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Department of Home Affairs

**Chief Director Legal Services**

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***Per Facsimile and E-mail***

Sir/Madam

**COMMENTS ON THE DRAFT RECOGNITION OF CUSTOMARY MARRIAGES  
AMENDMENT BILL, 2009**

Enclosed please find the joint submissions of the Legal Resources Centre (LRC) and the Impact Litigation Unit of the Legal Aid Board on the Draft Recognition of Customary Marriages Amendment Bill, 2009.

We take great pleasure in making these submissions and we thank you for affording us this opportunity. Should you have any queries please do not hesitate to contact the writer hereof on (011) 836 9831 or email at [sushila@lrc.org.za](mailto:sushila@lrc.org.za).

Yours faithfully,

**SUSHILA DHEVER**

**LEGAL RESOURCES CENTRE**

**JOINT SUBMISSIONS OF  
THE  
LEGAL RESOURCES CENTRE  
AND THE IMPACT LITIGATION UNIT OF THE  
LEGAL AID BOARD**

**TO THE DEPARTMENT OF HOME AFFAIRS  
ON THE DRAFT RECOGNITION OF CUSTOMARY  
MARRIAGES AMENDMENT BILL, 2009**

**29 MAY 2009**

## **Introduction**

The draft Recognition of Customary Marriages Amendment Bill, 2009 ("the draft Customary Marriages Amendment Bill") is an important piece of legislation that affects the lives of many black African women in South Africa. Given that roughly 35% of all households in South Africa are female headed and the poverty rate among these households is over 60%<sup>1</sup> it is necessary to ensure that the legislation enacted, not only secures the rights of women and their children but also makes these rights accessible to them.

## **The Legal Resources Centre (LRC)**

The Legal Resources Centre (LRC) is South Africa's largest independent, non-profit, public interest law centre. Established in 1979 it has since worked consistently to defend the rights of poor, vulnerable and historically disadvantaged people by using the law in the pursuit of social justice. The Legal Resources Centre (LRC) through its Gender Rights Project (GRP) focuses on empowering women by providing: legal advice; legal representation and negotiation; and by participating in advocacy and law reform.

## **Impact Litigation Unit of LAB**

The LRC has entered into a co-operation agreement with the LAB for a period of 3 years. As part of its co-operation agreement with the LAB, the Impact Litigation Unit was invited to make joint submissions with the LRC. These submissions have been included in this document.

### **Focus of the Submissions**

The Department of Home Affairs invitation for public comments on the draft Recognition of Customary Marriages Amendment Bill, 2009 is welcomed and viewed as an opportunity:

- 1) to highlight and address some of the challenges experienced by women utilising the current legislation; and
- 2) to illustrate the negative effect of some of the proposed amendments on women.

#### **1. Challenges Experienced by Women Utilising the Current legislation**

Whilst recent court judgments like Gumedel<sup>ii</sup> have addressed some of the iniquities that women suffered due to section 20 of the KwaZulu Act on the Code of Zulu Law, 1985 and sections 20 and 22 of Proclamation no. R151 of the Natal Code of Zulu Law, 1987 and whilst the draft Customary Marriages Amendment Bill substantially incorporates the Gumedel judgment there are still many challenges that women experience under the current legislation that need attention.

Although customary marriages are recognized, in terms of the Recognition of Customary Marriages Act 120 of 1998("Principal Act"), in practice many women do not register their customary marriages on time, because they are unaware of the legislation and the time periods prescribed for registering customary marriages. Many rural women are significantly affected by this provision of the Act, which prescribes time periods for registration of customary marriages. However both urban and rural women are not familiar with the legislation and its consequences.

Most women only become aware of the legislation on the death of their spouse, or on abandonment or when they are threatened with eviction from the marital home. Whilst the law is clear that a failure to register a customary marriage does not affect the validity

of the marriage, it does however affect the ability of the surviving spouse to administer the deceased's estate and to inherit from the deceased's estate because she cannot apply for a letter of authority from the Master's office without a certificate of registration. This applies to all instances where the husband dies intestate.

When the husband dies intestate the certificate of registration serves as *prima facie* proof of the existence of the customary marriage. Although the time period for registering customary marriages has been extended to 1 November 2009<sup>iii</sup> a family member of the late husband's family may refuse to co-operate with the widow or provide affidavits or *lobolo* agreements to verify the existence of the marriage. The effect of this is that the non-registration of the marriage ultimately results in the surviving spouse (wife) being denied the right to administer the estate of her late husband who died intestate. Very often the family member appointed to administer the aforesaid estate, does so without taking into consideration the customary law spouse and the children, thus depriving them of the right to inherit.

Since most of these estates fall under R150 000, they are administered in terms of section 18(3) of the Administration of Deceased Estates Act 66 of 1965 and therefore they are administered in the magistrate's courts and informally. The effect of this informal administration in the magistrate's courts unfortunately results in poor service when officials who are poorly trained and ill informed are assigned to assist with registration of customary marriages. These officials are unable to exercise discretion when a spouse has not registered her marriage and as a result she is not appointed to administer the deceased's estate. Although these courts are meant to serve the most vulnerable, illiterate women these institutions are unfriendly and serve as an impersonal bureaucracy thus violating the trust of women.

Another challenge that women experience is that after they have entered into the customary marriage, in accordance with the tenets of customary law, their husbands

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<sup>iii</sup> In terms of Government Notice No R 1391 and Government Notice No R 1390

refuse to accompany them to the Department of Home Affairs to register the customary marriage. When these women insist on registration experience shows that they are often beaten or abandoned. When women attempt to register their marriages by themselves, officials at the Department of Home Affairs, refuse to assist them despite sections 4(1) and 4(2) of the Recognition of Customary Marriages Act 120 of 1998("Principal Act"), which explicitly state that spouse have a duty to register their marriage and that either spouse may register the marriage.

Many women report of instances when customary marriage certificates issued by the Department of Home Affairs are subsequently cancelled without proper authority, reasons or notification. In general men are reluctant to register their customary marriages and refuse to accompany their spouses to the Department of Home Affairs to register the marriage. Often officials at the Department of Home Affairs do not assist women who are not accompanied by their husbands. Not much is being done to educate men on the importance of the legislation; therefore gender sensitivity training is needed at the Department of Home Affairs to give effect to the legislation in a proper and fair manner.

## **2. The negative effect of some of the proposed amendments on Women in Customary Marriages**

The effect of the proposed amendment section 4(2) of the Principal Act, by deleting the phrase "*either spouse may*" and replacing it with "*both spouses must together*" is that many women will not be able to register the marriage if their spouses refuses to apply to the registering officer to register the marriage, despite the fact that a valid customary marriage was concluded between them (a marriage to which they both consented). This amendment will make women vulnerable to the whims of the spouse and will not afford women the protection that they are most in need of. Men prefer not to register the

marriage to avoid the matrimonial property consequences that flow from the registration of the customary marriage.

When the marriage has not been registered the errant spouse may secretly enter into a civil marriage with another woman and without the knowledge of his customary law spouse. On his death the customary law spouse and children will have no claim to the marital property in the event of only the civil marriage being recognised by the Master's office. This allows unscrupulous husbands the opportunity to exploit women by withholding co-operation for the registration of the customary marriage. This is both humiliating and demeaning to the women because without the registration of the customary marriage, it is as if no marriage exists, and the husband escapes his obligations which accrue from such a valid customary law marriage. In the township this relationship is derogatively referred to and as "vat en sit" relationship

The proposed deletion of section 4(5) (a) and (b) of the principal Act is also problematic. Section 4(5)(a) and (b) states that:

*(a) "If a customary marriage is not registered, any person who satisfies a registering officer that he or she has a sufficient interest in the matter, may apply to the registering officer, in the prescribed manner, to enquire into the existence of the marriage.*

*(b) If the registering officer is satisfied that a valid customary marriage exists or existed between, the spouses, he or she must register the marriage and issue a certificate of registration as contemplated in subsection (4)."*

By deleting this provision, the draft bill makes it difficult for family members, creditors or any other interested party to enquire into the existence of the marriage and it also makes it difficult for children who are born of the customary marriage to enquire into the existence of the marriage if there is a need to do so.

The proposed inclusion of section 6B which states that *"No registering officer may register a customary marriage of which one spouse is deceased"* will adversely affect

surviving widows when the marriage has not been registered. For example if a woman entered into a customary marriage and her spouse dies before the marriage is registered she will have no proof that a valid customary marriage existed between them. Should she be faced with eviction proceedings by the deceased's family she will have difficulty in proving that she was married, or that she is the joint owner of the marital home. In addition, many widows will have difficulty registering immovable property in their names without the customary marriage certificate which serves as *prima facie* proof of the existence of the marriage.

Section 6B will provide no relief, whatsoever to the widow when family members of the deceased turn hostile and withdraw their co-operation regarding registration of the marriage. On the death of the spouse in a customary marriage it is not unusual for the parents of the deceased to lay claim to the marital estate where there is no will. The parents feel that they are entitled to all the property, in the mistaken belief, that whatever contribution made by the deceased during his life time to the marriage now reverts to them as parents. It is almost as if the marriage never existed and this results in hardship for the widow and children when the husband dies intestate.

There are no provisions in the draft bill that deal with the cancellation of certificates that are issued by the Department of Home Affairs. Women who have registered their marriages and have their certificates of registration later cancelled or withdrawn by the Department have no relief under the new draft bill.

### **REMEDY**

Given the difficulties that women experience when registering their marriages, we submit that the wording of section 4(2) of the principal Act remains the same, and that either spouse may apply to register the marriage. It is also recommended that section 4(5) (a) and (b) be retained in the draft bill, to protect the interests of children born out of customary marriages as well as creditors.

Section 6B will leave widows in a precarious position, and should be reconsidered or expanded to provide protection to woman in cases where the department withdraws registration of customary certificates. The issue of proof of the marriage has not been considered by the Department, since registration of the marriage serves as *prima facie* proof of the marriage. How would the draft bill protect the interests of women who failed to register their marriages prior to the deaths of their spouses?

We submit that the draft bill needs to contain a provision that sets out the legal consequences of certificates that are issued by the Department and then subsequently cancelled without proper notification and due process. Perhaps it would not be a bad idea to make registration of all customary marriages compulsory. Parties married in terms of Hindu rites or Muslim law are issued with marriage certificates if their marriage is solemnized by a priest who is also a marriage officer. Why should parties to a customary law marriage be treated differently?

It is well known that when people marry in terms of civil law, the marriage is registered by a marriage officer and they are immediately issued with a marriage certificate. In terms of the Marriages Act, marriage officers who conduct religious marriages, be it Muslim or Hindu, are recognised as marriage officers and are empowered to issue a valid certificate at marriage ceremonies. This benefit is not allowed to parties in a customary law marriage who have to proactively pursue registration of the customary marriage with a marriage officer at the Department of Home Affairs. Hence the registration takes place after the fact.

The inconsistencies which arise from the registration procedures pertaining to customary marriages and which have been discussed and referred to earlier on can be remedied if the same benefit is awarded to spouses in customary law marriages. In other words, registration should take place simultaneously with the celebration of the

traditional ceremony. The marriage should be registered by marriage officers appointed by the Minister, who should be present at the ceremony, or if the couple prefers by their traditional leader who may be deemed a marriage officer.

Alternatively, the marriage should be registered once the parties intend to enter into a customary law marriage and when *lobolo* negotiations have commenced. This will serve as a sign of good faith. So in the event that the *lobolo* is not fully paid for whatever reason, the customary certificate will still prove the existence of a valid customary marriage. This would obviate the necessity of a spouse to go through the tedious process of proving the existence of the marriage in order to have equal protection under the law and to access benefits that accrue from such marriages.

We are of the view that in so far as the registration procedures act unfairly against women and children to a customary marriage, it is unconstitutional. Registration of customary marriages is central to the recognition of such marriages. In reality marriages that are not registered, are in effect not recognised.

The problem does not lie with customary law practices which, if properly applied, make provision for the surviving widow and children in the event of the husband dying intestate because the rule of male primogeniture was fully addressed in the matter of Bhe and Others v Magistrate, Khayelitsha, and Others (Commission for Gender Equality as Amicus Curiae); Shibi v Sithole and Others; South African Human Rights Commission and Another v President of the Republic of South Africa and Another 2005 (1) SA 580 (CC) , where it was declared unconstitutional because it discriminated against females.

The Department of Home Affairs should embark on an education drive through the print media, radio and television to make its constituency, especially in the rural areas, aware of the Act, and its purpose to encourage registration of all customary marriages. There

should be extensive consultation with NGO's representing rural women as well as the input of traditional leaders should be canvassed for their opinion on how and when compulsory registration of customary law marriages should take place to ensure that women and children's rights are always protected.

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<sup>1</sup> **TELECOMMUNICATION POLICY AND REGULATION FOR WOMEN AND DEVELOPMENT** This paper was delivered at the Development Summit, TELCOM 99 + INTERACTIVE 99, Geneva, October 10- 17, 1999

<sup>11</sup> In the judgment Gumede v President of the Republic of South Africa and Others (CCT 50/08) [2008] ZACC 23 (8 December 2008) the Constitutional Court made an order changing the status of spouses in customary marriages which were concluded *before* 15 November 2000.