REPUBLIC OF SOUTH AFRICA

DIVORCE AMENDMENT BILL

(As introduced in the National Assembly (proposed section 75); explanatory summary of Bill published in Government Gazette No. 48844 of 23 June 2023)
(The English text is the official text of the Bill)

(MINISTER OF JUSTICE AND CORRECTIONAL SERVICES)

[B 22—2023]

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GENERAL EXPLANATORY NOTE:

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

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

BILL

To amend the Divorce Act, 1979, so as to insert a definition for a Muslim marriage; to provide for the protection and to safeguard the interests of dependent and minor children of a Muslim marriage; to provide for the redistribution of assets on the dissolution of a Muslim marriage; to provide for the forfeiture of patrimonial benefits of a Muslim marriage; and to provide for matters connected therewith.

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:—

Amendment of section 1 of Act 70 of 1979, as amended by section 1 of Act 7 of 1989, section 74 of Act 120 of 1993, section 4 of Act 65 of 1997 and section 10 of Act 31 of 2008

1. Section 1 of the Divorce Act, 1979 (Act No. 70 of 1979) (hereinafter referred to as the ''principal Act'') is hereby amended by the insertion after the definition of ''Family Advocate'' of the following definition:

''**'Muslim marriage'** means a marriage entered into or concluded in accordance with the tenets of Islam;''.

Amendment of section 3 of Act 70 of 1979

2. Section 3 of the principal Act is hereby amended by the substitution in section 3 for the words preceding paragraph *(a)* of the following words:

''A marriage, including a Muslim marriage, may be dissolved by a court by a decree of divorce and the only grounds on which such a decree may be granted are—''.

Amendment of section 6 of Act 70 of 1979, as amended by section 6 of Act 24 of 1987

3. Section 6 of the principal Act is hereby amended—

(a) by the substitution in subsection (1) for paragraph *(a)* of the following paragraph:

''*(a)* is satisfied that the provisions made or contemplated with regard to the welfare of any minor or dependent child of the marriage, including any minor or dependent child of a Muslim marriage, are satisfactory or are the best that can be effected in the circumstances; and''; and

(b) by the substitution for subsection (3) of the following subsection:

''(3) A court granting a decree of divorce may, in regard to the maintenance of a dependent child of the marriage, including a dependent

child of a Muslim marriage, or the custody or guardianship of, or access to, a minor child of the marriage, including a minor child of a Muslim marriage, make any order which it may deem fit, and may in particular, if in its opinion it would be in the interests of such minor child to do so, grant to either parent the sole guardianship (which shall include the power to consent to the marriage of the child) or the sole custody of the minor, and the court may order that, on the predecease of the parent to whom the sole guardianship of the minor is granted, a person other than the surviving parent shall be the guardian of the minor, either jointly with or to the exclusion of the surviving parent.''.

Amendment of section 7 of Act 70 of 1979, as amended by section 36 of Act 88 of 1984, section 2 of Act 3 of 1988, section 2 of Act 7 of 1989, section 1 of Act 44 of 1992, section 11 of Act 55 of 2003 and section 1 of Act 12 of 2020

4. Section 7 of the principal Act is hereby amended—

(a) by the insertion after subsection (3) of the following subsection:

''(3A) A court granting a decree of divorce in respect of a Muslim marriage, may, subject to the provisions of subsections (4), (5) and (6), on application by one of the parties to that marriage, in the absence of any agreement between them regarding the division of their assets, order that such assets, or such part of the assets, of the other party as the court may deem just, be transferred to the first-mentioned party.'';

(b) by the substitution for subsection (4) of the following subsection:

''(4) An order under subsection (3) or (3A) shall not be granted unless the court is satisfied that it is equitable and just by reason of the fact that the party in whose favour the order is granted, contributed directly or indirectly to the maintenance or increase of the estate of the other party during the subsistence of the marriage, either by the rendering of services, or the saving of expenses which would otherwise have been incurred, or in any other manner.'';

(c) by the substitution in subsection (5) for the words preceding paragraph *(a)* of the following words:

''In the determination of the assets or part of the assets to be transferred as contemplated in subsection (3) or (3A), the court shall, apart from any direct or indirect contribution made by the party concerned to the maintenance or increase of the estate of the other party as contemplated in subsection (4), also take into account—'';

(d) by the insertion in subsection (5) after paragraph *(a)* of the following paragraph:

''*(a*A*)* any contract or agreement between the parties in a Muslim marriage, where the husband is a spouse in more than one Muslim marriage;''; and

(e) by the substitution for subsection (6) of the following subsection:

''(6) A court granting an order under subsection (3) or (3A) may, on application by the party against whom the order is granted, order that satisfaction of the order be deferred on such conditions, including conditions relating to the furnishing of security, the payment of interest, the payment of instalments, and the delivery or transfer of specified assets, as the court may deem just.''.

Amendment of section 9 of Act 70 of 1979

5. Section 9 of the principal Act is hereby amended by the substitution for subsection (1) of the following subsection:

''(1) When a decree of divorce is granted on the ground of the irretrievable break-down of a marriage, including a Muslim marriage, the court may make an order that the patrimonial benefits of the marriage be forfeited by one party in favour of the other, either wholly or in part, if the court, having regard to the duration of the marriage, the circumstances which gave rise to the break-down thereof and any substantial misconduct on the part of either of the parties, is satisfied that, if the order for forfeiture is not made, the one party will in relation to the other be unduly benefited.''.

Application

6. This Act applies to all subsisting Muslim marriages, including a Muslim marriage—

(a) which was terminated or dissolved in accordance with the tenets of Islam and where legal proceedings for the dissolution of the said Muslim marriage in terms of the Divorce Act, 1979 (Act No. 70 of 1979) have been instituted but not yet finalised; and

(b) which subsisted as at 15 December 2014.

Short title

7. This Act is called the Divorce Amendment Act, 2023.

MEMORANDUM ON THE OBJECTS OF THE DIVORCE AMENDMENT BILL, 2023

1. INTRODUCTION

1.1 The landmark judgment of the Constitutional Court in *Women's Legal Centre Trust v President of the Republic of South Africa and Others* [2022] ZACC 23 (''*WLCT*'') recognised the need for and importance of protecting Muslim women and children of Muslim marriages, particularly in the instance of the dissolution of a Muslim marriage. In the *WLCT* case, the Constitutional Court held among others that the Divorce Act, 1979 (Act No. 70 of 1979) (''Divorce Act'') was unconstitutional to the extent that it failed to recognise Muslim marriages which have not been registered as civil marriages, as valid marriages.

1.2 The *WLCT* case marks a departure from the current position. Currently, Muslim couples who choose to marry according to Islamic law can only be afforded the statutory protection of the South African legal system as it pertains to civil spouses if they, in addition to their marriage under Islamic law, register a civil marriage.

1.3 On 28 June 2022, the Constitutional Court handed down the following order in the *WLCT* judgment:

''On application for confirmation of an order of constitutional invalidity granted by the Supreme Court of Appeal:

1. The Supreme Court of Appeal's order of constitutional invalidity is confirmed:
   - 1.1 The Marriage Act 25 of 1961 (Marriage Act) and the Divorce Act 70 of 1979 (Divorce Act) are declared to be inconsistent with sections 9, 10, 28 and 34 of the Constitution in that they fail to recognise marriages solemnised in accordance with *Sharia* law (Muslim marriages) which have not been registered as civil marriages, as valid marriages for all purposes in South Africa, and to regulate the consequences of such recognition.
   - 1.2 It is declared that section 6 of the Divorce Act is inconsistent with sections 9, 10, 28(2) and 34 of the Constitution, insofar as it fails to provide for mechanisms to safeguard the welfare of minor or dependent children born of Muslim marriages, at the time of dissolution of the Muslim marriage in the same or similar manner as it provides for mechanisms to safeguard the welfare of minor or dependent children born of other marriages that are dissolved.
   - 1.3 It is declared that section 7(3) of the Divorce Act is inconsistent with sections 9, 10, and 34 of the Constitution, insofar as it fails to provide for the redistribution of assets, on the dissolution of a Muslim marriage, when such redistribution would be just.
   - 1.4 It is declared that section 9(1) of the Divorce Act is inconsistent with sections 9, 10 and 34 of the Constitution, insofar as it fails to make provision for the forfeiture of the patrimonial benefits of a Muslim marriage at the time of its dissolution in the same or similar terms as it does in respect of other marriages that are dissolved.
   - 1.5 The common law definition of marriage is declared to be inconsistent with the Constitution and invalid to the extent that it excludes Muslim marriages.
   - 1.6 The declarations of invalidity in paragraphs 1.1 to 1.5 above are suspended for a period of 24 months to enable the President and Cabinet, together with Parliament, to remedy the foregoing defects by either amending existing legislation, or initiating and passing new legislation within 24 months, in order to ensure the recognition of Muslim marriages as valid marriages for all purposes in South Africa and to regulate the consequences arising from such recognition.

1.7 Pending the coming into force of legislation or amendments to existing legislation referred to in paragraph 1.6, it is declared that Muslim marriages subsisting at 15 December 2014, being the date when this action was instituted in the High Court, or which had been terminated in terms of *Sharia* law as at 15 December 2014, but in respect of which legal proceedings have been instituted and which proceedings have not been finally determined as at the date of this order, may be dissolved in accordance with the Divorce Act as follows:

(a) all the provisions of the Divorce Act shall be applicable, save that all Muslim marriages shall be treated as if they are out of community of property, except where there are agreements to the contrary, and

(b) the provisions of section 7(3) of Divorce Act shall apply to such a union regardless of when it was concluded.

(c) In the case of a husband who is a spouse in more than one Muslim marriage, the court:

(i) shall take into consideration all relevant factors, including any contract or agreement between the relevant spouses, and must make any equitable order that it deems just; and

(ii) may order that any person who in the court's opinion has a sufficient interest in the matter be joined in the proceedings.

1.8 Pending the coming into force of legislation or amendments to existing legislation referred to in paragraph 1.6, it is declared that, from the date of this order, section 12(2) of the Children's Act 38 of 2005 applies to a prospective spouse in a Muslim marriage concluded after the date of this order.

1.9 Pending the coming into force of legislation or amendments to existing legislation referred to in paragraph 1.6, for the purpose of paragraph 1.8 above, the provisions of sections 3(1)(a), 3(3)(a) and 3(3)(b), 3(4)(a) and 3(4)(b), and 3(5) of the Recognition of Customary Marriages Act 120 of 1998 shall apply, mutatis mutandis, to Muslim marriages.

1.10 If administrative or practical problems arise in the implementation of this order, any interested person may approach this Court for a variation of this order. . . .''.

1.4 The Constitutional Court held among others in the *WLCT* case that the Divorce Act is inconsistent with sections 9, 10, 28 and 34 of the Constitution of the Republic of South Africa, 1996 (''Constitution''). In particular, it was held that sections 6, 7(3) and 9(1) of the Divorce Act are unconstitutional as they fail to safeguard the interests of minor or dependent children of Muslim marriages in the same manner as children of other marriages on the dissolution of the marriage; fail to provide for the redistribution of assets on the dissolution of a Muslim marriage; and fail to make provision for the forfeiture of patrimonial benefits on the dissolution of a Muslim marriage in the same terms as other dissolved marriages, respectively.

1.5 The Constitutional Court ordered the President and Cabinet, together with Parliament, to amend the Divorce Act, or to initiate and pass new legislation, to remedy the foregoing defects in the Divorce Act in order to ensure the recognition of Muslim marriages as valid marriages for all purposes in South Africa and to regulate the consequences arising from such recognition. This must be done by 28 June 2024, the deadline set out in the order, being 24 months from the date of delivery of the *WLCT* judgment.

1.6 In the interim, the Constitutional Court specified measures which will operate pending the amendment of the Divorce Act, or the introduction of new legislation. The Constitutional Court declared that Muslim marriages subsisting at 15 December 2014, or Muslim marriages which have been terminated in terms of the tenets of Islam as at 15 December 2014, in respect of which legal proceedings have been instituted and which proceedings have not been

finally determined by 28 June 2022, may be dissolved in terms of the Divorce Act as prescribed in the *WLCT* order.

2. PURPOSE OF BILL

2.1 The purpose of the Divorce Amendment Bill, 2023 (''the Bill'') is to amend the Divorce Act, so as to insert a definition of a Muslim marriage; to provide for the protection and to safeguard the interests of dependent and minor children of a Muslim marriage; to provide for the redistribution of assets on the dissolution of a Muslim marriage; to provide for the forfeiture of patrimonial benefits of a Muslim marriage and to provide for matters connected therewith.

2.2 The Bill seeks to amend the Divorce Act to extend the application of the Divorce Act to Muslim marriages. This will ensure the recognition of Muslim marriages as valid marriages for the purpose of regulating the consequences of dissolution of a marriage as provided for in the Divorce Act.

3. SUMMARY OF BILL

3.1 ***Ad* Clause 1:**

Clause 1 amends section 1 of the Divorce Act to insert a definition for ''Muslim marriage''. This clause seeks to provide legal certainty in the interpretation as to what constitutes a Muslim marriage for the purposes of the Divorce Act.

3.2 ***Ad* Clause 2:**

3.2.1 Clause 2 amends section 3 of the Divorce Act, which provides for the dissolution of a marriage and grounds of divorce, by also providing for a Muslim marriage to be dissolved by a court.

3.2.2 This clause seeks to extend the application of the Divorce Act to the dissolution of Muslim marriages by a court.

3.3 ***Ad* Clause 3:**

3.3.1 Clause 3 amends section 6(1) and (3) of the Divorce Act, which provides for the safeguarding of interests of dependent and minor children. Clause 3*(a)* amends section 6(1)*(a)* of the Divorce Act by extending the application of the provision to include minor and dependent children of a Muslim marriage. Similarly, clause 3*(b)* amends section 6(3) of the Divorce Act to extend the application of that subsection in respect of maintenance of dependent children, to include dependent children of a Muslim marriage, as well as matters pertaining to the custody, guardianship of and access to a minor child of a marriage to include a minor child of a Muslim marriage.

3.3.2 This clause seeks to address the order of the Constitutional Court in the *WLCT* case, which held that section 6 of the Divorce Act is unconstitutional as it fails to safeguard the interests of minor or dependent children of Muslim marriages in the same manner as children of other marriages on the dissolution of the marriage.

3.4 ***Ad* Clause 4:**

3.4.1 Clause 4 amends section 7 of the Divorce Act, which provides for the division of assets and for the maintenance of parties, by—

3.4.1.1 providing for the insertion of a new subsection (3A),

3.4.1.2 extending the application of subsections (4), (5) and (6) to the new subsection (3A); and

3.4.1.3 extending the factors which the court must take into account when deciding an application for the redistribution of assets in respect of a marriage out of community of property, to include any contract or agreement between the parties in a Muslim marriage where the husband is a spouse in more than one Muslim marriage.

3.4.2 This clause was amended in order to address the order of the Constitutional Court in the *WLCT* case, which held that section 7(3) of the Divorce Act is unconstitutional because it fails to provide for the redistribution of assets on the dissolution of a Muslim marriage. The amendment in clause 4*(d)* was introduced following the consideration of an interim measure which the Constitutional Court set out in the order of the *WLCT* case and seeks to protect Muslim women in Muslim marriages where the husband is a spouse in more than one Muslim marriage.

3.5 ***Ad* Clause 5:**

3.5.1 Clause 5 amends section 9 of the Divorce Act, which provides for the forfeiture of patrimonial benefits of a marriage. Section 9(1) of the Divorce Act is amended to provide that when a decree of divorce is granted on the ground of irretrievable breakdown of a marriage, the court may make an order that the patrimonial benefits of the marriage be forfeited by one party in favour of the other, to be extended in its application to include a Muslim marriage.

3.5.2 This clause was amended to address the order of the Constitutional Court in the *WLCT* case, which held that section 9(1) of the Divorce Act is unconstitutional as it fails to provide for the forfeiture of patrimonial benefits on the dissolution of a Muslim marriage in the same terms as other dissolved marriages.

3.6 ***Ad* Clause 6:**

3.6.1 Clause 6 provides for the application of the Bill to all subsisting Muslim marriages including a Muslim marriage—

(a) which was terminated or dissolved in accordance with the tenets of Islam and where legal proceedings for the dissolution of the said Muslim marriage in terms of the Divorce Act, have been instituted but not yet finalised; and

(b) which subsisted as at 15 December 2014.

3.6.2 This clause was introduced as a result of the application of the interim measures specified in the order of the Constitutional Court in the *WLCT* case. The interim measures apply to Muslim marriages subsisting at 15 December 2014, being the date when the matter was initially instituted in the High Court, and to Muslim marriages which had been terminated in terms of the tenets of Islam as at 15 December 2014, but in respect of which legal proceedings have been instituted but not finally determined as at the date of the *WLCT* order, being 28 June 2022.

3.6.3 Clause 6*(a)* seeks to protect Muslim women whose Muslim marriages were dissolved only in terms of the tenets of Islam but in respect of which proceedings were instituted in terms of the Divorce Act for a civil dissolution. Clause 6*(b)* seeks to protect Muslim women whose Muslim marriages subsisted as at 15 December 2014 by providing for the application of the Divorce Act to those marriages, regardless of whether that marriage was dissolved in terms of the tenets of Islam.

The retrospective application of clause 6*(b)* is limited to balance the rights and interests of Muslim women and children and third parties and to limit potential unintended consequences.

3.7 ***Ad* Clause 7:**

Clause 7 provides for the short title of the Bill.

4. CONSULTATION

4.1 The Department of Home Affairs is a key stakeholder given the order in the *WLCT* case and the interconnected nature of marriage and divorce. The Department of Home Affairs was consulted on the Bill and has commented on the Bill.

4.2 The nature of the comments made by the Department of Home Affairs on the Bill are forward-looking. The proposed amendments by the Department of Home Affairs in the draft Marriage Bill, 2023, may require consequential amendments to the Divorce Act, which shall be considered after the Marriage Bill is passed by Parliament. The Department of Home Affairs has no objection to the Bill.

5. IMPLICATIONS FOR PROVINCES

None.

6. FINANCIAL IMPLICATIONS FOR STATE

None.

7. PARLIAMENTARY PROCEDURE

7.1 In determining how a Bill must be tagged, the tagging test as formulated in the Constitutional Court case of *Tongoane and Others v Minister for Agriculture and Land Affairs and Others* 2010 (8) BCLR 741 (CC) *("Tongoane and Others v Minister for Agriculture and Land Affairs and Others")* must be considered. In this case the Constitutional Court confirmed and upheld the ''substantial measure'' test as formulated in *Ex Parte President of the Republic of South Africa: In re Constitutionality of the Liquor Bill* (CCT12/99) [1999] ZACC 15; 2000 (1) SA 732 (CC); 2000 (1) BCLR 1 (CC) (11 November 1999).

7.2 In *Tongoane and Others v Minister for Agriculture and Land Affairs and Others,* the Constitutional Court held as follows:

> ''[56] In resolving this issue, this Court held that the heading of section 76, namely, ''Ordinary Bills affecting provinces'' provides ''a strong textual indication that section 76(3) must be understood as requiring that any Bill whose provisions in substantial measure fall within a functional area listed in Schedule 4, be dealt with under section 76.'' It went on to hold that ''[w]hatever the proper characterisation of the Bill . . . a large number of provisions must be characterised as falling 'within a functional area listed in Schedule 4', more particularly, the concurrent national and provincial legislative competence in regard to 'trade' and 'industrial promotion.' '' Accordingly, ''[o]nce a Bill 'falls within a functional area listed in Schedule 4' '' it must be enacted in accordance with the procedure in section 76.
>
> [57] . . .
>
> [58] . . .What matters for the purposes of tagging is not the substance or the true purpose and effect of the Bill, rather, what matters is whether the provisions of the Bill ''in substantial measure fall within a functional

area listed in Schedule 4''. This statement refers to the test to be adopted when tagging Bills. This test for classification or tagging is different from that used by this Court to characterise a Bill in order to determine legislative competence. This ''involves the determination of the subject-matter or the substance of the legislation, its essence, or true purpose and effect, that is, what the [legislation] is about''.

[59] There is an important difference between the ''pith and substance'' test and the ''substantial measure'' test. Under the former, provisions of the legislation that fall outside of its substance are treated as incidental. By contrast, the tagging test is distinct from the question of legislative competence. It focuses on all the provisions of the Bill in order to determine the extent to which they substantially affect functional areas listed in Schedule 4 and not on whether any of its provisions are incidental to its substance.

[60] The test for tagging must be informed by its purpose. Tagging is not concerned with determining the sphere of government that has the competence to legislate on a matter. Nor is the process concerned with preventing interference in the legislative competence of another sphere of government. The process is concerned with the question of how the Bill should be considered by the provinces and in the NCOP, and how a Bill must be considered by the provincial legislatures depends on whether it affects the provinces. The more it affects the interests, concerns and capacities of the provinces, the more say the provinces should have on its content.

. . .

[69] The tagging of Bills before Parliament must be informed by the need to ensure that the provinces fully and effectively exercise their appropriate role in the process of considering national legislation that substantially affects them. Paying less attention to the provisions of a Bill once its substance, or purpose and effect, has been identified undermines the role that provinces should play in the enactment of national legislation affecting them. The subject-matter of a Bill may lie in one area, yet its provisions may have a substantial impact on the interests of provinces. And different provisions of the legislation may be so closely intertwined that blind adherence to the subject-matter of the legislation without regard to the impact of its provisions on functional areas in Schedule 4 may frustrate the very purpose of classification.

. . .

[72] . . . What must be stressed, however, is that the procedure envisaged in section 75 remains relevant to all Bills that do not, in substantial measure, affect the provinces. . . .''. (Footnotes are omitted)

7.3 The test for tagging focuses on all the provisions in the Bill and it compels the consideration of whether the purpose and effect of the subject matter of the Bill in a substantial measure fall within the functional areas listed in Schedule 4 to the Constitution.

7.4 Although the subject matter of the Bill falls under family law or personal law, it also speaks to divorce and Muslim marriages. ''Divorce'' and ''marriages'' are not listed in Schedule 4, Part A to the Constitution as a functional area of concurrent national and provincial legislative competence.

7.5 In applying the substantial measure test, we examined the contents of the Bill. We considered whether the provisions in the Bill fall within Schedule 4 to the Constitution, and if so, whether the provisions of the Bill in a substantial measure fall within a concurrent national and provincial legislative competence.

7.6 The Department of Justice and Constitutional Development and the State Law Advisers are of the view that the purpose and effect of the Bill in a substantial measure does not deal with culture or customary marriages and subsequently does not fall within the functional areas of ''cultural matters; indigenous law and customary law; and traditional leadership subject to Chapter 12 of the Constitution'' as listed in Schedule 4, Part A to the Constitution.

7.7 The Department of Justice and Constitutional Development and the State Law Advisers have considered all the provisions in light of *Tongoane and Others v Minister for Agriculture and Land Affairs and Others*, and found that the purpose and effect of the Bill deals primarily with the application of family law, particularly, the dissolution of a Muslim marriage and the consequences thereof. Since ''family law'' is not listed as a functional area in Schedule 4 to the Constitution, the Department of Justice and Constitutional Development and the State Law Advisers are of the opinion that the Bill is an ordinary Bill not affecting provinces and must be tagged as a section 75 Bill. The Bill must be dealt with in accordance with the procedure established by section 75 of the Constitution.

7.8 Section 39 of the Traditional and Khoi-San Leadership Act, 2019 (Act No. 3 of 2019) (''Traditional and Khoi-San Leadership Act'') provides for referral of Bills to the National House of Traditional and Khoi-San Leadership by Parliament and reads as follows:

''Referral of Bills to National House

39. (1)*(a)* Any Parliamentary Bill—

(i) which directly affects traditional or Khoi-San communities or pertaining to customary law or customs of traditional or Khoi-San communities; or

(ii) pertaining to any matter referred to in section 154(2) of the Constitution,

must, in the case of a Bill contemplated in subparagraph (i) and may, in the case of a Bill contemplated in subparagraph (ii), before it is passed by the house of Parliament where it was introduced, be referred by the Secretary to Parliament to the National House for its comments.

(b) The National House must, within 60 days from the date of such referral, make any comments it wishes to make and submit such comments to the Secretary to Parliament: Provided that the National House may refer any such Bill to any provincial house for comments: Provided further that if the National House has no comments on any Bill referred to it, the National House must inform the Secretary to Parliament accordingly.''.

7.9 The Department of Justice and Constitutional Development and the State Law Advisers are also of the view that it is not necessary to refer this Bill to the National House of Traditional and Khoi-San Leadership in terms of section 39(1)*(a)*(i) of the Traditional and Khoi-San Leadership Act since it does not contain provisions which directly affect traditional or Khoi-San communities or pertaining to customary law or customs of traditional or Khoi-San communities.

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