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REPORT

ON

CUSTOMARY LAW MARRIAGES

PROJECT 7

LRDC 12

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LAW REFORM AND DEVELOPMENT COMMISSION OF NAMIBIA

To: THE HONOURABLE MINISTER OF JUSTICE

I have the honour to submit to you, in terms of section 9(1) of the Law Reform and Development Commission Act, 1991 (Act. 29 of 1991), the Commission's Report on Customary Law Marriages.

Mr. U D Nujoma
CHAIRPERSON: LRDC
2004-10-29 #

The Law Reform and Development Commission (LRDC) approved this Report before 1 July 2004. With effect from 15 July 2004 a new LRDC, with six new members, were appointed. The final changes indicated by the LRDC were however only effected by the Secretariat during the next few months.

LAW REFORM AND DEVELOPMENT COMMISSION OF NAMIBIA

The LRDC was established by the Law Reform and Development Commission Act, 1991 (Act 29 of 1991) which came into operation on 15 July 1992.

The members of the LRDC on 14 July 2004 were (see # on page (iii)):

Mr U D Nujoma (Chairperson)

Mr JR Walters (appointed as Ombudsman with effect from 1 July 2004)

Adv. D Sauls (nominated by the Law Society of Namibia)

Mr G M Mutwa (Deputy Chief: Legislative Drafting in the Ministry of Justice; nominated by the Minister of Justice)

Mr A Vaatz (Legal Practitioner)

Mr G N Ndauendapo (Legal Practitioner)

There were two vacancies.

The members of the LRDC on 29 October were (see # on page (iii)):

Mr U D Nujoma

Mr J R Walters (Ombudsman)

Ms L Conradie (nominated by the Law Society of Namibia)

Ms N N Shivute (Deputy Chief: Lower Courts in the Ministry of Justice, nominated by the Minister of Justice)

Mr S K Amoo (Lecturer at Law Faculty of University of Namibia)

Mr A Vaatz (Legal Practitioner)

Mr T Kamuhanga-Hoveka (Legal Practitioner)

Ms M Samson (Legal Adviser in Office of the Attorney-General).

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CONTENTS

	Page
1. Introduction and Background.....	1
2. Key Recommendations	2
3. Rationale for Reform.....	6
4. Constitutional Basis for Reform	6
5. Obligations under International Law	7
6. Incidence of Common Law Marriages and Customary Marriages and Divorce in Namibia	9
7. Customary Marriage Law in Namibia.....	9
8. Approach to Customary Marriage Law Reform in Namibia	10
9. Customary Law Marriages under Namibian Statute Law	11
10. Comparative Survey of Customary Marriage Law Reform	13
10.1 Australia	13
10.2 Zimbabwe	14
10.3 South Africa	15
10.4 South African Recognition of Customary Law Marriages Act, 1998 (Act No. 120 of 1998).....	16
11. Recommendations.....	16

Annexure A: Bibliography

Annexure B: Draft Recognition of Customary Law Marriages Bill

Annexure C: Draft Married Persons Equality Amendment Bill

Annexure D: List of persons and institutions consulted

Annexure E: Short consultation report: Traditional Leaders; Ministry of
Regional and Local Government and Housing; Council of Churches in
Namibia.

1. Introduction and Background

- 1.1 The Law Reform and Development Commission (LRDC) initially gave general attention to the broader field of family law as well as customary law. In due course matters that needed special and priority attention were identified and specific projects for such matters were established. One such matter identified as needing urgent reform was the area of customary law marriages. It is for this reason that the LRDC embarked on a project that seeks to ensure that customary law marriages enjoy the same recognition as common law marriages.
- 1.2 The Customary Law Marriages Project was initially handled by the Women and the Law Committee (WLC) of the LRDC, but in August 1999 a specific Project Committee, the Customary Law Marriages and Divorce Committee, was established with Adv Vicky Erenstein Ya Toivo as Chairperson and as members, Prof. M.O. Hinz and Ms Adri van der Merwe (who were also members of the WLC). Later on Ms Marlene Dammert and Adv Lucia Hamutenya also served on the Committee. Ms Van der Merwe, Ms Dammert and Adv Hamutenya are legal practitioners.
- 1.3 The Committee submitted its report (constituted by a draft bill and brief explanatory memorandum) to the LRDC, which was adopted during September 2001 as a basis for further consultation.
- 1.4 A lengthy and protracted consultation process followed with visits undertaken to almost all traditional leaders across the country. They were generally in favour of the Draft Bill. (See Annexure D for the list of all traditional authorities consulted and Annexure E for a Short Consultation Report.)
- 1.5 In addition letters soliciting comments were also written to the Ministry of Home Affairs, the Ministry of Regional and Local Government and Housing, the Ministry of Women Affairs and Child Welfare, the Law Society of Namibia, the Legal Assistance Centre (LAC), the Namibia Law Association (NLA) and the Council of Churches in Namibia. Valuable comments were received from some of these bodies.
- 1.6.1 It must be pointed out that in the initial draft bill it was proposed that the Ministry of Home Affairs must administer the new law. After visiting traditional leaders the LRDC proposed that the Ministry of Regional and Local Government and Housing must administer the new law. The LRDC did not receive any response from the Ministry of Home Affairs. The Ministry of Regional and Local Government and Housing was satisfied with the initial draft Bill, but when again consulted after the said change was made, indicated that they would not be able to perform this task effectively. This issue is further discussed under clause 1 of the proposed draft bill (Annexure B).
- 1.6.2 In order not to further delay the LRDC report, it was decided to rather refer this issue for further consultations between the Ministry of Justice and the said two Ministries during the further legislative process.
- 1.6.3 The LRDC regards it as imperative that the Ministry of Regional and Local Government and Housing, being the ministry generally responsible for

traditional leaders (see Traditional Authorities Act, 2000 (Act No. 25 of 2000)), should administer the new law. The role proposed for such traditional leaders in the draft bill can hardly be carried out by any other functionary and it stands to reason that such traditional leaders should rather get their administrative support, training and guidelines, etc. from the Ministry that is also responsible for their activities in general. The Ministry must of course get the necessary financial and human resources to carry out this function.

- 1.6.4 It must however be emphasized that for obvious reasons the keeping of a central register for all registered customary law marriages should be done by the Ministry of Home Affairs, i.e. as is the case with all common law marriages in terms of Chapter VII of the Births, Marriages and Deaths Registration Act, 1963 (Act No. 81 of 1963). It is therefore provided in the recommended Draft Bill (see Annexure B) that regulations can be made to cover this aspect.

2. Key Recommendations

This Report contains the following as major recommendations:

- 2.1 There shall be full legal recognition for customary law marriages so as to bring them on par with common law marriages.
- 2.2 Recognition shall not only be accorded to customary law marriages that are entered into after the coming into operation of the proposed new law, but to those entered into prior to the coming into operation of the proposed new law as well, provided they comply with relevant requirements.
- 2.3 The proposed new law shall require the mandatory registration of all future customary law marriages so that the question of marital status would become more certain and easier to prove. There shall be then be a two-year grace period after the coming into operation of the proposed new law for the registration of unregistered marriages concluded prior to the coming into operation of the proposed new law. To encourage registration of customary law marriages an awareness campaign must be undertaken to sensitise the public on the need to register.
- 2.4 In an attempt to provide for a national framework receptive to all marriages, the proposed new law lays down several requirements, namely-
- 2.4.1 there must be free consent of intending spouses;
- 2.4.2 a minor must obtain consent as is required in terms of the Marriage Act, 1961 (Act No. 25 of 1961);
- 2.4.3 marriages between parties related within prohibited degrees of relationships shall be prohibited;
- 2.4.4 it shall be prohibited for parties to an existing customary law marriage to contract a subsequent marriage under the common law;

- 2.5 Customary law marriages concluded after the coming into operation of the proposed new law shall be deemed to be in community of property unless spouses contract otherwise. Customary law marriages concluded prior to the coming into operation of the proposed new law shall, as far as proprietary consequences are concerned, be governed by customary law.
- 2.6 Amendments to the Married Persons Equality Act, 1996 (Act No.1 of 1996), so as to make it applicable to customary law marriages are recommended. (See Annexure C).
- 2.7.1 As regards the dissolution of customary law marriages, it has been decided that divorces of customary law marriages must also, as the LRDC intends to recommend in its Report on Divorce, take place on the basis of irretrievable breakdown as a ground of divorce. And as regards the procedure, this shall be in the manner prescribed by customary law, provided that such procedure is neither unconstitutional nor contrary to any other law.
- 2.7.2 However, it should be mentioned that an alternative position was considered whereby customary law divorce proceedings would be commenced in a community court, subject to a right of appeal to a superior court. This option was, however, not adopted.
- 2.8 The proposed policy with regard to multiple marriages could probably be the most controversial policy issue and it is therefore dealt with in detail below. It is also dealt with further under the Explanatory Notes below the relevant clauses of the Draft Bill (Annexure B).

2.8.1 Present situation:

- 2.8.1.1 In terms of existing law, a person married under the common law cannot, while so married, conclude a subsequent marriage under the common law. Bigamy is a common law offence. Normally such a person should not be able to get through a subsequent marriage ceremony because of the requirements and procedures contained in the Marriage Act, 1963 (Act No. 81 of 1963) and the regulations made under the Act. An innocent party is not guilty of the offence of bigamy*. The second marriage is void and does not have the normal consequences of a marriage; this does however mean that the innocent spouse and children from such a marriage are without any legal protection. (*"Bigamy consists in unlawfully and intentionally entering into what purports to be a lawful marriage ceremony with one person while lawfully married to another." [The Law of South Africa - Volume 6; Butterworths, 1981])
- 2.8.1.2. In terms of existing law, a man married under customary law can, while so married, conclude a subsequent marriage (or even more subsequent marriages) if the customary law under which the first and subsequent marriage(s) were concluded provides for that. Such a man is not guilty of the common law offence of bigamy, the reason being that the customary law marriage is not regarded as a valid subsisting marriage for the purpose of bigamy. (This is not put in a gender neutral way as customary law in this

regard is indeed not gender neutral.) The matrimonial property consequences of all these marriages are governed by the customary law.

2.8.1.3 Up till Independence, in terms of the law existing at that point in time, a man married under customary law could, while so married, conclude a subsequent marriage under the common law. This is based on the premise that a marriage under customary law did not enjoy the full status of a marriage. Provisions of the Native Administration Proclamation, 1928 (Proclamation No. 15 of 1928) confirm this. (The strange way in which parts of the said Proclamation were applied to parts of Namibia may raise complication issued in this regard. And the provisions of the Namibian Constitution, i.e. the law since Independence, may also raise even more such complicated questions.) Such a person is also not guilty of the common law offence of bigamy. The matrimonial property consequences of his marriage under customary law is governed by the customary law and the matrimonial property consequences of his marriage under the common law are that of out of community of property and of profit and loss (see section 17 (6) of the said Native Administration Proclamation).

2.8.1.4 The same would probably apply to a man married under common law and who, while so married, conclude a marriage under the customary law, but only if the customary law under which the subsequent marriage is concluded provides for that.

Recommended position:

2.8.1.5

2.8.2.1 The position with regard to subsequent marriages under the common law for persons already married under the common law obviously stays the same.

2.8.2.2 It will be explicitly stated that persons married under customary law, will, while so married, not be allowed anymore to conclude a subsequent marriage under the common law. The common law offence of bigamy will explicitly be extended to cover this too.

2.8.2.3 It will also be explicitly stated that persons married under customary law will, while so married, be prohibited from marrying another person under customary law. No polygamy will be allowed anymore - for existing marriages see paragraph 2.8.2.6 below. This applies to all communities in Namibia. The common law offence of bigamy will explicitly be extended to cover this too.

2.8.2.4 It will also be explicitly stipulated that persons married under the common law will, while so married, not be allowed to conclude a subsequent marriage under customary law. The common law offence of bigamy will be extended to cover this too.

2.8.2.5 Registration of customary law marriages, as provided for in the new law, will have no effect on the above-mentioned. Whether the customary law marriage of a person concluded before the new Act comes into operation is registered or not, he will still not be allowed, while so married, to conclude any other marriage, neither under the common law or the customary law.

- 2.8.2.6 The position of those who are legally married to more than one wife at the time of the coming into operation of the new law will remain unchanged. Such persons can, like others, register their customary law marriages. The new law will stipulate that this must be indicated on certificates in the manner as prescribed by regulations.
- 2.8.2.7 Matrimonial property consequences of marriages will generally receive attention under the LRDC's envisaged project on Matrimonial Property. Attention will then be given to the possibility that all married spouses can change the matrimonial property regime applicable to their marriage after some formalities have been complied with. Only limited possibilities in this regard is proposed in clause 10 of the proposed Draft Bill.
- 2.8.2.8 The possibility to rather not extend the offence of bigamy to future subsequent marriages where one of the marriages is a customary law marriage, has thoroughly been discussed quite regularly. The most convincing argument, on the face of it, seems to be that the very clear and rigid way in which common law marriages are dissolved does not apply at present to customary law marriages i.e. there is not necessarily a formal process ending up in a divorce which is effective from a clear date. Persons should not become guilty of an offence simply if they are under the impression that they are not married anymore to their former spouse. This is however properly covered by the common law offence of bigamy which clearly requires intent. The policy with regard to multiple marriages as far as all Namibians are concerned, will be now clearly stipulated in an Act and if this is not covered by the necessary criminal sanctions the whole purpose will be defeated.
- 2.8.2.9 Nobody who is legally married under the common law or under customary law will, while so married, be allowed to marry the same person again - not under the same law of course, but also not under the other law.
- 2.8.2.9.2. The LRDC has considered the possibility to provide for two spouses in an existing customary marriage (whether concluded prior to the commencement or after the commencement of this Act, and whether or not that marriage is registered) to subsequently get re-married in accordance with the common law, i.e. the subsequent common law marriage would then replace the existing customary law marriage This can only be allowed if the matrimonial property consequences of the subsequent common law marriage stays exactly the same as under the customary law marriage - and it would be necessary to stipulate that in the certificate issued for the common law marriage. If however customary law marriages are put in all respects on par with common law marriages, and such customary law marriages are properly registered and certificates are issued, all possible motivation for such re-marriages that there might have been in the past will fall away. The future law should in no way whatsoever contain any provisions that may carry the impression that customary law marriages are of a lower status.

3. Rationale for Reform

- 3.1 The reform of customary marriages law is premised on the idea that it is necessary to accord customary law marriages with the legal recognition and consequent privileges that are currently only available in common law marriages. It has also been recognized that law reform should be as least intrusive and alter the nature and practice of customary law marriage as little as possible, while at the same time ensuring compliance with the Namibian Constitution and international legal instruments which Namibia has ratified.
- 3.2 The philosophy underlying customary law marriage reform should be that marriages should be regulated for reasons of **certainty** and **necessity**. In other words, the State should not intervene or change customary law marriage practices unless it is **absolutely necessary** in order to protect vulnerable persons such as women and children or to fulfill constitutional guarantees of equality and human rights.
- 3.2.1 Firstly, people must clearly know their rights and duties under the law, and therefore changes are required to remove confusion and create certainty in the law. An example would be where many couples marry under both customary law and common law, which created confusion regarding the rights and duties in the marriage and which raises questions of which legal norms should govern the relationship.
- 3.2.2 Secondly, law reform is required out of necessity, either to remove out-dated practices, to protect vulnerable persons or to make customary law marriage practices satisfy basic human rights.

4. The Constitutional Basis for Reform

- 4.1 Several aspects of customary marriage law violate amongst others the rights to family as well the equality clause as enshrined in the Namibian Constitution, as will be indicated below. And in Articles 4(3) (b) and 12(1) (f) a customary law marriage is placed on an equal footing with a common law marriage.
- 4.2 Article 4(3) provides that:

"The following persons shall be citizens of Namibia marriage:

(a) those 1.vho are not Namibian citizens under Sub-Article (1) or(2) hereof and who:

(aa) in good faith marry a Namibian citizen or, prior to the coming into force of this Constitution, in good faith married a person who 1.would have qualified for Namibian citizenship if this Constitution had been in force, and

(bb) subsequent to such marriage have ordinarily resided in Namibia as the spouse of such person for a period of not less than two(2) years,

and (cc) apply to become citizens of Namibia;

(b) for the purposes *Of this Sub-Article (and I without derogating from any effect that it may have for any other purposes) a marriage by customary law shall be deemed to be a marriage: provided that nothing in this Constitution shall preclude Parliament from enacting legislation which defines the requirements which need to be satisfied for a marriage by customary law to be recognised as such for the purposes Of this Sub-Article.*"

4.3 Article 10 provides that "all persons shall be equal before the law" and prohibits discrimination on the basis of "sex, race, colour, ethnic origin, religion, creed or social or economic status".

4.4 Article 12(1)(£) provides that:

*"No persons shall be compelled to give testimony against themselves or their spouses, **who shall include partners in a marriage by customary law**, and no Court shall admit in evidence against such persons testimony which has been obtained from such persons in violation of Article 8(2)(b) hereof."*

It should be noted that that in both Articles 4(3)(b) and 12(1)(£) reference is made to "customary marriage" and not "customary union", which latter concept has been historically used in legal contexts to indicate a lesser legal context.

4.5 Article 14, which deals with the family, states that men and women of full age have the right to marry, and that they are entitled to equal rights as to marriage, during marriage, and at its dissolution.

4.6 Article 19 of the Constitution contains the right to practice any culture and tradition provided such practice does not infringe upon other terms of the Constitution or upon other rights.

4.7 Article 66 provides that:

"(1) Both the customary law and the common law of Namibia in force on the date of Independence shall remain valid to the extent to which such customary or common law does not conflict with this Constitution or any other statutory law".

4.8 And in terms of Article 95(a), the Government has a constitutional obligation to promote the welfare of the people by enacting legislation to ensure equality of opportunity for women and to enable them to participate fully in all spheres of Namibian society - and that should of course include full participation in marriage and family life.

4.9 It thus follows that the endeavour to recognise customary law marriages has a strong constitutional basis.

5. Obligations under International Law

5.1 Article 23 of the United Nations International Covenant on Civil and Political Rights (ICCPR), to which Namibia acceded on 28 November 1994, provides that:

"(1) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

(2) The right of men and women of marriageable age to marry and found a family shall be recognised.

(3) No marriage shall be entered into without the free and full consent of the intending spouses.

(4) States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children."

- 5.2 The Convention on the Elimination of All Forms of Discrimination of Against Women (CEDAW), to which Namibia acceded on 23 November 1992, sets standards for all marriages. Article 5 of CEDAW requires states to change customs and practices, which are based on the idea of inferiority of women, and article 16 calls for equality in marriage and family life.
- 5.3 Article 17(2) of the African Charter on Human and Peoples' Rights (ACHPR) provides that *"Every individual may freely take part in the cultural life of his community"* while sub-article (3) provides that *"the promotion of and protection of morals and traditional values recognized by the community shall be the duty of the State."* The ACHPR, ratified by Namibia on 30 July 1992, which was then under the auspices of the Organisation of African Unity, has since resorted under the Constitutive Act of the African Union. The latter Act was signed on 27 October 2000, ratified on 28 February 2001 and deposited on 31 March 2001.
- 5.4 Article 18, dealing with family, provides that:
- "(1) The family shall be the natural unit and basis of society. It shall be protected by the State which shall take care of its physical health and moral.*
- (2) The State shall have the duty to assist the family which is the custodian of morals and traditional values recognized by the community.*
- (3) The State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions."*
- 5.5 Article 6 (d) of the Protocol to the African Charter on Human and People's Rights on the Rights of Women states that, *"every marriage shall be recorded in writing and registered in accordance with national laws, in order to be legally recognised"* The Namibian Government has recently ratified the above Protocol with reservations to Article 6(d) because legislation on customary law marriages, as proposed in this Report, has not yet come into operation.
- 5.6 In terms of Article 144 of the Namibian Constitution the general rules of international law and agreements form part of the law of Namibia and the country, having ratified the above instruments, has an obligation to see to it that its customary laws meet international standards and promote the equal rights of women.

6. **Incidence of Common Law Marriages and Customary Law Marriages and Divorce in Namibia**

Statistics as contained in the publication, Central Statistics Office: 2001 Population and Housing Census National Report: Basic Analysis with Highlights, July 2003 reflect the incidence of customary and common law marriages in Namibia as follows:

About 56% of the Namibian population is never married, with about 19% being married at common law. And about 9% is married traditionally while 7% is married consensually. Some 3% is divorced persons while about 4% are widowed.

The highest incidences of married persons are found in the Caprivi (54%), Kunene (48%) and Kavango (61%) regions.

7. **Customary Marriage Law in Namibia**

[The information appearing hereunder is a summarised version as taken from the Report of the Legal Assistance Centre titled: "Proposals for Law Reform on the Recognition of Customary Marriages."]

7.1 Concept of marriage at customary law

A customary law marriage is referred to as a political and economic alliance between two families or kinship groups based on a common interest in the marriage and children of the marriage. A customary law marriage involves a series of negotiations between two kinship groups and creates rights and responsibilities between all family members.

7.2 Age of majority

Customary laws do not set a minimum age for marriage, but marriage generally does not take place before puberty, or before the attainment of an acceptable level of social maturity.

7.3 Consent to marriage

Family consent is generally required for a marriage to proceed, but nowadays (in most communities) the consent of both the intended spouses is generally necessary as well.

7.4 Formalities

A customary marriage is a process which is accomplished by a series of rites and negotiations which take place over time, in contrast to common law marriages which are solemnised by a single formality.

7.5 Polygyny

All traditional marriages which take place under customary law are potentially polygynous although there now seems to be a growing trend towards "second house" relationships where a married man sets up a house with another woman without following common law or customary law formalities.

7.6 Marital Property

While joint property is not a common concept in Namibian customary law systems, certain communities in the Caprivi treat certain types of marital property as joint property.

7.7 Legal Capacity

The legal capacity of women under customary law is in some respects unclear. Although the wife may have some areas of independent decision-making power, the husband in most cases has a greater share of authority or is considered to be the head of the household with respect to its internal affairs.

7.8 Adultery

As a corollary to the concept of polygyny, it is generally considered acceptable for a husband to have extramarital affairs, whilst the wife is expected to remain faithful to her husband.

7.9 Divorce

A number of grounds of divorce are recognised under Namibia's various customary law systems. These include adultery by the wife, taking a second wife without the consent of the first, and various forms of unacceptable behaviour such as drunkenness, witchcraft or neglect of the children. The extended families of the two spouses play a large role in mediation and attempting to resolve marital disputes. Divorce is usually accomplished by an informal procedure which takes place without any intervention from traditional leaders, who are more likely to become involved if there are issues which cannot be resolved between the couple and their families.

8. Approach To Customary Marriage Law Reform

8.1 One of the key policy questions that needs to be answered is which approach to adopt in addressing customary law marriage reform.

8.2 Amongst the approaches generally followed are unification, integration (or harmonization), or a plural legal system. M W Prinsloo in "Pluralism or unification in family law in South Africa" [XX.III Cilsa 1990 at 325) makes the following distinction between "unification", "integration" and "harmonization":

8.3.1 "Unification" entails a change in the condition of legal pluralism to unity of law. Complete unification means the creation of a uniform system of law which substitutes the existing legal systems completely. In the case of family law it

would mean one system with the same rules for all persons and groups. The uniform system could be composed of elements of the different legal systems or the unification process could be the adoption of one system as uniform law for all persons and abolition of the other systems.

The one advantage with unification is that it creates an efficient legal system with minimum conflict.

8.3.2 "Integration" amounts to partial unification, however small it may be. It means bringing together under one enactment the different laws with regard to a particular branch, for example marriage or family matters, in order that the different systems continue to exist but without conflict and that some elements thereof may be unified. Integration embodies a practical approach to the question of unification, namely that unification can be achieved gradually or by a cumulative process, unifying rules where this is possible and leaving matters which cannot be unified to the personal laws of the parties.

8.3.3 "Harmonization" is also seen as different from integration. It seeks to eliminate points of friction between the different legal systems but leaves the systems to continue to exist separately. An example of harmonization would be to place customary and civil marriage on an equal basis, that is considering both marriages as valid marriages with recognition and protection of the rights of the spouses and children. The main benefit of this approach lies in that it gives the communities the most autonomy and allows for self-regulation. However, the disadvantages are that it maintains historical divisions and creates conflict situation.

8.4 As to which approach to follow, guidance can be sought from section 6 of the Law Reform and Development Commission Act, 1991 (Act No. 29 of 1991). Paragraphs (b) and (c) of section 6 provide that the objects of the LRDC include the consolidation and codification of any branch of law and, the integration or harmonisation of common law and statutory law respectively.

8.5 It can therefore be stated that the approach followed by LRDC is that of both harmonisation and integration and not unification.

8 Customary law marriages under Namibian Statute Law

8.3 Customary law marriages never enjoyed legal recognition prior to Independence in 1990, primarily because of their polygynous nature.

8.4 Owambo Native Commissioner, M Tuupainen, in "Marriage in a Matrilineal African Tribe: A Social Anthropological Study of Marriage in the Ondonga Tribe" (1970) [at 121] states that:

"Marriage is a monogamous relationship, established by means of a State ceremony!], between a male and a female who have agreed to get married, obliging them to live together for life until the union is set aside by a competent court, and to afford/ each other conjugal rights".

8.5 Native Administration Proclamation, 1928 (Proclamation No. 15 of 1928)

If there is any piece of legislation from the pre-Independence era to have enormously impacted on customary law marriages, then it is the Native Administration Proclamation, 1928 (Proclamation No. 15 of 1928).

The history of this Proclamation is important to a discussion of the recognition of customary law marriages for several reasons, namely-

- 8.5.1 It provided rules guided in part by forms of marriage for when customary law would apply and when "European" law would apply to questions of succession.
- 8.5.2 It acknowledged a particular form of polygyny - a customary law marriage co-existing with a subsequent common law marriage.
- 8.5.3 It provided special legal provisions on matrimonial property and succession to deal with this form of polygamy.
- 8.5.4 It established a state forum - the Native Commissioner's Courts - empowered to deal with divorces arising from both customary and common law marriages.

- 9.3.3 A key provision in the Proclamation is section 17(6) which reads:

"A marriage between natives, contracted after the commencement of this Proclamation, shall not produce the legal consequences of marriage in community of property between the spouses: Provided that in the case of a marriage contracted otherwise than during the subsistence of a customary union between the husband and any woman other than the wife it shall be competent for the intending spouses at any time within one month previous to the celebration of such marriage to declare jointly before any magistrate, native commissioner or marriage effacer (who is hereby authorized to attest such declaration) that it is their intention and desire that community of property and profit and loss shall result from their marriage, and thereupon such community shall result from their marriage".

- 9.3.4 It must be pointed out that the LRDC has already submitted to the Minister of Justice a Report on Uniform Default Matrimonial Property Consequences of Common Law Marriages (Repeal of section 17 of Native Administration Proclamation, 1928 (Proclamation 15 of 1928)) during July 2003. The LRDC recommended that the repeal of this section should be "fast-tracked" and not stand over until the LRDC's Report on broader issues of succession and estates is finalised. The Minister of Justice has however indicated that he is of the opinion that it is not advisable to separate such an aspect from that of the broader issues. The LRDC is trying to finalize its comprehensive Report on Succession and Estates before 2005.

9.4 Married Persons Equality Act, 1996 (Act No. 1 of 1996)

- 9.4.1 The Married Persons Equality Act, 1996 (Act No. 1 of 1996) has been hailed as a positive development in the championing of women's rights. This legislation has abolished the Roman Dutch concept of marital power in terms of which the husband automatically assumes the role of head of the household.

9.4.2 The provisions of the Act pertaining to marital power and the head of the household were not extended to customary law marriages, since these were common law concepts which were applicable only to common law marriages. This position was severely criticized in certain quarters as it was found discriminatory towards those women who are married under customary law.

9.4.3 There are, however, two aspects of the Married Persons Equality Act which were made applicable to customary law marriages as well as to common law marriages. Firstly, the Act provides (section 14) that partners in a marriage will normally have equal guardianship of any children of that marriage. Secondly, the provisions of the Act dealing with domicile also apply to both common and customary law marriages (section 16).

9.5 Other Statutes

9.5.1 There seems to be a general trend in post-Independence laws to explicitly include customary law marriages in general provisions concerning marriage. The following is a list of statutory provisions (which list is not necessarily complete) where customary law marriages are explicitly treated as (common-law) marriages for all intents and purposes:

9.5.1.1 Section 3 of the Maintenance Act, 2003 (Act No. 9 of 2003)

9.5.1.2 Section 3(3)(a) of the Namibian Citizenship Act, 1990 (Act No. 14 of 1990)

9.5.1.3 Section 16(1)(b)(iii) of the Regional Councils Act, 1992 (Act No. 22 of 1992 as amended)

9.5.1.4 Section 4(3) of the Employees Compensation Act, 1995 (Act No. 30 of 1995)

9.5.1.5 Section 8(4) of the Arms and Ammunition Act, 1996 (Act No 7 of 1996)

9.5.1.6 Section 2(3) of the Combating of Rape Act, 2000 (Act No.8 of 2000)

9 Comparative Survey of Customary Law Marriage Reform: Australia, Zimbabwe and South Africa

A comparative survey of the approach followed in selected countries reveals that valuable lessons can be learned from these jurisdictions. South Africa and Zimbabwe were specifically chosen for their legal systems being similar to that of Namibia and having comparable socio-political circumstances.

9.3 Australia [The information appearing below was obtained from the website, [www.austlii.edu .au](http://www.austlii.edu.au)]

9.3.1 Patterns of traditional marriage amongst Aborigines continue to strongly feature in Australia's Northern Territory as well as in other parts of Western Australia, South Australia and Queensland. In the 1996 Report, the Australian Law Commission recommended that parties to traditional Aboriginal marriage should be regarded as married persons for the purposes of general Australian law

pertaining to such questions as the status of children, adoption, fostering and child welfare laws, inheritance, accident compensation, social security, spousal compellability, and marital communications in the law of evidence and spousal income tax rebates.

- 9.3.2 The Commission further recommended that there should not be any minimum age requirements for traditional marriage, and that registration should not be required, but rather that traditional authorities should be granted the option of setting up registration systems for themselves.

9.4 Zimbabwe

The information appearing hereunder has been obtained from Statute Law of Zimbabwe, Volume 1, Revised Edition 1996.

9.4.1 The Constitution

The Zimbabwean Constitution prohibits discrimination on the basis of race, tribe, place of origin, political opinions, colour or creed. As per 1996 constitutional amendment, sex has now been added as one of the prohibited grounds for discrimination. However, all aspects of customary law are explicitly excluded from the equality clause, as per Article 23(3) of the Constitution.

9.4.2 Statute law

- 10.2.2.1 Relevant legislation in this respect is the Customary Marriages Act (Chapter 5:07), to be read with the Married Persons Property Act [Chapter 5:12) and the Matrimonial Causes Act [Chapter 5:13).

- 10.2.2.2 In terms of section 3(1) of the Customary Marriages Act, a customary marriage shall be regarded as a valid marriage only if it is registered in terms of the Act otherwise failure to register would invalidate the marriage. Unregistered marriages would, however, be still valid for the purposes of determining status, guardianship, and children's rights of succession, for which the marriage can be ascertained by ordinary means.

- 10.2.2.3 It can therefore be concluded that in Zimbabwe, three categories of marriage can be found:

- (i) civil marriages (as solemnized in terms of the Marriage Act);
- (ii) registered customary marriages (solemnized in terms of the Customary Marriages Act); and
- (iii) unregistered customary marriages, usually referred to as "customary law unions" (which follow customary law and are not valid for general law purposes).

- 10.2.2.4 Civil marriages and registered customary marriages have the same property consequences and substantive rules concerning dissolution, but

unregistered customary marriages follow local custom on the above points.

10:3 **South Africa**

- 10.3.1 The South African Law Commission (SALC) had for years Leading up to 1985) been considering customary law. Its 1985 Report on Marriages and Customary Unions of Black Persons recommended the recognition of customary marriages, but the proposal was not implemented.
- 10.3.2 In 1996, the SALC published an Issue Paper (Issue Paper number 74 of the SALC) on customary marriages which called for public comment. Initial comments received from the public were summarised and incorporated into a Discussion Paper published in August 1997. This paper culminated in a Report on Customary Marriages (Project Number 90 of the SALC) which was published in August 1998.
- 10.3.3 The key recommendations of the SALC report were the following:
- 10.3.3.1 All customary marriages should continue to be potentially polygamous.
- 10.3.3.2 Free consent of spouses should be a primary requirement for a valid customary marriage.
- 10.3.3.3 Giving of lobola should not be prohibited nor should any restriction be imposed on the amount payable. And that lobola should not be deemed essential for the validity of customary law marriages, instead parties wishing to give it should be free to do so, with payment or non-payment having no effect on the spouses' marriage.
- 10.3.3.4 With respect to the fact that couples in South Africa often marry in terms of both customary and common law, the SALC suggested that the consequences of the marriage should be determined by the law expressly chosen by the parties to the marriage. If no choice was expressed, then a court should apply the law that is consonant with the lifestyles of the parties.
- 10.3.3.5 Spouses in customary law marriage should have equal legal and contractual capacity, as well as equal powers of decision-making. It was also suggested that the Age of Majority Act, 1972 (Act No. 57 of 1972) should be made explicitly applicable to persons subject to customary law.
- 10.3.3.6 All customary marriages should be registered to make sure the parties' marital status is made more certain and easier to prove. And although it was recommended that registration should be compulsory, no obvious penalty was to be introduced.
- 10.3.3.7 To encourage more people to register, traditional authorities were to constitute registering officers.

- 10.3.3.8 To ensure maturity on the part of spouses, a minimum age of 18 was recommended.
- 10.3.3.9 Regarding the rights and powers over marital property, it was suggested that one spouse should have the power to bind the other's estate for household necessities as is the position with common law marriages.
- 10.3.3.10 On the issue of dissolution, it was proposed that customary marriages be dissolved by a court order through the family courts. And the suggested ground of divorce would be irretrievable breakdown of the marriage.

10.4 The Recognition of Customary Law Marriages Act, 1998 (Act No. 120 of 1998)

The Recognition of Customary Marriages Act followed most of the recommendations made by the South African Law Commission.

Amongst the salient features of the Act are:

- 10.4.1.1 Section 17 provides that customary marriages would all be in community of property unless there was an antenuptial contract which provides otherwise.
- 10.4.1.2 Sections 7(1) and 7(4) provide that all customary marriages entered into prior to the commencement of the Act continue to be governed by the proprietary provisions of customary law, although such couples can apply to court for a change in their marital property system.
- 10.4.1.3 In contrast with the SALC's proposal that a court should have power to order the refund of bridewealth, the Act provides in section 8(4)(e) that the court granting a divorce decree may, when making an order for the payment of maintenance, take into account any provision or arrangement made in accordance with customary law.

10 Recommendations

The LRDC makes the following recommendations, namely-

- 11.1.1 the enactment of the Draft Recognition of Customary Law Marriages Bill attached hereto as Annexure B (Further explanations are given in frames below clauses of the Draft Bill.);
- 11.1.2 the enactment of the Draft Married Persons Equality Amendment Bill attached hereto as Annexure C; and
- 11.2.1. that apart from the necessary regulations, also extensive guidelines and directives (i.e. manuals) be prepared before the proposed law comes into operation and that thorough training be provided to those who must administer it;
- 11.2.2 that an awareness campaign, intended to sensitise the general public, in particular in the general public, in particular in the rural areas, must go hand in hand with the enactment of this legislation.

ANNEXURE A

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ANNEXURE B

DRAFT RECOGNITION OF CUSTOMARY LAW MARRIAGES BILL

BILL

To provide for the full legal recognition of marriages concluded under the customary law; to specify additional requirements for such marriages; to provide for the registration of such marriages; to provide for the **matrimonial property consequences of such marriages; to repeal rules limiting the legal capacity of certain persons; and to provide for incidental matters.**

*(Introduced by the Minister of Justice I Regional and local Government and Housing
(?))*

ARRANGEMENT OF SECTIONS

Section

1. Definitions
2. Recognition of customary law marriages
3. Requirements for customary law marriage
4. Party to existing marriage prohibited from concluding another marriage
5. Registration of new customary law marriages
6. Registration of existing customary law marriages
7. Certificates
8. Unregistered customary law marriages
9. Consent
10. Matrimonial property consequences of customary law marriage
11. No rule of law diminishing legal capacity of persons subject to customary law to operate
12. Dissolution of customary law marriages
13. Regulations
14. Short title and commencement

BE IT ENACTED by the Parliament of the Republic of Namibia, as follows:-

1. Definitions

In this Act, unless the context indicates otherwise -

"customary law marriage" means a marriage that complies with the relevant requirements set out in section 3;

"Minister" means the Minister responsible for regional government;

"Permanent Secretary" means the Permanent Secretary of the Ministry responsible for regional government;

"prescribed" means prescribed by regulation.

Explanatory Note:

1. See also paragraph 1.6 of the Report. In the LRDC's initial draft bill it was suggested that the administration of the bill should be vested in the Ministry of Home Affairs. Following consultation with various stakeholders, in particular traditional leaders, it has become apparent that this legislation is closer in spirit to the activities of Ministry of Regional and Local Government and Housing and as a result it would be more appropriate if the administration thereof is to be vested with the latter Ministry.

2 It will imply that the Ministry of Regional and Local Government and Housing will be tasked with such responsibilities as the appointment of customary law marriage officers and the actual solemnisation of marriages. The responsibility of maintaining a central register of customary law marriages will rest with the Ministry of Home Affairs as is presently the case with common law marriages -see clause 13(2).

Recognition of customary law marriages

2. (1) A customary law marriage is for all purposes in law regarded as a valid marriage and -

- (a) any reference to "marriage" in any law is construed so as to include a customary law marriage unless the customary law nature of the marriage has the effect that the provision concerned is clearly inappropriate for a customary law marriage;
- (b) any reference in any agreement (including any insurance policy or the rules of a pension fund) to a marriage is construed to include a reference to a customary law marriage, unless it is clearly demonstrated that the parties intended to exclude a customary law marriage from the agreement in question.

(2) The provisions of this section apply to a law or agreement that exists at the time of the commencement of this Act as well as to a law that is made or an agreement that is concluded after the commencement of this Act.

Explanatory Note:

1 This clause, which pertains to the recognition of customary law marriages, is the core provision of the bill. It essentially provides that a customary law marriage will for all intents and purposes be treated in a similar manner as a marriage under the common law.

2. Customary law marriages have all long been seen as second-class institutions. For instance, a person married under customary law could virtually nullify his or her union by marrying again under common law. And husbands in particular have had an easy method of ridding themselves of their wives without having to go through regular divorce procedures. (It should be noted that references to common law marriages include marriages solemnised by a functionary of a church who acted in his or her capacity as a marriage officer authorised by the State.)

3. Many existing statutes refer to "marriages". Some of them explicitly ensure that customary law marriages are placed on the same footing as other marriages (see e.g. the post-Independence laws mentioned in paragraph 9.5 of the Report), but other older laws may not be so clear. The purpose of this provision is to ensure that any reference in any law will indeed be a reference to customary law marriages as well. It is of course not easy to foresee what the exact scope of such a general reference to the word could be, but it was tested as far as possible.

4. Clause 2(1)(b) specifically deals with contracts such as insurance policies as well as rules of pension funds because these are matters that present most of the practical problems.

Requirements for customary law marriage

3. (1) A customary law marriage must -

- (a) in the case of a marriage concluded before the commencement of this Act, comply with the provisions of subsection (2); and
- (b) in the case of a marriage concluded after the commencement of this Act, comply with the provisions of subsections (2) and (3).

(2) A customary law marriage must be concluded in accordance with the customs applicable to the traditional community to which the parties belong, or if the parties do not belong to the same traditional community, be concluded in accordance with the customs of that community to which one of the parties belong, as preferred by the parties.

(3) A customary law marriage concluded after the commencement of this Act may only be concluded if-

- (a) both parties to that marriage have freely consented thereto;
- (b) any party who is a minor has obtained the consent from the persons and institutions that are required by the provisions of the Marriage Act, 1961 (Act No.25 of 1961) ;
- (c) the parties who contract such marriage are not related to each other by affinity or blood to such a degree that their marriage would not be valid in terms of applicable customary law;

- (d) neither prospective spouse is a party to an existing customary law marriage or a marriage under the common law.

Explanatory Note:

1. Clause 3 prescribes requirements for a customary law marriage to be recognised as such in terms of this Act. A distinction is then drawn between marriages concluded prior to the commencement of the Act and those concluded thereafter. In the former case, marriages will be recognized whether they comply with the minimum requirements prescribed in terms of subclause (3), or not. In the case of marriages concluded after the commencement, they will only be recognized if they comply with these requirements.

2. In respect of paragraph (b) of subclause (3) it must be pointed out that the Ministry of Home Affairs is in the process of formulating new marriage legislation, which, if passed, may perhaps prescribe different requirements regarding the persons and institutions from which a minor may need to obtain consent.

3. Paragraph (c) of subclause (3) is based on the approach followed in both South Africa and Zimbabwe. In terms of this approach prohibited degrees of relationship are regulated by applicable customary law rather than by either common law or statute.

4.1 Paragraph (d) reinforces the notion that under the new law, bigamy (and naturally polygamy) will be outlawed, implying that in future nobody can contract a second marriage whilst the first one is still in existence.

4.2 There are various arguments that have been raised both for and against the retention of polygamous marriages in the new law:

4.2.1 At the forefront of arguments against, is that polygamous relations are structured around one man and several wives, which fact will inevitably harm the women involved.

4.2.2 A further argument against polygamy is that it can lead to competition between women for the attention and resources of a single man, which can in turn be used as an excuse to abandon the older wife.

4.2.3 The main argument for polygamy lies in the fact that women have the power to choose whether or not to be party to a polygamous relationship.

4.3 It was then against this background that a decision was taken that, since polygamy is becoming less a feature in Namibian society, a system along monogamous lines should be adopted as this would lead to more certainty in the marital system.

Party to existing marriage prohibited from concluding another marriage

- 4(a) No person may, while married under customary law or under the common law, conclude a marriage with another person under the customary law or under the common law.

- (b) A person who contravenes the provisions of paragraph (a) shall be guilty of the common law offence of bigamy.

Explanatory Note:

1. This clause extends the common law offence of bigamy to all future multiple marriages. See paragraph 2.8 of the Report.

2. It was considered to also provide that the two parties in an existing customary law marriage (whether concluded prior to the commencement or after the commencement of this Act and whether or not that marriage is registered) may subsequently get married in accordance with the common law. The subsequent common law marriage would then replace the existing customary law marriage, but the matrimonial property consequences of the subsequent common law marriage would be exactly the same as under the customary law marriage. This is however not recommended: It will simply strengthen the perception that a customary law marriage is still not on the same footing as a common law marriage - something that this new law tries to eliminate. It will in any event also complicate matters - in particular matrimonial property issues.

3. Where parties decide to officially get married under the common law (i.e. either before the magistrate or before the pastor acting as an official marriage officer), but merely want to go through a traditional ceremony, whether before or after the official marriage, it will of course mean that there is indeed not a customary law marriage - i.e. the ceremony does not have the legal consequences of a customary law marriage. In other words the intention of the parties as regards the choice of the marital regime and applicable matrimonial property consequences would be paramount.

Registration of new customary law marriages

5. (1) If a customary law marriage that complies with the provisions of section 3 is concluded, such marriage must be registered in the prescribed manner for it to be legally recognised as a valid marriage.

(2) (a) (i) The Permanent Secretary may appoint persons to act as customary law marriage officers for a traditional community for which a traditional authority has been established in terms of section 2 of the Traditional Authorities Act, 2000 (Act No. 25 of 2000).

(ii) The appointment of a person in terms of subparagraph (i) may be limited to the carrying out of only some of the powers, duties and functions that vest in customary law marriage officers in terms of this Act.

(b) The Permanent Secretary may, in a particular case or generally, and subject to such directions as he or she may deem fit, delegate the power conferred upon him or her by paragraph (a) to a staff member in his or her Ministry.

(3) If a customary law marriage has been concluded, it is the duty of the customary law marriage officer appointed for the relevant traditional community to determine whether the provisions of this Act have been complied with: Provided that the customary law marriage officer must determine the question whether the marriage complies with the customs of the relevant traditional community in consultation with the traditional authority of that traditional community.

(4) If a customary law marriage officer is satisfied that the provisions of this Act have been complied with, he or she has such duties relating to the registration of the marriage concerned as are prescribed and is subject to such penalties as may be prescribed for the failure to comply with such duties.

(5) If a customary marriage officer registers a customary law marriage, he or she must issue a certificate in the prescribed form to the parties to that marriage.

Explanatory Note:

1. This section deals with the registration of customary law marriages, specifically those concluded after the coming into operation of the proposed law.

2. Different countries have approached the issue of registration of customary marriages differently:

2.1 In Zimbabwe, failure to register customary marriages would result in a marriage being rendered illegitimate for many legal purposes. And in Zambia, registration is purely optional, which approach has achieved very little success. And in Uganda, a much harsher stance is followed, it being mandatory to register a customary law marriage within six (6) months of contracting it. Non-compliance does not result in delegitimisation, but instead in a significant fine.

2.2 It was initially decided to follow to follow the South African model as provided for in the RSA's Recognition of Customary Marriages Act, 1988 (Act No. 120 of 1988). In terms of that Act it is mandatory to register customary marriages, with no penalty for failure to register. After due consideration, the LRDC decided to make the registration of future customary law marriages in Namibia mandatory. This position is consistent with article 6(d) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (see paragraph 5.5 of the Report), which has been ratified by Namibia.

3. Arguments for and against registration:

3.1 Various arguments have been advanced for the registration of customary law marriages:

3.1.1 It facilitates proof of existence of the customary law marriage and of particulars contained in the certificate (including the identity of the parties and the date of the marriage).

3.1.2 It ensures certainty for the spouses who have contracted a customary marriage.

3.1.3 It provides a means for the State to create laws to protect vulnerable family members.

3.1.4 It can be used as a tool to confer legal validity on customary marriages.

3.2 Arguments against the registration of customary law marriages include:

3.2.1 Registration would increase the State's power, influence and control over a citizen's private marital affairs.

3.2.2 It can be both expensive and inaccessible.

4.1 Subclause (2) authorises the Permanent Secretary of the Ministry of Regional and Local Government and Housing to appoint customary law marriage officers - and to delegate this authority to staff members in that Ministry. In some of the consultations conducted with traditional leaders it has overwhelmingly been recommended that customary law marriage officers should have a good standing in their communities and be well-versed in local customs. The Permanent Secretary is further authorized to specify that some customary law marriage officers can only carry out some of the tasks, i.e. only registration of new marriages, registration of existing marriages, issuing of divorce certificates, etc.

4.2 Such customary law marriage officers will be appointed for a traditional community - and it is done by cross-reference to the Traditional Authorities Act, 2000 (Act No. 25 of 2000). ("Traditional community" is defined as "*an indigenous homogenous, endogamous social grouping of persons comprising families deriving from exogamous clam which share a common ancestry, language, cultural heritage, customs and traditions, who recognizes a common traditional authority and inhabits a common communal area, and may include the member of that traditional community residing outside the common communal area.*")

5 There seems to be no reason why this provision should be of a more flexible nature or that it should refer to geographical areas. There will simply be customary law marriage officers for those communities where such marriages are still being concluded.

6.1 Subclause (3) highlights the vital role that traditional authorities would have to play in advancing the broader objectives of this new law. Section 3 of the Traditional Authorities Act, 2000 (Act No. 25 of 2000) confers various powers, duties and functions on traditional leaders and members thereof.

6.2 Warranting special mention is subsection (1)(b) relating to the administration and execution of customary law of the particular traditional community; subsection (1)(e) pertaining to the performing of traditional ceremonies and functions held within that traditional community; and subsection (1)(h) on performing any other function as may be conferred upon it by law or custom.

6.3 It is thus from the above provisions that the consultative role of traditional leaders is derived. This role pertains not only to the registering of customary law marriages, but also in ascertaining customs applicable in certain communities.

7. The provisions of subclause (4) are self-explanatory. It merely serves as a punitive clause for acts of negligence on the part of customary marriage officers.

8. Subclause (5) relates to the certification of marriages. After the registration of a customary law marriage, there will be an obligation on the part of the marriage officer to issue a marriage certificate, just as it is the position with common law marriages. Further particulars on this point will be dealt with under the regulations .

A certificate is intended to constitute *prima facie* proof of the existence of the marriage union (see clause 7).

Registration of existing customary law marriages

6. (1) Any person-

- (a) who alleges that he or she is a party to an existing customary law marriage which was concluded before the commencement of this Act;
- (b) who alleges that he or she is a child born from parents who have concluded a customary law marriage before the commencement of this Act; or
- (c) who has a substantial interest in the question whether two persons have concluded a customary marriage before the commencement of this Act;

may apply to the relevant customary law marriage officer to register that marriage.

(2) The customary law marriage officer may request such further information as may be necessary to determine whether the customary law marriage complies with the relevant provisions of this Act and must consult, where appropriate, the traditional authority of that traditional community.

(3) If the customary law marriage officer is satisfied that the customary law marriage concerned complies with all the relevant provisions of this Act, he or she must issue a certificate to the effect that the parties concerned have concluded a customary law marriage and. he or she has such further duties relating to the registration of the marriage concerned as are prescribed and is subject to such penalties as may be prescribed for the failure to comply with such duties.

(4) The requirements with which an application in terms of subsection (1) must comply as well as the procedure to be followed by the customary law marriage officer when such an application is considered, must be prescribed: Provided that such requirements and procedure must give every person who has a substantial interest in the matter an adequate opportunity to present relevant information to the customary law marriage officer.

(5) Any person who has a substantial interest in a decision by the customary law marriage officer to register a customary law marriage or to refuse to register a customary law marriage may appeal to the High Court within the prescribed period in the prescribed manner.

(6) For two years after the commencement of this section, or such longer period as the Minister may determine by notice in the *Gazette*, no fee must be charged for the registration of an existing customary law marriage.

Explanatory Note:

1. The LRDC's approach is that it would just be fair to extend the advantages of registration to existing customary law marriages as well. As a matter of fact it is recommended (see paragraph 11.2 of Report) that to make a success of this initiative, an awareness campaign should be conducted to make the public aware of the need to register their marriages.

2. Subclause (1) sets out the list of categories of people that can apply to a customary law marriage officer for the registration of an existing customary law marriage. These are:

a person alleging to be party to the marriage;
 a child alleging to be born of such a marriage; and
 any person who has a substantial interest in the existence of the marriage.
 Envisaged under (iii) are, for instance, pension funds, the Guardian Fund, executors in deceased estates, etc.

3. Subclause (5) provides that persons who are aggrieved by decisions of customary law marriage officers can seek redress from the High Court. Some comments were received that designating the High Court would lead to problems of accessibility to most people who are subject to customary law and that it must be considered to take such matters to the magistrates' courts. It must however be borne in mind that it is very unlikely that disputes in this regard will be the order of the day and whenever there are such disputes they will most probably entail adjudication of difficult issues .

4. It is expected that extensive guidelines should be prescribed in the regulations.

5. It is trusted that providing that the registration of existing customary law marriages will be free of charge for at least two years, as in subclause (6), will encourage persons to make use of the opportunity to register such marriages. The LRDC is of the opinion that thereafter a rather heavy fee must be charged (say N\$2000).

Certificates

7. A certificate issued in terms of section 5(6) or 6(3) is *prima facie* proof of any matter contained therein.

Explanatory Note:

In simple terms this means that certificates must be accepted on its face value and that the holder of such certificate can rely on that. Whoever wants to dispute it will carry the onus to prove otherwise.

Unregistered customary law marriages

8. An unregistered customary law marriage concluded before the commencement of this Act is regarded as a valid customary law marriage if it complies with all the provisions of section 3(1)(a) or if such marriage is deemed to be valid as a result of the provisions of section 9(3).

Explanatory Note:

This provision deals with unregistered customary law marriages. Such marriages, if concluded prior to the commencement of this Act, stays valid. It is not only impractical to declare a marriage not to be valid from any specific point in time, but it is also against the spirit of the provisions of the Namibian Constitution referring to customary law marriages.

Consent

9. (1) A customary law marriage officer may only register a customary law marriage concluded after the date of commencement of this Act, if the express consent of all the persons and institutions whose consent is required under the provisions of this Act, has been obtained.

(2) Subject to the provisions of subsection (3), a customary law marriage officer may only register a customary law marriage concluded after the commencement of this Act, if both parties to such a marriage have consented to such registration.

(3) If the person whose consent has not been obtained is one of the parties to the marriage that is to be registered and the person concerned refuses to consent to the registration or the consent of that person cannot be obtained, then it is deemed that the consent of such person has been validly obtained if it is clear that such person has tacitly given his or her free and voluntary consent to the marriage or voluntarily ratified the marriage.

(4) Where the consent of the person or institution that was not obtained, was required due to the minority or youth of a party to the marriage, that party may apply to a court having jurisdiction for a declaration that such marriage is void.

Explanatory Note:

1. This provision is an extension/ expansion of section 3(a) and (b).

2. Consent is considered the most basic requirement of a marital union to the extent that even Article 14(2) of the Namibian Constitution provides that "*Marriage shall be entered into on/y with the free and full consent of the intending spouses.*". With the assumption that "marriage" in the Namibian Constitution refers to both common law and customary law marriages, it can only be assumed that consent constitutes an integral requirement of customary unions.

3. The reason behind requiring free and full consent is quite simple and clear: Persons should not be forced into marriage against their wish. And as it is usually only women who are so forced, these provisions will further enhance the equality of men and women.

Matrimonial property consequences of customary law marriage

10. (1) Subject to the provisions of subsections (2) and (3), a customary law marriage concluded after the commencement of this Act will have the consequences of a marriage in community of property.

(2) If the parties have concluded an agreement or made a declaration that complies with the prescribed requirements, regulating the matrimonial consequences of the marriage concerned, then that contract or declaration will regulate the matrimonial property consequences of the marriage concerned.

(3) The matrimonial property consequences of a customary law marriage concluded before the commencement of this Act are regulated by the applicable customary law.

(4) The parties to a customary law marriage concluded before the commencement of this Act, and provided that the husband is not married to any other woman too, may cause their marriage to be in community of property by the execution and registration of a notarial contract to that effect within two years from the commencement of this section, or such longer period, but not less than six months, determined by the Minister of Justice by notice in the *Gazette*.

Explanatory Note:

1. Clause 10 relates to marital property consequences of customary law marriages. Presently two marital property regimes exist in Namibia namely, marriage in community of property and marriage out of community of property.

2. Marriage in community of property:

2.1 The pre-marital and marital assets and debts of the parties form one joint estate. Each spouse owns half of the joint estate and each has equal rights to dispose of assets and to contract debts. Each can administer the joint estate without the consent of the other spouse, but the important dealings require the consent of both spouses.

2.2 The advantage of this marital property regime lies in the fact that spouses share equally in their collective wealth during the marriage, and upon divorce the wife is entitled to half of the estate. The disadvantage of marriage in community of property, on the other hand, is that spouses do share the collective debts.

3. Marriage out of community of property:

3.1 Each spouse owns and controls his or her separate estate. The advantages are that each party has a right to control their own assets, and that spouses do not share each other's debts.

3.2 However, this regime can prove disadvantageous to women because they cannot share in their husband's wealth upon dissolution of the marriage even though they may have indirectly contributed to the husband's estate.

4. There is also the third possible option; it is not yet applicable in Namibia, but has been in use in e.g. South Africa for some time now. The "marriage out of community of property with accrual" system keeps the estate of the parties separate during the marriage. In the event of separation or death, the growth of the two estates is divided between the parties

5. Situational Analysis

5.1 The present position with default matrimonial proprietary consequences in Namibia is based on an arbitrary geographical distinction, having no rational basis.

5.2 In terms of section 17(6) of the Native Administration Proclamation, 1928 (Proclamation No. 15 of 1928), all common law marriages in the central and southern part of Namibia are in community of property unless the parties make an antenuptial contract stating otherwise. And civil marriages between residents of the northern regions of Ovambo, Kavango and Caprivi, as they were formerly known, are automatically out of community of property unless the couple makes a special joint declaration before a magistrate to the contrary within one month before the marriage.

5.3 As regards numerous existing customary law marriages, the position has always been such that each party to the marriage had to maintain a separate estate. The above then reflects the extent to which customary law has and still continues to lean towards the system of out of community of property.

6.1 Subclause (1) reflects the LRDC's choice for marriages concluded after the commencement of the proposed law, i.e. that they would automatically be in community of property.

6.2 Despite initial suggestions to retain the out of community of property option, it was felt that such an option would amount to subjecting women and other vulnerable parties to permanent poverty. This then left "marriage in community of property" as the only viable option for the following reasons:

- holding separate estates can be destructive of marriage as an institution;
 - it signals a shift in values and responsibilities (especially for women);
-

- customary values do favour community of property, since every member is entitled to support from their community estate.

6.3 It is then for the above reasons that the LRDC decided that all customary marriages concluded after the commencement of the proposed new law be automatically in community of property.

7. Subclause (2) makes provision for spouses to parties to regulate their matrimonial consequences in a manner other than in community of property. More detail must be prescribed in the regulations.

8. Subclause (3) enforces the view that the new Act should not have a retroactive effect on existing matrimonial property arrangements.

9. Subclause (4) has been inserted after comments were received. It was argued that the new law will effect a sharp divide between past and future customary law marriages and that seems unfair. Provision is therefore made that spouses in a already existing customary law marriage can change their matrimonial property system to be one of in community of property. This can of course only be provided for a monogamous marriage.

10.1 It is important to point out that the LRDC has already submitted a Report on Uniform Default Matrimonial Property Consequences of Common Law Marriages (Repeal of section 17(6) of Native Administration Proclamation, 1928 (Proclamation 15 of 1928) to the Minister of Justice in July 2003. This was meant to be a "fast-track" report under the LRDC's Succession/Estates Project. The urgent repeal of the said section 17(6) was recommended as well as provisions for spouses to a customary law marriage who were married out of community of property to change their marriages to in community of property (i.e. like in subclause (4)). The indications are however that the Honourable Minister deems it advisable to rather not separate any particular aspect from the broader issues.

6.2 It is also important to point out that the LRDC envisages embarking on a project on Matrimonial Property. It may be advisable not to provide for any changes of matrimonial property regimes before all new possibilities with regard to such regimes have not been developed and enacted.

No rule of law diminishing legal capacity of persons subject to customary law to operate

11. (1) A person married under customary law, whether before or after the commencement of this Act, and if married before the commencement of this Act, whether such married is registered or not, has the same legal capacity as a person married under common law.

(2) The effect of subsection (1) is that any person who is a major according to the rules of the common law, may institute or defend proceedings in any court of law, (whether such proceedings are brought under the customary law or under the common law) without the assistance of any other person and also that such person has

full capacity to perform a juristic act and to own property (whether under the common law or under the customary law).

Explanatory Note:

1. Clause 11 is intended to entrench the equality bedrock of the Namibian Constitution.
 2. Under certain traditional communities' customary laws, some persons (particularly women) only have diminished legal capacity to act, which includes the capacity to bring personal actions, to own personal property and to enter into contracts.
 3. This provision therefore seeks to repeal any rule that may diminish the legal capacity of persons subject to customary law as well as rules that address the question of majority under customary law differently from the common law.
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Dissolution of customary law marriages

12(1)(a) A customary law marriage may be dissolved on the ground of irretrievable breakdown.

- (b) A customary marriage may be dissolved in the manner and procedure determined by the applicable customary law, provided the manner and procedure are not unconscionable or unreasonable in terms of the Namibian Constitution or any other law.

(2) The dissolution of a valid customary law marriage will only take effect after a certificate is issued by a customary law marriage officer to that effect.

(3) A customary law marriage officer may only issue a certificate provided for in subsection (2) -

- (a) if he or she is satisfied that the dissolution concerned has taken place in accordance with the applicable customary law;
- (b) if an agreement contemplated in subsection (4) has been reached or, if no such an agreement has been reached, a court has made an order under subsection (5).

(4) If the dissolution of a valid customary law marriage is accompanied by an agreement relating to the division of property or the custody or maintenance of any children, such agreement must be recorded in the certificate referred to in subsection (2).

(5) A person who had been a party to a valid customary law marriage that was dissolved in accordance with the provisions of this section may approach the

High Court to settle any dispute or enforce any agreement that resulted from the dissolution of the marriage concerned.

Explanatory Note:

1. Clause 12 deals with the dissolution of customary law marriages.

2. Current customary law on divorce:

2.1 A number of **grounds** are recognised under Namibia's various customary systems, amongst them adultery by the wife, taking the second wife without the consent of the first one, and various forms of unacceptable behaviour such as drunkenness, witchcraft or neglect of the children.

2.2 The **procedure** is primarily informal in nature with spouses invoking the assistance of extended family members in mediating and attempting to resolve marital disputes. Traditional leaders only intervene in the divorce process where issues cannot be resolved between the couple and their families.

3. Recommended position

3.1 Deciding on the appropriate **ground** of dissolution has proved to be problematic. After due consideration it was decided that the most appropriate ground of dissolution is irretrievable breakdown of the marriage as this is consistent with recommendations of the LRDC in its Report on Divorce for marriages under the common law.

3.2 Regarding the **procedure**, several options were considered.

3.2.1 One can follow the approach followed in South Africa where customary law marriages are dissolved by means of a court order issued by the High Court. The problem with this approach concerns accessibility in that persons married under customary law would often not have the means to have their marriages dissolved through such a costly forum that is at present only situated in the capital city.

3.2.2 It is for this reason that it is deemed appropriate to deal with dissolution of customary law marriages in terms of procedure followed under applicable customary law.

3.2.3 And to deal with the initial concern raised by some stakeholders that some procedures might be found wanting for being both unconstitutional and eroding the rights of vulnerable parties, this has now been dealt with by way of the proviso under subclause (1).

4. Subclause (2) is premised on the idea that since the State is involved in the contracting of the marriage, it is therefore necessary that the State be involved in the dissolution of the marriage. For this reason, a certificate by a customary law marriage officer is required before the divorce becomes

effective. This will also link the divorce to a specific date which is for various reasons advisable.

5.Subclause (3) makes the issuance of a divorce certificate subject to two conditions.

5.1 Firstly, the customary law marriage officer must satisfy himself or herself that the requirements of customary law as regards the dissolution of marriages have been complied with.

5.2 Secondly, that officer must ensure that either there is an agreement in place regarding the division of property, custody and maintenance of the children or that a court has made an order that regulates these matters. This condition is intended to prevent later conflict in respect of property and to safeguard the children's best interests.

6.Subclause (5) provides a forum for persons aggrieved by any dispute or enforcement of any agreement resulting from the dissolution of the marriage. The appeal can be lodged with magistrates court.

Regulations

13. (1) The Minister may make regulations -

- (a) prescribing the duties of customary law marriage officers;
- (b) prescribing the forms and documentation that are required when an application is made under the provisions of this Act for the registration of an existing customary law marriage;
- (c) prescribing the procedures that must be followed when a customary law marriage is concluded and when application is made for the registration of an existing marriage;
- (d) prescribing any matter that is required to be prescribed under the provisions of this Act;
- (d) providing for any matter that is necessary to be regulated in order to facilitate the operation of this Act.

(2) The Minister responsible for the registration of births, deaths and marriages, in consultation with the Minister, may make regulations to generally provide, as far as customary law marriages are concerned, for such matters as are dealt with in respect of marriages under the common law in the Births, Marriages and Deaths Registration Act, 1963 (Act No. 81 of 1963).

(3) Regulations made under the provisions of this Act may -

- (a) contain different provisions in respect of different communities;

- (b) prescribe penalties for any contravention of or failure to comply **with** their provisions not exceeding a fine of N\$ 1000 or imprisonment for a period not exceeding three months or both such fine and such. imprisonment.
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Explanatory Note:

1. The regulations to be made under this Act in terms of clause 13 will be of the utmost importance for the smooth implementation of the new law. It will require wide spread consultation.

2. Subclause (2) provides that, as far as central registry matters are concerned, and which is the responsibility of the Minister of Home Affairs, the same can be extended by way of regulations to customary law marriages.

Short title and commencement

14. This Act is called the Recognition of Customary Law Marriages Act and will come into operation on a date to be determined by the Minister in the *Gazette*.

Explanatory Note:

It is imperative that the new Act will only come into operation after proper preparation has been made for its implementation and after the general public have been given ample notice.

BILL

To amend the Married Persons Equality Act, 1996, so as to amend the long title of the Act; to insert certain definitions; to adjust the provision relating to the abolition of marital power given to either spouse under common law or customary law; to afford equal capacity to all spouses; to make the provisions of the Married Persons Equality Act, 1996 applicable to marriages in community of property irrespective of whether such community of property result from common law or customary law principles; to provide for the regulation of liability for household necessities of spouses married out of community of property irrespective of whether such separate estates result from common law or customary law principles; to extend the application of the Married Persons Equality Act, 1996 to all marriages; to restrict the application of the amended section 1 of the Matrimonial Causes Jurisdiction Act, 1939 to marriages contracted under the Marriages Act, 1961; and to provide for matters incidental thereto.

(Introduced by the Minister of Justice)

BE IT ENACTED by the Parliament of the Republic of Namibia as follows:-

ANNEXURE B

Amendment of the long title to Act No. 1 of 1996

1. The long title of the Married Persons Equality Act, 1996 (hereinafter referred to as the principal Act) is amended by the insertion of the words "any form of " immediately after the word "abolish".

Amendment of section 1 of Act No. 1 of 1996

2. Section 1 of the principal Act is amended by -

(a) the insertion of the following definition before the definition of " joint estate":

"in community of property" means the husband and wife from date of marriage are the owners of one joint estate comprising all their property, movable or immovable;"; and

(b) the addition of the following definition:

"out of community of property" means the husband and wife ~~ten~~owners each of his and her separate estates comprising his or her movable and immovable property after date of their marriage;" . .

Amendment of section 2 of Act No. 1 of 1996

3. Section 2 of the principal Act is amended by the substitution for paragraphs (a) and (b) of subsection (1) of the following paragraphs:

- "(a) **[the]** any rule in common law [rule] or customary law in terms of which a husband or a wife acquires **[the]** any form of marital power over the person and property of his **[wife]** or her spouse is hereby repealed; and
- (b) **[the]** any form of marital power which any husband had in common law or customary law over the person and property of his wife **[immediately]** before the commencement of this Act, is hereby abolished."

Substitution of section 3 of Act No. 1 of 1996

4. The following section is substituted for section 3 of the principal Act:

"Effect of abolition of marital power

3. Subject to this Act, the effect of section 2(1) is -
- (a) to **[remove the restrictions which the marital power places]** afford equal capacity to all spouses whether they are married under the provisions of the Marriage Act, 1961 (Act No. 25 of 1961) or customary law and to remove the restrictions which any form of [the] marital power [places] may have placed on the legal capacity of a wife to contract and litigate, including, but not limited to, the restrictions on her capacity -
- (i) to register immovable property in her name;
 - (ii) to act as an executrix of a deceased estate;
 - (iii) to act as a trustee of an insolvent estate;
 - (iv) to act as a director of a company; and
 - (v) to bind herself as surety; and

- (b) that the common law position of the husband as head of the family and any similarly defined position of a husband or a wife in a customary law marriage is abolished, provided that nothing herein shall be construed to prevent a husband and wife from agreeing between themselves to assign to one of them, or both, any particular role or responsibility within the family."

Substitution of section 4 of Act No. 1 of 1996

5. The following section is substituted for section 4 of the principal Act:

"Application of this Part

4. The provisions of this Part shall apply to every marriage in community of property, irrespective of the date on which such marriage was entered into and irrespective of whether such community of property resulted from common law or customary law principles."

Amendment of section 15 of Act No. 1 of 1996

6. The following subsection is substituted for subsection (1) of section 15 of the principal Act:

"(1) Spouses married out of community of property irrespective of whether such separate estates resulted from common law or customary law principles, are jointly and severally liable to third parties for all debts incurred by either of them in respect of necessaries for the joint household."

Substitution of section 16 of Act No. 1 of 1996

7. The following section is substituted for section 16 of the principal Act:

"Application of Act to all marriages

16. The provisions of this Act shall apply to all marriages whether by customary law or contracted under the Marriages Act, 1961 (Act No. 25 of 1961) (or any substituting legislation)."

Substitution of section 17 of Act No. 1 of 1996

8. The following section is substituted for section 17 of the principal Act:

"Amendment of section 1 of Matrimonial Causes Jurisdiction Act, 1939, as amended by section 6 of Act No. 37 of 1953 and section 21 of Act No. 70 of 1968

17. ill The following section is hereby substituted for section 1 of the Matrimonial Causes Jurisdiction Act, 1939:

"Jurisdiction

1. (1) A court shall have jurisdiction in a divorce action if the parties are or either of the parties is -

- (a) domiciled in the area of jurisdiction of the court on the date on which the action is instituted; or
- (b) ordinarily resident in the area of jurisdiction of the court on the said date and have or has been ordinarily resident in Namibia for a period of not less than one year immediately prior to that date.

(2) A court which has jurisdiction in terms of subsection (1) shall also have jurisdiction in respect of a claim in reconvention or a counter-application in the divorce action concerned.

(3) A court which has jurisdiction in terms of this section in a case where the parties are or either of the parties is not domiciled in Namibia shall determine any issue in accordance with the law which would have been applicable had the parties been domiciled in Namibia on the date on which the divorce action was instituted.

(4) The provisions of this Act shall not derogate from the jurisdiction which a court has in terms of any other law or the common law.

(5) For the purposes of this Act a divorce action shall be deemed to be instituted on the date on which the summons is issued or the notice of motion is filed or the notice is delivered in terms of the rules of court, as the case may be."

(2) The substitution of section 1 of the Matrimonial Causes Jurisdiction Act, 1939 by sub-section (1) shall, notwithstanding the provisions of section 16 of this Act, only apply to marriages contracted under the Marriages Act, 1961 (Act No. 25 of 1961)."

Short title and commencement

9. This Act shall be called the Married Persons Equality Amendment Act, 2004, and shall come into operation on a date to be determined by the Minister of Justice by notice in the *Gazette*.

Explanatory Notes to the Married Persons Equality Amendment Bill, 2004:

One major point of criticism levelled against the married Persons Equality Act, 1996 (Act No. 1 of 1996), is that it does not apply (*in its entirety*) to customary marriages. The reason initially put forward by then was that customary marriages were so complicated that they warranted further research.

It is on this basis that the amendments to sections 1, 2, 4, 16 and 17 are proposed, which if effected would make the Married Persons Equality Act, 1996 (Act No. 1 of 1996), applicable to customary marriages.

ANNEXURE D

List of Persons and Institutions consulted:

- (1) Ministry of Regional and Local Government and Housing
- (2) Ministry of Home Affairs
- (3) Ministry of Women Affairs and Child Welfare
- (4) Council of Churches in Namibia
- (5) Legal Assistance Centre
- (6) Law Society of Namibia
- (7) Namibia Lawyers' Association
- (8) Ombalantu Traditional Authority
- (9) Uukwaluudhi Traditional Authority
- (10) Uukolonkadhi Traditional Authority
- (11) Ongandjera Traditional Authority
- (12) Uukwambi Traditional Authority
- (13) Ndonga Traditional Authority
- (14) Kwanyama Traditional Authority
- (15) Mbukushu Traditional Authority
- (16) Kwangali Traditional Authority
- (17) Gciriku Traditional Authority
- (18) Sambyu Traditional Authority
- (19) Mbunza Traditional Authority
- (20) Mafwe Traditional Authority
- (21) Masubia Traditional Authority
- (22) Mayeni Traditional Authority
- (23) Damara Traditional Authority
- (24) Witbooi Traditional Authority
- (25) Bondelswarts Traditional Authority
- (26) Soromas Traditional Authority
- (27) Kai -#Kun Traditional Authority
- (28) Topnaar Traditional Authority
- (29) Afrikaner Traditional Authority
- (30) Swartbooi Traditional Authority
- (31) Blouwes Traditional Authority
- (32) Vaalgras Traditional Authority
- (33) Batswana BaNamibia Traditional Authority

ANNEXURE E

SHORT CONSULTATION REPORT: TRADITIONAL LEADERS, MINISTRY OF REGIONAL AND LOCAL GOVERNMENT AND HOUSING AND THE COUNCIL OF CHURCHES IN NAMIBIA.

The process leading up to the drafting of the Draft Recognition of Customary Law Marriages Bill entailed an extensive and drawn-out consultation process mostly with traditional leaders throughout the country, the Council of Churches in Namibia (CCN), the Law Society of Namibia, the Legal Assistance Centre, the Ministry of Regional and Local Government and Housing and the Ministry of Home Affairs.

Traditional Leaders

Virtually all traditional leaders are in agreement with the main proposals as contained draft bill. However there are those that expressed some reservations about certain clauses in the proposed legislation.

An opinion was expressed regarding the standing and qualifications required of persons to become customary law marriage officers with most traditional leaders suggesting that these be drawn from persons that are well-versed in customary **law. (Oshana and Kavango Regions)**

There were traditional leaders that recommended to see the retention of polygamous marriages; seeing this phenomenon as a way of life in their communities. (**Tribal Authorities in the Caprivi Region and to a lesser extent the Batswana Tribal Authority**) The latter tribal authority wished to establish whether, as is presently the practice amongst the Tswana speaking people, it would be possible for persons to get married to more than wife subject to permission from the first wife.

A highlight of consultation with the **Namas** was that in that community people are no longer getting married under customary law. However, the traditional leaders consulted indicated that if the bill is revived, there is a strong possibility that lots of people would be interested as this practice would be affordable.

Ministry of Regional and Local Government and Housing

This Ministry expressed concern over two matters:

- the future of polygamous marriages, considering that the emphasis of the new law is more on monogamy; and
- that it may be a good thing that customary marriage officers be drawn from the ranks of justices (or judges) of the community courts.

Council of Churches in Namibia

A major point of concern for many traditional leaders was whether the new legislation would go down well with the churches, which for years had been solemnising common law marriages. The CCN has commented positively on the draft bill in general, but expressed reservations on a few aspects of the proposed law:

- the minimum age for persons to enter into customary law marriage considering that in the past young girls had been forced into getting getting married without their consent;
- the state of polygamous marriages under the new law; and
- the effect of the new bill on the role of pastors, who for ages have been solemnising marriages.