is entitled to apply for a decree of *Faskh* in terms of this Act for that purpose only, in which event the provisions of this Act apply, with the changes required by the context.

(3) The matter may, in circumstances referred to in subsection (2), be referred back to the court in order to determine the proprietary or other consequences of the marriage in terms of the Divorce Act and related matrimonial legislation.

(4) Where, in addition to the existing civil marriage, the husband has concluded a further Muslim marriage or marriages which are registrable under this Act, the husband's existing spouse or spouses must be joined in the divorce action referred to in subsection (1).

(5) The provisions of subsection (1) apply with the changes required by the context, to spouses in an existing civil marriage who have elected to adopt the provisions of this Act, as provided for in section 2.

Regulations

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

- (a) relating to -
 - (i) the requirements to be complied with and the information to be furnished to a marriage officer in respect of the registration and dissolution of a Muslim marriage;
 - (ii) the manner in which a marriage officer must satisfy himself or herself as to the existence or the validity of a Muslim marriage;
 - (iii) the manner in which any person may participate in the proof of the existence or in the registration of any Muslim marriage;

- (iv) the form and content of certificates, notices, affidavits and declarations required for the purposes of this Act;
 - (v) the custody, certification, implementation, rectification, reproduction and disposal of any document relating to the registration of Muslim marriages or of any document prescribed in terms of the regulations;
 - (vi) any matter that is required or permitted to be prescribed in terms of this Act; and
 - (vii) any other matter which is necessary or expedient to provide for the effective registration of Muslim marriages or the efficient administration of this Act.
- (b) prescribing the fees payable in respect of the registration of a Muslim marriage and the issuing of any certificate in respect thereof.

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

(3) Any regulation made under subsection (1) may provide that any person who contravenes a provision thereof or fails to comply therewith is guilty of an offence and is liable on conviction to a fine or to imprisonment for a period not exceeding one year.

Costs in divorce action

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

Recognition of foreign Muslim marriages

16. In the event of a dispute relating to whether or not a Muslim marriage concluded in a foreign country is recognised as a valid Muslim marriage under this Act,

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the dispute must be determined by the court, having regard to all relevant factors, including the principles of conflict of laws and in accordance with Islamic Law.

Amendment of laws

17. The Acts specified in the Schedule are hereby amended to the extent set out in the third column of that Schedule.

Short title and commencement

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

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SCHEDULE

(Section 17)

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

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

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

Act No and year	Short title	Extent of repeal or amendment
		<p>(c) forms an asset in a joint estate and was registered in the name of the husband only; or</p> <p>(d) is registered in the name of a person who on the date of the registration was a party to a marriage governed by the Recognition of Customary Marriages Act, 1998(Act No. 120 of 1998), <u>or a marriage governed by the Muslim Marriages Act, 20...</u></p> <p>the registrar shall on the written application by the person concerned and on the submission of the deed in question and of proof of the relevant facts, endorse the change in status or make a note to the effect that the said person is a party to a marriage in community of property, as the case may be: Provided that where there are two or more mutually dependent deeds, all such deeds must be submitted for endorsement: Provided further that in the case of an order envisaged in section 7(9) of the Recognition of Customary Marriages Act 1998 (Act 120 of 1998), <u>or in section ... of the Muslim Marriages Act, 20...</u>, the registrar shall, on submission of the relevant deed and court order and without the necessity of a written application, make the endorsement or note."</p> <p>2. Amendment of section 45<i>bis</i></p> <p>—</p> <p>(a) by the substitution for paragraph (b) of subsection (1) of the following paragraph:</p> <p>"(b) forms or formed an asset in a joint estate, and a court has made an order and given an authorisation, under section 20 or 21(1) of the Matrimonial Property Act, 1984 (Act</p>

Act No and year	Short title	Extent of repeal or amendment
		<p>88 of 1984, [or] under section 7 of the Recognition of Customary Marriages Act, 1998, or under sections.. or .. of the <u>Muslim Marriages Act, 20</u>, as the case may be, in terms of which the property, lease or bond is awarded to one of the spouses;" and</p> <p>(b) by the substitution for paragraph (b) of subsection (1A) of the following paragraph: "(b) forms or formed an asset in a joint estate and a court has made an order, or has made an order and given an authorisation under section 20 or 21(1) of the Matrimonial Property Act, 1984 (Act 88 of 1984), [or] under section 7 of the Recognition of Customary Marriages Act, 1998, or under sections.. or .. of the <u>Muslim Marriages Act 20</u>.., as the case may be, in terms of which the property, lease or bond is awarded to both spouses in undivided shares;"</p>
Act 81 of 1987	Intestate Succession Act, 1987	<p>1. Amendment of section 1 by the insertion after paragraph (f) of subsection (4) of the following paragraph: "(g) "spouse" includes a <u>spouse of a Muslim marriage recognised in terms of the Muslim Marriages Act, 20</u>.., and otherwise includes the <u>spouse of a deceased person in a union recognised as a marriage in accordance with the tenets of any religion: Provided that in the event of a deceased man being survived by more than one spouse, the following applies-</u> (i) <u>for the purposes of subsection(1)(a), the surviving</u></p>

Act No and year	Short title	Extent of repeal or amendment
		<p><u>spouse or spouses inherit the intestate estate in equal shares;</u></p> <p><u>(ii) for the purposes of subsection (1)(c), the surviving spouse or spouses each inherits a child's share of the intestate estate or so much of the intestate estate in equal shares as does not exceed in value the amount so fixed as provided for in this section. ”.</u></p>
Act 27 of 1990	Maintenance of Surviving Spouses Act, 1990	<p>1. Amendment of section 1 by the insertion after the definition of “executor” of the following definition:</p> <p><u>“ ‘marriage’ includes a Muslim marriage recognised in terms of the Muslim Marriages Act, 20... and otherwise includes a union recognised as a marriage in accordance with the tenets of any religion.”.</u></p>