**RECOGNITION OF CUSTOMARY MARRIAGES AMENDMENT BILL, 2019 [B 12-2019]: DEFINING FORMS OF CUSTOMARY LAW PROPERTY OWNERSHIP**

1. On 3 March 2020 the Department presented a summary of submissions and the responses on the Recognition of Customary Marriages Amendment Bill, 2019[Bill 12 -2019] (the Bill) to the Portfolio Committee (the Committee).

2. During the deliberations a concern was raised to the effect that the Bill fails to define the forms of property ownership at customary law. These forms are "marital property", "house property", “family property" and "personal property". The Committee noted that the suggestion to define these terms in the Bill was raised by the Women's Legal Centre and the Helen Suzman Foundation.

3. The response of the Department was that the Department is of the view that these terms should be given their meaning as it exist at customary law in different cultural groups, and it be left to the courts to develop the meaning of these terms on the basis of the evidence as will be placed before them. It needs to be pointed out that section 211 (3) of the Constitution enjoins the courts to apply customary law when that law is applicable, subject to the Constitution, and any law that deals with customary law. In this way it will be manageable to develop the definitions on the basis of jurisprudence has developed. Adopting this approach will be to ensure that the definitions developed do not result in unintended consequences. It was pointed out that properly defining these terms will require in-depth research as well as comprehensive consultation with the relevant stakeholders. The Committee instructed the Department to define these terms so that the definitions could be included in the Bill.

4. While the concern to define these customary law property ownership terms is appreciated, the following remains relevant for this discussion:

(a) there is a risk of attaching to the definitions meaning that is westernised and is foreign to customary law as practiced by different cultural groups, and this could render them unfit for customary law polygamous marriages;

(b) During the consultation process on the Bill, the traditional leaders were specifically requested to provide guidance on the meaning and definitions of these customary law property ownership terms. None of this could be provided. There were sharp disagreements among the traditional leaders on the interpretation and meaning of these terms in their respective cultural groups. The general view seemed to be that the definition of these terms should be left out of the Bill as they may distort the way these concepts are practiced in different cultures; and

(c) The Commission for Gender Equality (the CGE) offered the following definitions:

"**household property**” means all movable property owned by the spouses and in their control or possession within the dwelling or property in a family unit. This would include motor vehicles and excludes personal property.

“**marital property**”, means all property whether movable or immovable acquired by the spouses during the marriage as well as that which is brought by the spouses into the marital home at the commencement of the marriage which is located in any marital home.

“**family unit**”, means the husband, spouse and children within a specific marriage relationship to the exclusion of other spouses and their children.

“**joint family**”, means the husband and all his wives and children jointly whether they occupy a single or multitude of dwellings.

“**personal property**”, means any property that is of a personal nature and would include gifts, items of clothing, jewelry and compensation for damages or personal injury including any property designated as such in terms of any agreement or law.".

As can be seen from the definitions proposed by the CGE, the meaning of the concepts is to an extent "westernised" as stated in paragraph (*a*), and creates the risk of changing customs unfairly.

5. The Constitutional Court did not pronounce on the manner by which these terms should be interpreted and applied in practice.

6. Defining these complex customary law concepts without proper research and consultation with interest groups including traditional leaders and women rights advocacy groups, could result in unintended consequences to the detriment of women in customary marriages, and whom the Bill aims to protect. It is important that these words are carefully defined so as not to leave the women more vulnerable.

7. The South African Law Reform Commission, in conjunction with the Department of Home Affairs is reviewing the South African marriage regime. A view is held that this process will be better placed to investigating the definitions of these concepts

8. It is against this background that the Department is of the view that it may not be practical at this point, to define these property ownership concepts in the Bill without the benefit of extensive research and comprehensive consultation.