

G E N E R A L N O T I C E S
A L G E M E N E K E N N I S G E W I N G S

NOTICE 2457 OF 1999

**SOUTH AFRICAN LAW COMMISSION: DISCUSSION PAPER 88
THE REVIEW OF THE MARRIAGE ACT 25 OF 1961 (PROJECT 109)**

The Working Commission of the South African Law Commission recently approved the publication of discussion paper 88 on the Review of the Marriage Act of 1961 for general information and comment. The investigation focuses mainly on whether the provisions contained in the Act are adequate or whether they should be amended and, in that event, the way in which such amendments should be effected.

Some of the issues and recommendations raised in the discussion paper are the following:

- 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.
- Section 2(1) of the Act should provide 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.
- The 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." One option suggested to the Commission is the amendment of the provision by the substitution of the words concerned with the phrase "according to the rites of the religious denomination or organisation concerned". Another option is 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 is 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.
- The 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 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 terms "conduct a marriage" or "join in marriage" are better substitutes and words to that effect should be used in place of the terms "solemnize" or "solemnization" where appropriate in the Act.

- 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.** 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.
- The minimum age for marriage (set out in section 26) should be 18 years of age for males and females.
- 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. This provision should correspond to the provision setting out the minimum age for marriage for males and females to be 18 years of age.
- 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 maybe conducted would be less limited than is presently the case although they should **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. Comment on these two options is requested: 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.
- The Act should further provide for a marriage conducted under or recognised in terms of the provisions of the Act to be recorded in the prescribed register, for the transmitting of the marriage register and records concerned to a regional or district representative of the department in whose district or region the marriage was conducted, and for causing the particulars of the marriage concerned to be included in the population register in accordance with the provisions of the Identification Act of 1997.
- 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.
- 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. 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. On 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. There is therefore no need to amend section 37 besides the substitution of the term "Republic" for the term "Union".

The Commission invites the comments of all parties who feel that they have an interest in the topic concerned or may be affected by the type of measures set out in the Marriage Act. Individuals, organisations and institutions affected by the Marriage Actor who are likely to be

affected by possible amendments to the existing legislation should participate in this debate **and** are invited to **indicate how the** present law governing the contracting of marriage affects them, what their concerns are, what solutions they are able to propose and whether there are other issues **and/or options affecting the law of marriage that must be explored. Based on the outcome of these comments, a report containing the Commission's final recommendations** will be prepared and presented to the Minister of Justice.

It would be appreciated if written comments or suggestions could reach the Commission by 30 November 1999 at the address given below.

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The discussion paper is available on the Internet at the following site:
<http://www.law.wits.ac.za/salc/discussn/discussn.html>

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