**SUMMARY OF WRITTEN SUBMISSIONS AND RESPONSES: RECOGNITIONOF CUSTOMARY MARRIAGES AMENDMENT BILL [B 13 - 2019]**

**Introduction**

What follows hereunder is a summary of submissions received from the provinces as submitted to the Select Committee on Security and Justice AmendmentBill [B 13 - 2019].

**TABLE SUBMISSIONS/RECOMMENDATIONS BY CLAUSE**

| **Clause/ theme** | **Province** | **Submission / Recommendation** | **DOJCD Response** |
| --- | --- | --- | --- |
| **Clause 1** | **Gauteng****Gauteng****Gauteng** | (a) The definition of “**traditional leader**” should be revised to align it with the definition as contained in the Traditional and Khoi-San Leadership Act, No. 3 of 2019 once this Act has commenced.(b) There is concern regarding the definition of “traditional leader” which is aligned to an Act that may soon be repealed.(c) Omission of the words, “any person who is in terms of customary law or any other law hold a position in a traditional ruling hierarchy” from the definition of traditional leader, and referring to the Traditional Leadership and the Governance Framework Act where the role of traditional leadership is thoroughly explained as an institution rather than a title is welcomed. | (a) While the submission is noted, it should be made clear that the Traditional and Khoi-San Leadership Act, 2019(Act No. 3 of 2019) has not been implemented and that it is not known when it will be. The challenge is that the Act may be amended before it is even implemented and this will then require all other legislation that was amended on its account to be amended as well. It is rather safer to use a general kind of definition that will also cover any other legislation that is relevant in traditional leadership roles. The following definition is proposed for consideration:**‘‘traditional leader’’** means any person who, in terms of customary law of the traditional community concerned, holds a traditional leadership position and isrecognised in terms of the applicable legislation providing for such recognition” . This definition will be consistent with the definition as proposed in the Traditional Courts Bill.(b) Noted, and see (a) above(c) Noted, and see (a) above |
| Clause 2 | Eastern Cape(House of Traditional Leaders)LimpopoGautengFree StateKZNEastern CapeGauteng | (a) The parties who are getting married must build their own so that they do not develop the family home. The rationale behind this is that when they divorce they do not claim what is not theirs, which is the family home. Therefore, a definition of what constitutes personal property as indicated in clause 2(1) (c) should be inserted in the Billin order to avoid any confusion.(b) Define what is meant by **marital properties; house, family and personal property** the constitutional court has constantly pointed out and confirmed that some customary marriages and practices are steeped in patriarchy and patriarchal principles and therefore there is a concern that patriarchal stereotypes will feature into the manner in which these properties are defined.*(c)*Amendments are supportedbutall marital properties acquired need to be defined. (d) There may **not** be universal definitions of the various property types across tribes, the Department of Justice should investigate whether these customary definitions aligns with the intentions of the Bill. | *Ad (a)-(b):*The DOJ&CD intentionally left the terminology in question to be given its meaning as contemplated in customary law, as it exists in different parts of the country. If necessary, the courts will give meaning to the terms, on the strength of evidence placed before them on what the terms mean in the particular area of jurisdiction. In this way, jurisprudence will develop and adapt as customary law itself evolves.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, which the Department is trying to avoid. It is important that these words are carefully defined so as not to leave the women more vulnerable. It is not practical at this point, to define these property ownership concepts in the Bill without the benefit of extensive research and comprehensive consultation.The Constitutional Court did not pronounce on the manner by which these terms should be interpreted and applied in practice. (c) See (a) above.(d) Noted. This view is shared by the Department, hence the reservation in defining these terms without the benefit of further investigation and research. |
|  | KwaZulu Natal Provincial LegislatureFree State | (a) In order to provide clarity and prevent unintended consequences, the following definitions are proposed:**“house property”** or **“family property”** assets that are acquired by either or both parties in a customary marriage during the course of the marriage, including assets that predate the marriage. These terms may be used interchangeably. Examples are real property, pensions, businesses, vehicles, etc“***personal property”*** means *moveable property which can be divided into “****tangible****” and “****intangible”*** *form*. Examples of tangible property are clothing, books, electronic gadgets etc. Intangible property does not usually have physical forms and these may include assets such as patents, trademarks, stocks and bonds.”(b) Define the property types referred to in the Bill as follows:**“Family property”** means property belonging to a family as customarily understood in a particular indigenous cultural group constituted by spouses in a customary marriage for the sole ownership, management, control and exercise of other rights by the family concerned, to an extent recognised and permitted by customary practice of the cultural group of that family;**“House property”** means property belonging to a house as customarily understood in a particular indigenous cultural group constituted by spouses in a customary marriage for the sole ownership, management, control and exercise of other rights by the house concerned, to an extent recognised and permitted by customary practice of the cultural group of that family;**“Marital property”** means property as customarily understood in a particular indigenous cultural group to be belonging to spouses in a customary marriage for the sole ownership, management, control and exercise of other rights by the house concerned, to an extent recognised and permitted by customary practice of the cultural group of that family;**“Personal property”** means property as customarily understood in a particular indigenous cultural group to be constituting personal effects belonging to a spouse in a customary marriage for the sole ownership, management, control and exercise of other rights by the spouse concerned, as recognised and permitted in customary practice of the indigenous cultural group of that spouse. | (a) Noted. Defining the terms from the understanding of one community will not serve the benefits a law of general application such as the Recognition of Customary Marriages Act. Extensive research and consultation are required in order to have definitions that will be practicable to everyone. (b) Over and above the response above, the definitions suggested seem to repeat what the Bill says that the types of property should be understood to mean. So, the suggested definitions do not take the matter any further. |
|  | **Ad (a)-(i):Limpopo** | (a) Imprecise words were used in parts of the text of the Bill. The consequence of the choice of words may lead to ambiguity in the interpretation of the Act as well create further uncertainties in its application.In **clause 2(1)(a),** the usage of the word **‘*person*’** may present interpretation problems on the nature of the marriage in question. it creates a contradiction in the Act considering that s7(4)(b) & 7(6) of the principal Act are very specific in that it is a husband in a customary marriage that can be a spouse in more than one customary marriages. Unless, woman-to-woman marriages are included in polygamous marriages before 1998 (pre-RCMA). If so, the amendment must be clear, even though it is not clear on what grounds would a woman-to-woman marriage would be included in this regard. (b) C**lause 2(1)(b)(i)** reverts to the usage of words **‘*husband*’** and **‘*wife*’**: this will create confusion taking into consideration the neutral word used in s2(1)(a) above. Unless, the wording in this particular section is meant to conform to the intentions of the Act, which is to deal with matters of polygamy where a husband, who is male, has more than one wife, who are female. Therefore, it is submitted that there is a clear contradiction between clause 2(1)(a) and clause 2(1)(b)(i). It is thus, recommended that the word ‘person’ in clause 2(1)(a) be removed as it is inconsistent with the subject matter and replaced with the word ‘husband’ to avoid uncertainties. (c) The words “**family”property” and “personal property” need to be defined. However,** further research and analysis on the types of property under customary law is recommended in order to ensure proper alignment with the Bill of Rights and other relevant legislation.(d) The joint ownership, management and control of property in pre-RCMA polygamous marriages as proposed in the amendment Bill may create more confusion than intended (or may create uncertainties.(e) House property and family **property will always overlap because the husband is the common denominator**. The husband has joint ownership, management and control in all house properties and joint ownership, management and control with his wives in the **family property**.(f) It would appear that **family property** is also made up of half of the **house properties**, since according to customary law (as stated in clause 2(1) (d)) the husband may be the main contributor and administrator of this property. This has the potential to give rise to gender inequality, where the husband ends up with more than what his wives are worth in the marriage.TheBill must guard against this.(g) It would also seem that the wives by virtue of being in community of property with the husband in their respective houses are also impliedly in community of property with one another to a certain extent.(h) Although the court in the *Ramuhovhi* case gave reasons why the proprietary regime set for the ‘new’ polygamous marriages in section 7(7) of the principal Act would not be practical for the pre-Act polygamous marriages,it is still not clear why a joint property regime would be the best option.(i) More needs to be done to ensure that the issues of proprietary consequence in customary marriages are crafted carefully in order to be suitable for the marriages in question. Clause 2 may require revision in order for the proposed amendment to provide clear and adequate recourse concerning the proprietary regime for pre-Act polygamous marriages.(j) Amendment of section 7 (1) (2) of the Bill does not do away with some of the issues that perpetuates the inequalities that is embedded within customary marriages. | (a)-(b) There is no confusion in clause 2. . The words where a person is a spouse is a more than one customary marriage are descriptive and better for understanding for drafting purposes. The word “person” being a spouse can only mean husband in the context of the Bill and the Recognition of Customary Marriages Actat customary law. There is nothing wrong with the usage of the word “person” in clause 2. This has to be considered in conjunction with the whole object of the Act. There is also no debate on whether there is any custom in South Africa that recognises that a woman can be a party in more than one customary marriage, or at least that debate has not surfaced. Also, this is the wording that is used in the RCMA currently.(c) The need to define the words is supported, and that comprehensive and extensive research is needed in order to avoid unintended consequences.(d) The principle was well considered by the High Court and the Constitutional Court in the judgement of *Ramuhohvi,* and the judgement is clear that there must be joint ownership, management and control of property between spouses in order to give effect to the principle of equality. Any other action or omission to give effect to the decision of the court will be contempt of the court. The intention of the Bill is to enable spouses to have equal in say and control over, the property they are customarily entitled to have a say and control on. It should be noted that the Bill follows closely the remedy provided in the judgment of the Constitutional Court, and which is, for all intents and purposes, the law at this point in time. The legal position in this regard is settled by the CC and we are giving effect to that position.(e) It cannot be confirmed that there will be an overlap between the types of property until research has been done on the meaning of these properties. The meaning has to be consistent as it will be contained in a law of general application.(f) See (e) above, further the Constitutional Court held that there Act must be amended to provide for equality of spouses so that there is joint ownership, management and control between the spouses. Therefore, argument for a main contributor falls foul of the judgement of the Constitutional Court. The amendment provides for and joint ownership, management and control between the spouses, and for this reason there is no spouse who will be entitled to more share than the one, unless their marriage regime dictates otherwise.(g) Until extensive research has been done on the types and meaning of property the argument that the wives are in community of property with one another is not justified. (h) A joint property regime in pre-RCM Act polygamous marriages was decided in the case of Gumede v President of South Africa in order to protect the proprietary consequences of spouses in the customary marriages before the Act. It cannot be justified why the same protection that is provided for in the Act cannot be extended to persons in the same marriage regime who got married before the promulgation of the RCMA.(i) The court has already considered this situation in the case of Gumede referred to above. The Bill places pre Act customary marriage and post Act customary marriages on the same footing in respect of proprietary consequences. The judgment of Gumede requires that this be the remedy. In terms of the Bill, customary marriages in which a spouse is not a partner in any offer existing customary marriage will be a marriage in property and of profit and loss between spouses, unless spouses have entered into an ANC which will regulate that, unless matrimonial property system of their marriages.(e) The Bill provides that spouses have the equal rights in the ownership, control and management in the joint property. This is to prevent the said inequalities. |
|  | **Limpopo** | There seems to be a disjuncture between theBill and other existing legislation.There is no clear link between the Bill and other legislation regulating customary marriages. | The Bill amends the Recognition of Customary Marriages Act, 1998, and this is the only Act that deals with customary marriages. Every attempt has been made to align the Bill with the judgement of the Constitutional Court in Ramuhovhi and the Gumede judgement.  |
|  | **Eastern Cape** | In the case of a family home, the estate must be calculated and be divided in equal portions. The party who wants to divorce his or her partner must be given his or her portion and the said portion must be divided into equal portions for the purposes of their divorce. This arrangement must also consider the cultural adoptees. | The division of the estate in the event of divorce will be regulated by the settlement agreement between the parties. Adopted Children, including those adopted in terms of customary law are entitled to inherit from their adopted parents. |

**GENERAL SUBMISSIONS:**

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|  | Northern Cape | The Bill must include traditional courts in the processing of customary marriages.  | The proposal relates to section 3 of the Act, dealing with the validity of customary marriages, the administration of which has been transferred by the President to the Minister of Home Affairs. Engagements with the Department of Home Affairs may be necessary in order to address this issue.Furthermore, the traditional courts are clear on matters that these courts may deal with, and these are disputes between members of the community. |
|  | Eastern CapeNorthern Cape | Public education on the contents of thisBill is necessary. | Noted. The Department has a "Let's Talk Justice" programme that is broadcast live on local radio stations, where the Deputy Minister or officials of the Department discuss relevant topics on the development of the law. This programme is intended to teach the people about various legal issues affecting them. A communications initiative will be undertaken by the Department once the legislation is passed.  |
|  | Ad (a) –(d) Eastern Cape | (a) Section 6 provides that a wife in a customary marriage has, on the basis of equality with her husband and subject to the matrimonial property system governing the marriage, full status and capacity. This is correct and the in case where the marriage has more than one spouse line of succession lies with the first marriage.(b) Section 7(4) (b and sec 7(6) states that a husband in a customary marriage who wishes to enter into a further customary marriage with another woman after the commencement of this Act must make an application to the court to approve a written report which will regulate the future matrimonial property system of his marriages. A customary marriage is an agreement between two families with respect to the two individuals, negotiations were done byfamilies, therefore even when things are changing, spouses must follow the procedures of informing families concerned and Traditional institution before the court can approve a written report.(c) Section 8 (5) refers to any person including a traditional leader in the mediation, in accordance with customary law …., therefore, traditional institutions must be the first channel in full consideration and all processes must be followed as a way of trying to restore the marriage. Spouses may appeal to the court of law. | Noted. However, the argument that case where the marriage has more than one spouse line of succession lies with the first marriage does not hold water as this section provides for equal status with the husband and capacity to act. The Bill also advocates for equality of spouses in relation to proprietary rights, so no marriage will be elevated over the other in relation to proprietary rights.(b) Nothing prevents spouses from engaging elders and any other person when enerring into marriage.However, it is important for the court to scrutinise the agreement in order to ensure that theproprietary rights of prior customary marriage or marriages are protected. A party may even approach a traditional institution for assurance that the proprietary rights of other marriage are considered when entering into another marriage. (c) Section 8(5) is broad enough to allow for mediation if the custom of a particular community requires mediation to be undertaken. The parties are also not precluded from approaching traditional institutions for guidance and counsel. The legislation does not prohibit this. Parties also have a right to approach courts so that they can ensure that their rights are well protected. |
| Recognition of traditional leaders | Eastern Cape | Unrecognised traditional leaders are not dealt with in the Bill as they may play a role in facilitating lobola and registering customary marriages. | The Bill does not deal with traditional leadership. There is nothing preventing traditional leaders from facilitating lobola if that is the cultural practice of a particular community. Also registration of customary marriages falls in the mandate of the Department of Home Affairs. |
|  |  | (a) The Department of Justice should clarify the role Traditional Leaders play in customary marriages.(b) The role and responsibility of the Department of Home Affairs in the registration of customarymarriages should be clearly outlined.(c) The Department of Home Affairs rejects the registration of the second marriage, reason being that they don’t want to register a marriage that is going to be disputed. There is therefore a need to make clear directives that mandates home affairs to register polygamous marriages.  | Ad (a)-(c): The proposal relates to section 4 of the Act, dealing with the registration of customary marriages, the administration of which has been transferred by the President to the Minister of Home Affairs. Therefore the Department of Home Affairs is responsible for the registration of marriages, including customary marriages. |
| Public education | Northern CapeEastern CapeGautengMpumalangaMpumalanga | (a) Public education, especially in rural areas should be undertaken once the Bill has been enacted.(b) Women need to be more educated about their rights within polygamous marriages. There is lack of education as far as the polygamous marriages are concerned and because of lack of education, men will always discriminate the women.(c) Legislature should continue to educate women and make them aware of these amendments.Alternative consultation methods by the Mpumalanga Legislature amid the current situation and Regulations in encouraging public participation are appreciated. It is hoped that the courts will also uphold these principles when adjudicating matters. (d) Public education on the Bill in all official languages in a manner understandable to lay persons is necessary. (e) The Mpumalanga Legislature should continue to educate women and make them aware of these amendments as most women are faced with such challenges and fully support the Bill. | (a) Noted. The Department has a "Let's Talk Justice" programme that is broadcast live on local radio stations, where the Deputy Minister or officials of the Department discuss relevant topics on the development of the law. This programme is intended to teach the people about various legal issues affecting them. A communications initiative will be undertaken by the Department once the legislation is passed. (b) Noted. See (a) above. The Public Education Unit of the Department and GCIS will undertake this responsibility once the Bill has been enacted. (c) Noted.(d) Noted. The Department of Justice, from time to time deals with different pieces of legislation in local radio station where an officials of the Department address issues in the language mostly used in the particular radio station.(e) Noted. |
| Consultation | Gauteng | (a) The Department of Justice needs to ensure proper consultation and involve the National and Provincial Departments in the drafting of legislation since same departments will be the custodian of the Act after its promulgation. (a) There was no consultation with Traditional Leaders.  | (a) The Department consulted role-players during the development of the Bill. The National House of Traditional Leaders provided inputs on the Bill. Some of the issues they raised do not reside with the DOJ&CDbut fall under the mandate of the Department of Home Affairs and those comments were transmitted to that Department.(a) See (a) above. |
| Role of traditional leaders in registration of customary marriages | *Ad*(a) –(b): Eastern CapeNorthern CapeEastern Cape(IYA)Gauteng | (a) Traditional councils must be given authority to certify marriages in their jurisdiction.(b) Section 4(6) of the Act provides that if a registering officer is not satisfied that a valid customary marriage was entered into by the spouses, he or she must refuse to register the marriage. Traditional leaders must be allowed to intervene in such a situation; Traditional leaders, in traditional councils should also be permitted to preside over registration of customary marriages as marriage officers and valid evidence of procedures and processes such as price of lobola, celebration performed (utsiki) availability of witnesses be presented.(c)Traditional courts must be reinstated to deal with the customary marriages and other traditional issues | (a) The proposal relates to section 4 of the Act, dealing with the registrationof customary marriages.. The administration of this section has been transferred by the President to the Minister of Home Affairs.(b) See (a) above. The parties are also not precluded from approaching traditional institutions for guidance and counsel on marriage issues. (c) The traditional Courts Bill provides for specific issues that these courts may deal with, it may not deal with dissolution of marriages, but parties are also not precluded from approaching traditional institutions for guidance and counsel on customary marriages.  |
|  |  | The traditional leaders should make sure that Communities are educated about the *ante-nuptial* contracts and the different matrimonial property regimes | The Department has a "Let's Talk Justice" programme that is broadcast live on local radio stations, where the Deputy Minister or officials of the Department discuss relevant topics on the development of the law. This programme is intended to teach the people about various legal issues affecting them. A communications initiative will be undertaken by the Department once the legislation is passed. Also, it should be borne in mind that the provision that the parties may enter into an ante-nuptial agreement are not new in the Act and have been part of the Act since its inception. There has been several public education drives on the Act over the years. However, there will be a need for renewed education on the Bill once enacted. |
|  | Eastern Cape | The age of 18 must be an acceptable age of getting married, further to that there must be consent amongst by the parties to the marriage.  | This submission relates to sections 3 of the Act, dealing with requirements for a valid customary marriage. A person must be over the age of 18 in order to enter into any marriage, including a customary marriage. A person below the age of 18 can also enter into a valid customary marriage provided requirements of the Act relating to consent have ben complied with. |
|  | Limpopo | Government should encourage different stakeholders such as NPO/NGO, local government, social workers and etc to educate society about these Acts so that they can fully understand. | Noted. NGO’s may within their means provide advocacy on rights and legislation. |
| Recognition of traditional leaders | Gauteng | (a) The Provincial Department of CoGTA should ensure that the issue of unrecognised traditional leaders is addressed.(b) The non-recognition of traditional leaders in Gauteng is a concern | (a) Noted. The function of recognising traditional leaders does not reside with the Department of Justice and Constitutional Development(b) The Bill does not deal with traditional leadership. Traditional Leaders is the area of responsibility of the Department of Traditional Affairs. |
|  | **Eastern Cape** | Full recognition of customary marriage is appreciated and all the spouses will have joint and equal ownership and other rights entitled to.  | Noted.Customary marriageshave been formally recognised since the enactment of the RCMA. |
| Lobolo/dowry | **Mpumalanga****Gauteng****Eastern Cape****Gauteng** | (a) Various academics and human rights advocates have over the years argued against and for the abolishment of lobolo as a prerequisite for a valid customary marriage. One of the reasons for this assertion is that the payment or arrangement of lobolo is demeaning and said to be a tool through which the active subordination of women is further entrenched in South African society. It was also reported that on the other hand, lobolo is argued to be a necessary part of customary life in that the bride’s family is compensated for the loss of the earning capacity of their daughter and the transfer of the reproductive capacity of a woman to the family of her husband. Although lobola is compensation, it also forces strong relationship between two families. (a) The amendment should be made available in all official languages in a manner understandable to lay persons.(b) The meaning of lobola in customary marriage should be clearly defined.(c) Lobola also means bride dowry in customary law.(d) Lobola must be paid, and the two families must sign an agreement and witness must also sign. The Chief will certify their agreement and parties will decide whether they want to marry the civil way | (a) Although the Bill does not deal with the subject of requirements for a valid customary marriage, the submission is noted.(a) Noted, although at this point a view is held that the need to conduct public education on the Bill once enacted outweighs the need to provide the translated versions of the Bill.(b) The RCMA defines what lobola is. (c) Noted, but the Act defines the concept of lobola(d) The law cannot impose lobola arrangements on persons. The two families can negotiate the *lobola* with its terms, and they can agree on its payment and processes without this being imposed by legislation. |
| Protection of the rights of women and other vulnerable persons | **Gauteng Prov Leg****Mpumalanga****Mpumalanga****Eastern cape****(g) - (i): Limpopo****Gauteng** | (a) The Bill should protect women rights from all cultures. (b) The Bill does not seek to protect the rights for all women as other cultures including immigrant communities, Hindu, Islamic and Khoi-San have been excluded. (c) The passing of the Bill into law will benefit women who are in customary marriages and will end the various forms of discrimination against women in polygamous marriages, including those married either before or after the commencement of the Recognition of Customary Marriages Act of 1998. (d) Bill must protect women who are married in terms of custom to avoid abuse and victimisation.Women in polygamous marriages should have equal rights to assets.(e) Consideration should be given to the rights of spouses during divorce or termination of polygamous marriages.(f) The Bill does not afford protection to spouses with disabilities, taking into account their vulnerable position.(g) The systems at the Department of Home Affairs seems to subvert spousal rights of women as they are required to bring along the male spouses when registering their marriages.(h) It would be best if men get are sensitized that it is not about their properties or wishing them early death, but about taking care of their loved ones equally when they have passed on. | (a)-(b):The Bill only deals with customary marriages, and the Act defines a customary marriage as a marriage concluded in accordance with customary law. Customary law is, in turn defined as the customs and usages traditionally observed among the indigenous peoples of South Africa and which form part of the culture of those peoples. There are other pieces of legislation whose object is to protect the rights of women in general.(c) Noted.(d) Noted. The Bill provides for joint ownership, control and management. There are other initiatives by government to deal with gender violence and abuse. (e) The aims to protect the rights of persons in customary marriages in any eventuality, such as divorce or death.(f) The Bill does not aim to provide for certain spouses but covers all spouses in customary marriages, irrespective of their vulnerability, otherwise this will amount to discrimination. (g) The Department of Home Affairs as the registering authority for customary marriages can be engaged on this issue. During the consultation stage the Departmentreferred to issues raised by traditional leaders around registration of marriages to the DHA.(h) Noted. |
| Support for Bill | **Eastern Cape****Mpumalanga****Eastern Cape Provincial Legislature)****Eastern Cape****Eastern Cape****Limpopo****Gauteng****Free State** | **(a)** Supports the Bill because it is customary that where there has been a union between 2 families remains and the relationship is not broken, they remain in-laws.(b) The passing of the Bill into law will benefit women who are in customary marriages and will end the various forms of discrimination against women in polygamous marriages, including those married either before or after the commencement of the Recognition of Customary Marriages Act of 1998. (c) While the Bill is supported, a question is raised whether the children will benefit in the event of the mother’s death. **(d)** What happens when a widow remarries – does she benefit in both marriages?(e) The Bill is supported especially that where a husbands leave their wives in rural areas and marry other wives in the cities where they work. When the husband dies, the wife unknown to the community and the Chief gets all the property, to the exclusion of the rural area.(f) The amendment does not only give effect to the Court Order(s) but confirms the supremacy of our Constitution and the Rule of Law. (g) Bill is supported as it aligns the Act to the Constitutional Court judgement.(h) Bill fails to ensure that wives in polygamous marriages will be able to exercise the rights afforded them. | Ad (a) and (b): Noted.(c) In terms of the law of succession every child inherits from their mother irrespective of whether such a child was born in or out of wedlock.(d) A widow or widower benefits from the estate of their spouse on the basis of a subsisting marriages and irrespective of how many times they have been married. (e) Section 3(2) prohibits a spouse in a customary marriage from entering into a marriage under the Marriage Act, 1961. Also section 10(4) prohibits a spouse in a marriage under the Marriage Act, 1961, while such marriage still subsists from entering into any other marriage. Therefore, a person cannot enter into two types of marriages.(f) Noted.(g) Noted.(h) This is not true because the Bill gives persons rights and with awareness provided, it remains the responsibility of such persons to enforce their rights. |
| Dissolution of customary marriages | **Gauteng****Eastern Cape Provincial Legislature)** | Customary marriages may only be dissolved by a court by a decree of divorce on the ground of irretrievable breakdown of the marriage. The Recognition of the Customary Marriages Act should also include the mental illness or continuous unconsciousness as a ground for divorce like in civil marriages as what happens in civil marriages is no different to what happens in customary marriages. The dissolution of such marriages should be clearly outlined.Customary marriage may only be dissolved by the court through a decree of divorce on the ground of irretrievable breakdown of the marriage. However, in reality, customary marriages are not always dissolved through courts but between the spouses and their families. In some instances, one spouse just leaves the family homestead without getting a decree of divorce. This presents challenges in the case of death as the marriage still subsists as no decree of divorce was granted. | The proposal is noted and it is proposed that it be dealt with in the review of marriage regimes undertaken by the Department of Home Affairs.This problem does not require legislative intervention but rather awareness raising so that people can be more aware of their rights.  |
| A valid customary marriage | **Limpopo****Limpopo** | (a) Section3 (3)(a) provides that if either of the prospective spouses is a minor, both his or her parents or if not his or her legal guardian must consent to the marriage. The logic behind that amendment is that South Africa has ratified the African Charter on the rights and Welfare of the child in 2000 which protects children against harmful social and cultural practices and it states that child marriages should be prohibited and effective action such as legislation should be taken to specify the minimum age of marriage to be 18 years. There is a need for our legislation to protect our children.(b) The Bill is only focused on proprietary consequences of a customary marriage and in the process falls short in defining what a wedding is and who is regarded as a spouse especially taking into account the fact that a woman can marry a house woman for the family in some traditional communities. | (a) The Act contains very comprehensive provisions on what needs to happen if a person who is planning to get married is below the age of 18. Marrying off of minors without complying with the law can be dealt with in terms of other Statutes, and if there is criminality involved it should be reported to authorities for investigate and possible prosecution.(b) The amendment only deals with the court judgements. The review of marriage regimes undertaken by the Department of Home Affairs is better placed to deal with this issue. |
| **Nature of customary law** | **Mpumalanga** | Originally, African customary law was not recorded in written legal sources, such as statutes, law reports or textbooks. Court procedures were conducted orally, and the law was also transmitted orally from one generation to the next. The process of legal transmission was furthered by the public participation of elders, men in particular, in the administration of justice. Communities had a general knowledge of the law. Legal principles were expressed by means of legal maxims. | Noted. |
|  | **Eastern Cape** | It must be customary that when getting married the parties to the marriage must establish their own homestead. If the married parties decide to stay in the family home, whatever improvements they effect, it must be treated a donation to the family home. | Customs of communities cannot be prescribed in legislation. Customs evolve and this is the area of private law that it will not be easy to monitor and evaluate. |
|  |  | The last wife cannot get equal share of property to the first wife.  | The amendment provides for and joint ownership, management and control between the spouses, and for this reason there is no spouse who will be entitled to more share than the one, unless their marriage regime dictates otherwise. |
|  |  | (a) The requirement that parties who wish to get married out of community of property enter into an anti-nuptial agreement is not supported because it is an expensive legal process which ordinary poor people cannot afford.(b)The issue of ante-nuptial agreement is a challenge. The anti-nuptial agreement when parties wish to get married out of community of property | It should be borne in mind that the provision that the parties may enter into an ante-nuptial agreement are not new in the Act and have been part of the Act since its inception. There has been several public education drives on the Act over the years. However, there will be a need for renewed education on the Bill once enacted.(b) See (a) above. |
|  | **Eastern Cape****Mpumalanga(CGE)** | Parties who conclude polygamous, customary marriages after the commencement of the Act are required to make application to court for approval of a contract between all spouses which will regulate their future matrimonial property regimes. Failure to do so does not invalidate the subsequent polygamous customary marriage, but the default will be that the latter is out of community of property. | This issue will be better dealt with in the review of the marriage regime undertaken by the South African Law Reform Commission and the DHA. |
|  | **Gauteng** | The Department of Justice is not competent to deal with the issues of customary law/ marriages but the Department of CoGTA should be seized with such a matter and that civil marriages should not take precedence over the customary marriages | The DOJ&CD does not deal with marriagesit only deals with proprietary consequences of marriage and the dissolution thereof. This is because of the role of courts in these matters. Also, civil marriages are not elevated over customary marriages. |
|  |  | Change of marital regime should take place at the Department of Home Affairs as opposed to a protracted and expensive process of the court.  | It is important that courts are involved in the change of marital regime so that the rights of spouses can be better scrutinised. |
|  | **Gauteng** | (a) The habit of having wills needs to be encouraged and be attached to a polygamous marriage contract.(b)The government should also promote and educate the people about the importance of making a valid will.  | As the name suggests, a will is the testament of a person, expressing their own will on how they want their assets or estate to devolve when they are deceased. What is important is to raise awareness about the importance of having a will. Ever year in October the DOJ&CD has a wills month where the officials from the Master’s Office raise public awareness about wills. |
|  | **Gauteng** | (a) Bill must take into account the interest of minor children upon dissolution of a customary marriage.(b) The husband remarries, and the children do not inherit anything. These interests of children need to be catered for in this piece of legislation. | (a) and (b):The Bill only amends the RCMA, and only deals with marriages. There are pieces of legislation dealing with issues of children, such as the laws on succession and maintenance.(b) See (a) above. |
|  | **Gauteng** | Registering officers to register customary marriages despite the presence of both parties would essentially benefit women from the envisaged amendments of section 7 of the RCMA | Department of Home Affairs is responsible for the registration of customary marriages. The registering officer must be satisfied that the marriage was concluded. The DHA may be engaged on this matter. The matter can also be dealt with in the comprehensive review of the marriage regime. |