



FW de Klerk
FOUNDATION

THE FW DE KLERK FOUNDATION
Upholding South Africa's National Accord

To: **The Department of Home Affairs**
For attention: Adv. Moses Malakate; Ms. Agnes Molefe
Per email Moses.Malakate@dha.gov.za; Agnes.Molefe@dha.gov.za
RE: **Comments on the Draft Marriage Bill 2022**
Date: **Thursday, 31 August 2023**

FW DE KLERK FOUNDATION SUBMISSION ON THE DRAFT MARRIAGE BILL 2022

Dear Honourable Minister Aaron Motsoaledi

1. INTRODUCTION

- 1.1 We refer to your invitation for written submissions on the Draft Marriage Bill 2022 (“the Bill”) submitted to Parliament and referred to the Committee on Home Affairs.
- 1.2 The FW de Klerk Foundation (“the Foundation”) is a non-profit organisation dedicated to upholding the Constitution of the Republic of South Africa, 1996 (“the Constitution”).
- 1.3 To this end, the Foundation seeks to promote the Constitution and the values, rights and principles enshrined in the Constitution; to monitor developments including legislation and policy that may affect the Constitution or those values, rights and principles; to inform people and organisations of their constitutional rights and to assist them in claiming their rights. The Foundation does so in the interest of everyone in South Africa.
- 1.4 As such, the Foundation welcomes this opportunity to make a concise submission to the Committee on the Bill.
- 1.5 We trust that our submission will assist the Committee in its deliberations regarding the Bill. We are also available to make a verbal submission if required.

2. LEGAL FRAMEWORK

- 2.1 South Africa is characterised by the coexistence of various marriage laws, including the Marriage Act 25 of 1961 (the ‘Marriage Act’), the Recognition of Customary Marriages Act 120 of 1998 (the ‘ROCMA’), and the Civil Union Act 17 of 2006 (the ‘Civil Union Act’). This fragmented legal framework has led to inconsistencies in the treatment of different marriage types, resulting in disparities in property rights, inheritance, and marital obligations among spouses.
- 2.2 The Bill seeks to bridge these legal gaps by rationalising and harmonising the existing marriage laws. As per Section 2, the Bill’s key objectives include:

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- to streamline the legal landscape by consolidating the different types of marriage under a single comprehensive framework;
- to set out clear criteria for the validity of marriages, ensuring legal certainty and reducing disputes related to the recognition of marriages;
- to provide guidelines for the solemnisation of marriages, ensuring that the process is standardised and adheres to legal requirements; and
- to emphasise the importance of registering marriages, creating a central repository for marital records and enhancing the legal status of all marriages.

2.3 The Bill contrasts with the Marriage Act by addressing its gender-based discrepancies which had previously allowed girls to marry at 15 with parental consent, while boys could marry at 18. This discrepancy perpetuated gender inequality by treating girls as minors and reinforcing traditional gender roles. The Bill addresses this inconsistency by introducing a uniform minimum age of consent of 18 for all genders.

2.4 By enacting a uniform minimum marriage age of 18, the Bill actively contributes to the achievement of the United Nations Sustainable Development Goals (the 'SDGs'), which specifically target the elimination of child marriages by 2030.

2.5 The Marriage Act primarily dealt with monogamous civil marriages, leaving customary and religious marriages, as well as same-sex unions, without comprehensive legal frameworks. While the ROCMA recognised customary marriages and the Civil Union Act recognised civil unions, it did not fully integrate them into the legal landscape, leading to potential inconsistencies and gaps.

2.6 The Bill extends its reach beyond the confines of the Marriage Act by encompassing all types of marriages, including monogamous, polygamous, customary, and religious marriages, as well as same-sex marriages. This broader scope acknowledges the diverse cultural and religious practices present in South Africa.

2.7 The Bill aims to rectify the gap left by the ROCMA by providing a unified legal framework that recognises and regulates customary marriages within the same legal framework as other marriage types. This consolidation helps ensure equal rights and protections for spouses in customary marriages.

2.8 The Bill aligns with international standards by promoting gender equality, non-discrimination, and human dignity within marriages. The Bill ensures specific conformity with the Universal Declaration of Human Rights (the 'UDHR'), which emphasises the inherent dignity and equal rights of all individuals, without distinction of any kind. The Bill resonates with the spirit of the UDHR by promoting these fundamental principles within the institution of marriage. By eliminating gender-based age discrepancies, ensuring equal legal status and capacity for spouses, and prohibiting discrimination based on gender or marriage type, the Bill upholds the principles enshrined in the UDHR.

2.9 The Bill further aligns with the Convention on the Elimination of All Forms of Discrimination Against Women's (the 'CEDAW') goals by explicitly ensuring gender equality within all marriage types. This echoes the CEDAW's stance on eliminating stereotypes and ensuring that women and men enjoy equal rights within institutions of marriage and family.

2.10 Section 3(1) of the Bill makes a departure from the previous fragmented approach by deeming all legislation or common law related to marriages to refer to marriages as defined in the Bill. This

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comprehensive application ensures that regardless of registration status under prior laws, all marriages now fall under the purview of the Bill.

2.11 Sections 10 and 11 of the Draft Bill expand the categories of marriage officers, accommodating magistrates, religious denominations, traditional councils, and secular organisations. This expansion caters to diverse cultural and religious practices.

2.12 The Constitution emphasises the importance of legal certainty and access to justice for all citizens. Sections 13(1) and 13(2) contribute to these principles by providing a remedy for individuals who unknowingly entered into marriages that were not solemnised by authorised marriage officers. This helps avoid legal disputes and uncertainties that could arise from the invalidation of such marriages.

2.13 The Bill outlines various offences and penalties for non-compliance, including imprisonment for religious officers who fail to solemnise marriages in accordance with the stipulated provisions. Marriage officers who violate the Bill by knowingly solemnising prohibited or unauthorised marriages could face penalties of up to 5 years imprisonment. This includes those who delegate solemnisation without authority or assist unappointed officers, aligning with the Act's provisions for ensuring compliance and accountability among marriage officers.

2.14 The Constitution, in Section 9, enshrines the right to equality and prohibits discrimination on various grounds, including gender. Section 19 of the Bill is a pivotal provision that addresses the issue of equal legal status within marriages. This provision ensures that all spouses, regardless of their gender, possess the same legal status and capacity. This principle of equality is deeply intertwined with the Constitution's foundational values and constitutional rights.

2.15 While the Bill presents a comprehensive effort to modernise South Africa's existing marriage laws, it is not without flaws and gaps. These shortcomings, if left unaddressed, could undermine the Bill's intended objectives and potentially lead to legal uncertainties:

- The Bill fails to recognise polyandry (marriage of a woman to multiple men), despite their increasing prevalence and legal significance. This is a glaring omission as other laws recognise civil unions, which include formalised marriage-like partnerships of same-sex couples.
- The Bill does not provide clarity on the legal status of subsequent customary or religious marriages after an initial civil marriage. This omission could lead to complications in matters of inheritance, property rights, and child custody.
- The Bill defines polygamous marriage as one in which a male spouse has multiple wives. This definition reinforces traditional gender roles and contradicts the Bill's objective of gender equality.
- The definition of *lobola* as "*property in cash or kind which a prospective husband or the head of his family undertakes to give to the head of the prospective wife's family in consideration of a customary marriage*" implies that only traditionally male family heads can receive such dowry. This definition does not anticipate a role for women in the negotiating process, especially in instances where the mother of the prospective bride has raised the bride alone.
- The Bill's exclusion of intimate life partnerships from regulation disregards the evolving nature of relationships and fails to provide legal protection and recognition to these partnerships, despite the Constitutional Court having accorded these the same legal status as formal marriages.
- The omission of provisions addressing the legal status and consequences of coexisting civil, customary, and religious marriages creates potential conflicts and uncertainties.

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3. THE FW DE KLERK FOUNDATION'S VIEWS:

- 3.1 The Foundation acknowledges the Bill's commendable attempt to harmonise South Africa's fragmented marriage laws, encompassing various marriage types under a unified legal framework. This move is essential to rectify disparities in property rights, inheritance, and marital obligations among spouses caused by the existing fragmented legal landscape.
- 3.2 We commend the Bill's objectives outlined in Section 2, which include streamlining legal procedures, ensuring marriage validity criteria and standardising marriage solemnisation. These efforts contribute to legal certainty, reducing disputes and promoting equal treatment for all individuals regardless of marriage type or gender.
- 3.3 The Foundation applauds the Bill's alignment with international human rights standards, including the UDHR and the CEDAW. By upholding gender equality, promoting non-discrimination, and recognising the inherent dignity of all individuals within marriages, the Bill exemplifies South Africa's commitment to global human rights norms.
- 3.4 The Bill's integration of equal legal status within marriages, as stipulated in Section 19, resonates with the Constitution's principles of equality and non-discrimination. This provision ensures that spouses, regardless of their gender, enjoy equal rights, aligning with Section 9 of the Constitution, which prohibits discrimination.
- 3.5 The Foundation recognises the Bill's comprehensive approach and alignment with human rights standards. However, the penalties for marriage officers who breach the law by solemnising prohibited marriages raise questions about the potential impact on the practice of religious officers and compliance within diverse cultural contexts.
- 3.6 While the Bill is a significant step towards modernising marriage laws, the Foundation identifies certain shortcomings that require attention. We recommend addressing the exclusion of polyandry, clarifying the legal status of subsequent marriages and revising the definition of polygamous marriage to align with gender equality principles.
- 3.7 Additionally, the definition of *lobola* should be reevaluated to encompass evolving family structures and roles, ensuring fairness and inclusivity. The Foundation urges the inclusion of provisions addressing intimate life partnerships, acknowledging the Constitutional Court's recognition of their legal status.
- 3.8 Lastly, the Bill's silence on coexisting marriages should be rectified to prevent potential conflicts and uncertainties in matters of inheritance, property rights, and child custody.

CONCLUSION

- 4.1. For the abovementioned reasons, the Foundation supports the adoption of the Bill.
- 4.2. In line with section 9 of the Constitution, the Bill will align South Africa's marriage legal framework with

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contemporary societal values and ensure equal rights, ensuring the equal recognition of all marriages.

Kind Regards,

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