



Commission for Gender Equality
A society free from gender oppression and inequality

THE MARRIAGE BILL, 2023

Commission for Gender Equality Comments

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1. Introduction

The Commission for Gender Equality (CGE) wishes to express its gratitude for the opportunity to make written submissions on the publication of the National Identification and Registration Bill, 2023.

The CGE, as an independent statutory body created in terms of Chapter 9 of the Constitution of the Republic of South Africa, 1996 (the Constitution), is mandated to promote and protect gender equality in government, civil society, and the private sector.

The Commission for Gender Equality Act 39 of 1996, as amended (the CGE Act), gives the Commission the power to:

- Monitor and evaluate policies and practices of organs of State at any level.
- Monitor and evaluate statutory bodies and functionaries.
- Monitor public bodies and authorities and private businesses, enterprises, and institutions to promote gender equality.
- Make any recommendations that the CGE deems necessary.

The CGE welcomes the opportunity to make inputs into the Bill and shall reiterate the proposed sections under review in the Bill and respond thereto.

2. Background

In South Africa, the laws regulating marriage have historically been riddled with unfair discrimination. This has been fully illustrated by the Constitutional Court in judgments such as *Minister of Home Affairs and Another v Fourie and Another*



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and *Women's Legal Centre Trust v President of the Republic of South Africa and Others* [2022] ZACC 23.

Currently South African marriage law is regulated by multiple different statutes. Monogamous marriage between heterosexual partners is regulated by the Marriage Act 25 of 1961, except those entered into by black persons prior to 2 December 1988. These marriages are instead regulated by the Black Administration Act 38 of 1927, a law that was described by Deputy Chief Justice Pius Langa as 'a cornerstone of racial oppression, division and conflict in South Africa, the legacy of which will still take years to completely eradicate.'¹

The Recognition of Customary Marriages Act 120 of 1998 regulates marriages entered into in terms of custom, regardless of whether the marriage is monogamous or polygamous.

The Civil Unions Act 17 of 2006 was enacted as a response to the Constitutional Court's finding that the exclusion of recognition of same-sex marriages by both the common law and the Marriage Act was an infringement of the right to equality and dignity, and therefore unconstitutional.² Both heterosexual and same-sex couples may solemnise and register their unions in terms of the Civil Union Act, either has a marriage or a civil partnership. However, the Civil Unions Act has been criticized for creating a system of marriage regulation for same-sex marriage that is separate from heterosexual marriages.³ While heterosexual couples can get married both in terms of the Marriage Act and the Civil Unions Act, same-sex couples may only so in terms of the latter.

¹ *Bhe and Others v Khayelitsha Magistrate and Others* [2004] ZACC 17 par 61.

² *Minister of Home Affairs and Another v Fourie and Another* [2005] ZACC 19

³ N Ntlama 'A Brief Overview of the Civil Union Act' [2010] *PER* 6 at 197



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Islamic marriages concluded according to *Sharia* law (and not in accordance with the Marriage Act) are not regulated, nor recognised, by any statute. Recently, the Constitutional Court has declared the failure of the Marriage Act and Divorce Act 70 of 1979 to do so to be inconsistent with sections 9, 10, 28, and 34 of the Constitution, and thus unconstitutional.⁴

The Bill therefore aims to unify the regulation of marriage into one law, so that all marriages are regulated by the same law regardless of whether they are civil, religious, or customary in nature, and regardless of the prospective partners' gender and sexual orientation. This is essential for many of the instances of unfair discrimination that have historically underpinned marriage recognition to be dealt with and eradicated.

3 The Commission for Gender Equality's Submissions on Aspects of the Bill

In light of the above, the CGE's submissions regarding the Bill are set out hereunder.

3.1 General Comments

The CGE welcomes and supports the unification of marriage laws into one law. Furthermore, it is of the view that this is essential for issues related to unfair discrimination that have historically been prevalent regarding marriage recognition to be removed from the law all together.

⁴ *Women's Legal Centre Trust v President of the Republic of South Africa and Others* [2022] ZACC 23.



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However, the Bill uses gender-specific language throughout (see for example sections 10 (1) and (2), Section 11 (1), section 13 (1) and (2), section 14(1) Section 16(a)(i), and section 17). Recently, the National Identification and Registration Bill was drafted to cater for non-binary individuals who do not ordinarily fall within the male/female binary and whose gender is non-specific. We propose that this accommodation of non-binary persons be written into this Bill as well by the addition of gender-neutral language such as 'they' or 'them'.

3.2 Chapter 1

The Bill defines 'customary marriage' as a marriage entered into in terms of the Recognition of Customary Marriages Act before commencement of the Bill as a law. However, this definition does not take account of the retrospective nature of the Recognition of Customary Marriages Act.

Regarding the definition of 'dowry', a dowry is not usually paid by a husband to a wife as the terms is defined. Furthermore, the definition does not indicate that the 'money, property or anything of value' is payable in terms of any culture or religion, or when such is to be paid. (i.e., at conclusion of marriage). Technically, this definition would therefore include any instance where money or similar is payable by a husband to a wife, regardless of any cultural or religious context. For example, money payable by a husband to a wife in terms of a divorce settlement would constitute a 'dowry' as defined. The definition of 'dowry' should therefore specify that the money is payable in terms of a custom or religion at the conclusion of the marriage.



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The definition of 'lobolo' refers to a prospective spouse of the head of a family undertaking to give. However, in many instances it is neither the spouse or the head of the family that does this, but rather a representative from the family. We propose that the definition of 'lobolo' be altered to include this.

Part (d) of the definition of 'marriage' brings in marriages that were previously governed by the Black Administration Act into the definition. However, the definition does not clarify what is meant by 'concluded'. In other words, it does not clarify whether 'concluded' means concluded in terms of a law or concluded in accordance with any religion or custom, irrespective of whether a marriage concluded in terms of that religion or custom is currently legally recognised. The CGE would support the latter meaning, as this would remove any further unfair discrimination incurred by a marriage conducted in terms of a custom or religion which has not yet received legal recognition.

3.3 Chapter 2

Section 6 deals with the requirement of consent. We propose that we a marriage officer obtains the consent from the prospective spouses in section 6(1), that the consent be given verbally before witnesses and then is reduced to writing in the marriage register before the marriage certificate can be issued. Furthermore, regarding section 6(3), we further propose that where fraud exists that such must be reported and the marriage be declared null and void.

Section 7 provides that anybody who wishes to enter into a marriage must be 18 years of age or older. The CGE is in support of this section as it prevents child marriages and abuse of *ukuthwala*. The provision is consistent with South



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Africa's international obligations to prevent child marriage, as well as section 12 of the Children's Act 38 of 2005 which provides that every child has the right not to be subjected to social, cultural, or religious practices detrimental to their well-being.

3.4 Chapter 3

Section 8 deals with the requirements for a valid monogamous marriage. We proposed that the consent required by section 8(1)(b) must be in writing in a prescribed form. The requirement in section 8(4) that any prospective spouse who is a foreigner must provide a letter of non-impediment is fully supported and must be emphasized in the training of marriage officers. It should also be made clear in the consent form, possibly through a tick box to be checked.

Section 9 sets out the requirements for a valid polygamous marriage and the comments made regarding requirements for a valid monogamous marriage apply equally to this section, including the proposal that the consent be in written form. Section 9(2)(b) provides that the husband in a prospective polygamous marriage must bring an application to court to approve a written contract that will regulate the future matrimonial property system of the marriage. We propose that the written consent must form part of the application papers.

Furthermore, section 9(2)(b) uses gender-specific terminology and only a husband (i.e., a male spouse) can bring such application. The CGE is not aware of any custom or religion in South Africa in which a women may have more than one spouse (polyandry) and the section was presumably drafted in



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such a way to reflect this reality. However, the CGE is concerned that the section nevertheless reinforces gender discrimination. We would suggest that section 9 be drafted in gender neutral terms for two reasons:

1. Gender-specific terminology reinforces patriarchy.
2. A particular religion or custom that practices polygamy may in the future decide to remove its own gender discriminatory restrictions and recognise polyandry. Should it do so, however, the gender-specific terminology in section 9 would mean that a women with multiple spouses would not get the same recognition provided by section 9 as a man with multiple spouses. The section should therefore allow for the possibility of culture and religion changing its views and still receive recognition in terms of the Bill.

Furthermore, section 9(2)(b) does not provide clarity on who prepares the contract referred to in this paragraph. In terms of South Africa marriage law, similar contracts such as antenuptial contracts must be prepared by a notary and registered at the Deeds Office. The Act does not provide clarity as to whether such a requirement applies to contracts envisaged by section 9(2)(b), and whether the failure to register such contract affects its validity. It is particularly important that this section deals with the issue of customary marriages being registered, to avoid future litigation. It must also deal with consequences of the husband not bringing the application contemplated in section 9(2)(b) to court.

It must be noted that the proposed requirement in section 9(2)(b) to bring an application to court will most likely entail costs for parties who seek to comply with this section. Many of those who wish to enter into polygamous marriages,



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however, live in rural areas, which are mostly poor. The section therefore imposes a requirement that carries a financial burden they may not be able to bear. A more efficient process should be considered for ease of compliance.

Finally, section 9(3)(a)(i)(bb) requires a court to effect a division of the matrimonial property of the existing marriage before it approves the written contract regulating the matrimonial property system of the new marriage. We propose that it be a requirement that the division be finalized before any subsequent marriage is entered into.

3.5 Chapter 4

The Commission proposes that both sections 11 and 12 include a provision that the Minister may not designate any person who is not a South African citizen as a marriage officer, and that this exclusion apply to naturalized South Africans. Furthermore, agrees with the chapter as it was drafted, subject to the general comments noted above regarding gender-neutral terminology.

3.6 Chapter 5

Section 16 prohibits a marriage officer from solemnizing a marriage unless the prospective partners produce their identity documents, passports, or valid visas. The Commission proposed that the section also include a provision requiring a prospective spouse who is a foreigner to produce the letter of non-impediment required by section 8(4).



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The Commission notes that section 18 of the Marriage Bill discusses the registration of marriages in the Republic of South Africa. Although section 18 confirms the requirement to register any marriage in South Africa, the Commission notes that the section is salient on whether the non-registration of a marriage under the Marriage Bill will affect the validity of the marriage.

In this instance the Commission takes note of the current law governing customary marriages, namely the Recognition of Customary Marriages Act. Section 4(9) of the Recognition of Customary marriages Act confirms expressly that the failure to register a customary marriage does not affect the validity of that customary marriage. The Commission recommends that the legislature earnestly consider the inclusion of a similar provision in the proposed Marriage Bill.

In its current form the Marriage Bill does not stipulate what the effect of non-registration will have on the validity of the marriage, particularly in the instances of customary and religious marriages. Very often the spouses to customary marriages are not resident close to urban hubs, and this often leaves them out of range for public and civic services. Since these services are not easily accessible, in many instances these customary marriages are not registered.

The legislature in this instance should clearly outline the implications of the non-registration of customary and religious if the intention is to repeal the Recognition of Customary Marriages Act.



3.7 Chapter 6

Section 21, which sets out when a marriage may be dissolved, is structured as a single paragraph containing at least three different bases on which a marriage may be dissolved. We are of the view that the section would be more user-friendly if each of these bases were set out in separate subsections.

3.8 Chapter 7

Chapter 7 sets out the offences in the Act. However, the Bill does not create an offence for a person to enter into a polygamous marriage knowing that the first spouse has not consented. Furthermore, the Bill does not indicate what the consequences of the second marriage are in these circumstances.

We are also of the view that if any person who is party to or solemnizes a marriage with a minor, they be deemed to have committed additionally offences in terms of the Criminal Law (Sexual Offences and Related Matters) Act 32 of 2007.

3.9 Chapter 8

Section 23 authorised the Minister to make regulations on various aspects covered in the Bill. The Commission proposes that a form dealing with written consent be created and issued in terms of regulations to be issued under the proposed Act.



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3.10 Chapter 9

The Commission agrees with the chapter as it was drafted.

3.11 Chapter 10

The Commission agrees with the chapter as it was drafted.

5. Conclusion

The consolidation of South Africa's marriage laws into one statute is to be welcomed. Doing so ensures that the right to equality is respected and given effect to regardless of religion, culture, gender, or sexual orientation. The CGE therefore welcomes the Marriage Bill and what it seeks to achieve.

However, it has some reservations regarding certain aspects of the Bill. The lack of gender-neutral terminology does not cater for gender non-conforming individuals. Furthermore, some provisions have the potential to entrench patriarchy, particular section 9 dealing with polygamous marriages. The Bill also contains requirements that carry financial implications that may hinder many South Africans from being able to fully enjoy their rights guaranteed in the Constitution. Finally, the Bill does not address what the consequences are should its provisions not be complied with.