



PARLIAMENT
OF THE REPUBLIC OF SOUTH AFRICA

LEGAL SERVICES

PO Box 15 Cape Town 8000 Republic of South Africa
Tel: 27 (21) 403 2911
www.parliament.gov.za

Tel: (021) 403-2626
Direct: (021) 403-8149
Fax (021) 403-3888
E-mail: nmpikashe@parliament.gov.za

MEMORANDUM

[Confidential]

**TO: MR M.G.E HENDRICKS, MP
MEMBER OF THE NATIONAL ASSEMBLY**

**COPY: MR X GEORGE
SECRETARY TO PARLIAMENT**

**FROM: CONSTITUTIONAL AND LEGAL SERVICES OFFICE
[ADV Z ADHIKARIE – CHIEF LEGAL ADVISER]**

DATE: 14 NOVEMBER 2022

REF: P7. 2022

SUBJECT: DIVORCE AMENDMENT BILL, 2022



MEMORANDUM

TO: MR M.G.E Hendricks, MP
Member of the National Assembly

COPY: Mr X George
Secretary to Parliament

FROM: Constitutional and Legal Services Office
[Adv Z Adhikarie – Chief Legal Adviser]

DATE: 14 November 2022

REFERENCE: P7.2022

SUBJECT: Divorce Amendment Bill - 2022

INTRODUCTION

1. Our Office was requested to assist the Honourable Hendricks, MP (“Member”) on an amendment to the Divorce Act, 1979 (Act No. 70 of 1979) (“the Act”), by drafting the Divorce Amendment Bill (“the Bill”).

THE BILL

2. Having regard to the proposals provided, a draft has been prepared for the Member’s approval. A copy of the proposed Bill is attached hereto as Annexure A.
3. The Bill seeks to amend the Act so as to provide for mechanisms to safeguard the welfare of minor or dependent children born of Muslim marriages; to provide for the redistribution of assets on the dissolution of a Muslim marriage; and to provide for the forfeiture of patrimonial benefits of a Muslim marriage.

PART A: MOTION OF DESIRABILITY

4. NA Rule 286(4)(i) requires the relevant committee to, after due deliberation, “consider a motion of desirability on the subject matter of the Bill”. In our experience, a number of topics could affect the desirability of a Private Member’s Bill. We discuss a few of these below.

Constitutionality

5. It is my opinion that neither the Bill nor any of its clauses go against the spirit, purport or object of the Constitution.
6. The Bill contains no provisions that would render it a Money Bill or a Bill envisaged in section 214 of the Constitution and may be introduced by the Member.

Conflict with existing legislation or legislative processes

7. I am unaware of any existing legislation or legislation awaiting consideration by the Assembly and the Council that deals with a similar substance as this Bill.
8. I am of the opinion that the Bill is not in conflict with any legislation on the statute book. I am further of the opinion that it will not be necessary to amend any other statute in order to implement the provisions of the Bill.
9. I am aware that similar legislation is soon to be introduced by the national executive on similar content as that of this Bill. In 2013 the then Minister of Justice and Constitutional Development, Minister Radebe, commissioned the South African Law Reform Commission (“SALRC”) to conduct research for consideration on the possibility of a single Marriages Act that will regulate all marriages and unions in South Africa. In response to that the then Minister of Home Affairs, Minister Pandor, replied that:

“The ministry of Home Affairs would like to propose the investigation of the development of a single Marriage Act for South Africa. Such an Act will enable South Africans of different religious and cultural persuasions to conclude legal marriages that will accord with the doctrine of equality as set out in the Constitution of the Republic of South Africa. We propose that the study should be a comparative study that will serve to inform our country's reform of the marriage dispensation in South Africa. This will, I believe, create a legal marriage regime that will create universal provisions that adequately cover the interests that the state holds in marriage contracts while providing due recognition to all religious and cultural marriage practices.”

10. The SALRC released an Issue Paper¹ in 2019 and a Discussion Paper² in January 2020 to canvass views on a single marriage statute. In the Discussion Paper, the SALRC proposed two possible Bills, namely the Protected Relationships Bill and the Recognition and Registration of Marriages and Life Partnerships Bill. In addition to this in March 2022 the Department of Home Affairs issued a White Paper on marriages in South Africa. One of the recommendations made in the White paper is that the monogamous marriage legal framework must cater for both heterosexual and homosexual couples. In the White Paper it is stated that ‘the marriage contract or certificate thereof will be gender neutral. This inclusive approach means that there shall be indiscriminate recognition of all monogamous marriages, including religious marriages that were solemnized in accordance with religious rites and beliefs such as Muslim, Hindu & Rastafarian marriages. This proposal is also consistent with recent judicial pronouncements on Muslim marriages wherein the Supreme Court of Appeal, among others, declared the Marriage Act and the Divorce to be inconsistent with ss 9, 10, 28 and 34 of the Constitution in that they fail to recognise marriages solemnised in accordance with Sharia law (Muslim marriages) as valid marriages (which have not been registered as civil marriages) as being valid for all purposes in South Africa, and to regulate the consequences of such recognition.’ (own emphasis).

11. With regards to polygamous marriages the White Paper recommends as follows:

“An inclusive marriages framework that regulates polygamous marriages, promotes values of nondiscrimination and the realisation of human dignity and tolerance. Similarly, this proposal is also consistent with recent judicial pronouncements on Muslim marriages which instructed government to introduce legislation that will regulate Muslim marriages.”

12. It is evident from the above that the national executive has been working on the regulation of Muslim marriages, which includes Muslim divorce. It should be noted that to date no Bill has been brought to Parliament.

PART B: COMMENTS ON THE CONTENT OF THE BILL

Implementation

13. I do not foresee any difficulties with implementing the Bill.

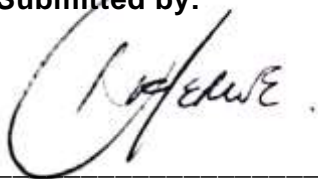
¹ SALRC Issue Paper 35

² SALRC Discussion Paper 152

PART C: LEGISLATIVE PROCESS

14. If the Member feels satisfied that the Bill reflects the policy intent that the Member wishes to achieve, the Member may request the Speaker to introduce the Bill by submitting the relevant *Gazette* (the explanatory summary is expected to be published during the course of next week), the Bill and the Memorandum on the objects of the Bill to the Speaker. If the House is in session, and the Member requires that the Bill must be read a first time, the Member must also submit a notice of First Reading of the Bill.
15. Should the Bill be introduced in the format contained in Annexure A, I am of the opinion that a recommendation should be made to the Joint Tagging Mechanism that the Bill should be classified as a section 75 Bill.
16. That the Bill does not need to be referred to the National House of Traditional and Khoi-San Leaders in terms of 39(1)(a) of the Traditional and Khoi-San Leadership Act, 2019 (Act No. 3 of 2019), as it does not contain any provisions pertaining to customary law or customs of traditional or Khoi-San communities, nor does it contain any provisions pertaining to any matter referred to in section 154(2) of the Constitution.
17. Upon request by the relevant Committee, the content of this opinion related to the desirability of the Bill will be presented to the relevant National Assembly Committee in support of the Bill.

Submitted by:



Adv CR van der Merwe
Senior Parliamentary Legal Adviser



Adv Zuraya Adhikarie
Chief Legal Adviser