

REPUBLIC OF SOUTH AFRICA

GENERAL (FAMILY) LAWS AMENDMENT BILL

*(As introduced in the National Assembly (proposed section 76); explanatory summary of
Bill and prior notice of its introduction published in Government Gazette No. 52939 of 4
July 2025)*
(The English text is the official text of the Bill)

(MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT)

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

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

To amend the—

- Divorce Act, 1979, to provide for consequential amendments of certain sections, arising from the amendments to the Mediation in Certain Divorce Matters Act, 1987, and to provide for the transfer of assets by a court granting a decree of divorce in respect of a marriage out of community of property, regardless of when it was entered into;
- Matrimonial Property Act, 1984, to provide for the distribution of matrimonial property of a marriage out of community of property upon the dissolution of the marriage by death; and
- Mediation in Certain Divorce Matters Act, 1987, to provide for the functions of the Office of the Family Advocate, to provide for the amendment of the short title, and to provide for the amendment of the long title, and to provide for matters connected therewith.

Amendment of section 6 of Act 70 of 1979, as amended by section 6 of Act 24 of 1987 and section 3 of Act 1 of 2024

1. Section 6 of the Divorce Act, 1979, is hereby amended by the substitution in subsection (1) for paragraph (b) of the following paragraph:

“(b) if an enquiry is instituted by the Family Advocate in terms of section [4(1)(a) or (2)(a)] 4(3) of the Mediation in Certain **[Divorce]** Family Matters Act, 1987, has considered the report and recommendations referred to in **[the said]** section [4(1)] 4.”.

Amendment of section 7 of Act 70 of 1979, as amended by section 36 of Act 88 of 1984, section 2 of Act 3 of 1988, section 2 of Act 7 of 1989, section 1 of Act 44 of 1992, section 11 of Act 55 of 2003, section 1 of Act 12 of 2020 and section 4 of Act 1 of 2024

2. Section 7 of the Divorce Act, 1979, is hereby amended—

(a) by the substitution in subsection (3) for paragraph (a) of the following 15 paragraph:

“(a) entered into **[before the commencement of the Matrimonial Property Act, 1984,]** in terms of an antenuptial contract by which community of property, community of profit and loss and accrual sharing in any form are excluded;”;

- (b) by the substitution in subsection (7) for paragraph (a) of the following paragraph:
- “(a) In the determination of the patrimonial benefits to which the parties to any divorce action may be entitled, the pension interest of a party shall, subject to **[paragraphs]** paragraph (b) **[and (c)]**, be deemed to be part of **[his]** that party’s assets.”;
- (c) by the substitution in subsection (7)(b) for the words preceding subparagraph (i) of the following words:
- “The amount so deemed to be part of a party’s assets, shall be reduced by any amount of **[his]** that party’s pension interest which, by virtue of paragraph (a), in a previous divorce—”; and
- (d) by the deletion in subsection (7) of paragraph (c).

Amendment of section 8 of Act 70 of 1979, as amended by section 7 of Act 24 of 1987

3. Section 8 of the Divorce Act, 1979, is hereby amended by the substitution for subsection (1) of the following subsection:
- “(1) A maintenance order or an order in regard to the custody or guardianship of, or access to, a child, made in terms of this Act, may at any time be rescinded or varied or, in the case of a maintenance order or an order with regard to access to a child, be suspended by a court if the court finds that there is sufficient reason therefor: Provided that if an enquiry is instituted by the Family Advocate in terms of section **[4(1)(b) or (2)(b)]** 4(3) of the Mediation in Certain **[Divorce]** Family Matters Act, 1987, such an order with regard to the custody or guardianship of, or access to, a child shall not be rescinded or varied or, in the case of an order with regard to access to a child, not be suspended before the report and recommendations referred to in **[the said]** section **[4(1)]** 4 have been considered by the court.”.

Amendment of section 12 of Act 70 of 1979, as amended by section 8 of Act 24 of 1987

4. Section 12 of the Divorce Act, 1979, is hereby amended by the substitution for subsection (3) of the following subsection:
- “(3) The provisions of subsections (1) and (2) shall *mutatis mutandis* apply with reference to proceedings relating to the enforcement or variation of any order made in terms of this Act as well as in relation to any enquiry instituted by a Family Advocate in terms of the Mediation in Certain **[Divorce]** Family Matters Act, 1987.”.

Insertion of section 24A in Act 88 of 1984

5. The following section is hereby inserted after section 24 of the Matrimonial Property Act, 1984:

“Distribution of matrimonial property of marriage out of community of property upon dissolution of marriage by death

- 24A.** (1) Where a marriage is dissolved by the death of a spouse, a court may, on the dissolution of a marriage out of community of property referred to in section 7(3) and (3A) of the Divorce Act, 1979 (Act No. 70 of 1979), and a customary marriage entered into in terms of an antenuptial contract referred to in section 7(2) of the Recognition of Customary Marriages Act, 1998 (Act No. 120 of 1998)—
- (a) on application by a surviving spouse or the executor of the estate of the deceased spouse;
- (b) in the absence of any agreement regarding the division of assets; and
- (c) subject to, with the necessary changes required by the context, the provisions of section 7(4), (5), (6) and (7) of the Divorce Act, 1979, order that such assets, or such part of the assets, of the surviving spouse or the estate of the deceased spouse, as the case may be, as the court may deem just, be transferred to the applicant.
- (2)(a) A claim in terms of subsection (1) may not be made by or against an executor of a deceased estate that has been finally wound up.

(b) Subsection (1) will have no effect on the validity of any exercise of power, duty, function, procedure, process, provision or any other act performed in respect of the administration of a deceased estate that has been finally wound up.”.

Substitution of section 4 of Act 24 of 1987

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6. The following section is hereby substituted for section 4 of the Mediation in Certain Divorce Matters Act, 1987:

“Functions of Office of Family Advocate

4. (1) The functions of the Office of the Family Advocate include, but are not limited to—

- (a) mediation services to children, parents and interested parties involved in disputes relating to the fulfilment and exercising of parental responsibilities and rights;
- (b) conducting investigations and making a report and recommendations to the court regarding the best interest of a child;
- (c) assisting parents and interested parties to reach agreement on disputed issues relating to the care, contact, custody, maintenance, access and guardianship of a child; and
- (d) any other function assigned by any other law.

(2) Where the rights of a child are affected in terms of—

- (a) the Maintenance Act, 1998 (Act No. 99 of 1998);
- (b) the Domestic Violence Act, 1998 (Act No. 116 of 1998);
- (c) the Children’s Act, 2005 (Act No. 38 of 2008); or
- (d) any application or action proceedings instituted, which may affect the exercise of any right by a parent or interested party regarding the care, contact, custody or guardianship of a child or for the variation, rescission or suspension of any order with regard to such rights,

a Family Advocate must, if so requested by any party to the proceedings or if so ordered by the court, institute an enquiry in order to furnish the court with a report and recommendations on any matter concerning the best interest of every child involved in such proceedings.

(3) A Family Advocate may, if it is in the best interest of any child concerned, apply to the court concerned for an order authorising such Family Advocate to institute an enquiry contemplated in subsection (2).

(4) A Family Advocate must, if it is in the best interest of any child concerned or if so requested by a court, appear at the hearing of any application or action proceedings referred to in subsection (2) and may adduce any available evidence relevant to the application and cross-examine witnesses giving evidence thereat.”.

Substitution of section 9 of Act 24 of 1987

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7. The following section is hereby substituted for section 9 of the Mediation in Certain Divorce Matters Act, 1987:

“Short title [and commencement]

9. [(1)] This Act [shall be] is called the Mediation in Certain [Divorce] Family Matters Act, 1987[, and shall come into operation on a date fixed by the State President by proclamation in the Gazette.

(2) Different dates may be fixed under subsection (1) in respect of different provisions of this Act].”.

Substitution of long title of Act 24 of 1987

8. The following long title is hereby substituted for the long title of the Mediation in Certain Divorce Matters Act, 1987:

“ACT

To provide for [mediation in certain divorce proceedings, and in certain applications arising from such proceedings, in which minor or dependent children of the marriage are involved, in order to safeguard the interests of such children; and to amend the Divorce Act, 1979, in order to provide for the consideration by a court in certain circumstances of the report and recommendations of a Family Advocate before granting a decree of divorce or other relief and to make the provisions of section 12(1) and (2) of the said Act applicable to an enquiry instituted in terms of this Act] the appointment of Family Advocates; to provide for the appointment of Family Counsellors; to provide for the functions of the Office of the Family Advocate; and to provide for matters connected therewith.”.

Short title

9. This Act is called the General (Family) Laws Amendment Act, 2025.

MEMORANDUM ON THE OBJECTS OF THE GENERAL (FAMILY) LAWS AMENDMENT BILL, 2025

1. PURPOSE OF BILL

1.1 The purpose of the Bill is to amend the—

- (a) Divorce Act, 1979 (Act No. 70 of 1979) (“Divorce Act”), in order to align the Divorce Act with the Constitutional Court’s order in the case of *EB (born S) v ER (born B) and Others; KG v Minister of Home Affairs and Others* [2023] ZACC 32 (“*EB and KG judgment*”);
- (b) Matrimonial Property Act, 1984 (Act No. 84 of 1984) (“Matrimonial Property Act”), in order to align the Matrimonial Property Act with the Constitutional Court’s order in the *EB and KG judgment*; and
- (c) Mediation in Certain Divorce Matters Act, 1987 (Act No. 24 of 1987) (“Mediation Act”), following the Constitutional Court’s judgment in *Centre for Child Law v TS and Others* [2023] ZACC 22 (“*Centre for Child Law judgment*”).

1.2 Divorce Act and Matrimonial Property Act

1.2.1 The amendments give effect to the orders of the Constitutional Court in the *EB and KG judgment*. The Constitutional Court judgment is in respect of two cases, which were heard together, and decided simultaneously on 10 October 2023. The Bill seeks to give effect to the Constitutional Court’s finding on the limited scope of application of the redistribution remedy provided for in section 7(3) of the Divorce Act by providing for the wider application of the redistribution remedy to marriages out of community of property in two ways. First, by removing the limitation of the remedy to only marriages out of community of property concluded before the commencement of the Matrimonial Property Act and second, by extending the remedy to marriages out of community of property which are dissolved by the death of a spouse.

1.2.2 The Constitutional Court made the following order in *EB (born S) v ER (born B) and Others* (Case CCT 364/21):

- “1. The High Court’s order of constitutional invalidity is confirmed.
- 2. Subsection 7(3) of the Divorce Act 70 of 1979 is declared inconsistent with the Constitution and invalid to the extent that it fails to include the dissolution of marriage by death.
- 3. The declaration of invalidity is suspended for a period of 24 months from the date of this order to enable Parliament to take steps to cure the constitutional defects identified in this judgment.
- 4. Pending any remedial legislation as contemplated in paragraph 3 above, and pursuant to this Court’s conclusions in the present case and in Case CCT 158/22 *KG v Minister of Home Affairs and Others*, which has been decided simultaneously with the present case, the Matrimonial Property Act 88 of 1984 is to be read as including, as section 36A, the following provision:

“(1) Where a marriage out of community of property as contemplated in paragraphs (a), (b) or (c) of subsection 7(3) of the Divorce Act, 1979 (Act 70 of 1979) is dissolved by the death of a party to the marriage, a court may, subject *mutatis mutandis* to the provisions of subsections 7(4), (5) and (6) of the said Divorce Act, and on application by a surviving party to the marriage or by the executor of the estate of a deceased spouse to the marriage as the case may be (hereinafter referred to as the claimant), and in the absence of agreement between the claimant and the other spouse or the executor of the

deceased estate of the other spouse (hereinafter referred to as the respondent), order that such assets, or such part of the assets, of the respondent as the court may deem just, be transferred to the claimant.

(2) For purposes of subsection (1), paragraph (a) of subsection 7(3) is to be read as excluding the following words: ‘before the commencement of the Matrimonial Property Act, 1984’.”.

5. *The order in paragraph 4 shall have no effect on the validity of any acts performed in respect of the administration of a deceased estate that has been finally wound up by the date of this order and no claim as contemplated in paragraph 4 may be made by or against the executor of a deceased estate that has been finally wound up by the date of this order. . . .”.*

1.2.3 The Constitutional Court made the following order in *KG v Minister of Home Affairs and Others* (Case CCT 158/22):

- “1. The High Court’s order of constitutional invalidity is confirmed.
2. Paragraph (a) of subsection 7(3) of the Divorce Act 70 of 1979 (Divorce Act) is declared inconsistent with the Constitution and invalid to the extent that it fails to include marriages concluded on or after the commencement of the Matrimonial Property Act 88 of 1984 (Matrimonial Property Act).
3. The declaration of invalidity is suspended for a period of 24 months from the date of this order to enable Parliament to take steps to cure the constitutional defects identified in this judgment.
4. Pending any remedial legislation as contemplated in paragraph 3 above, paragraph (a) of subsection 7(3) of the Divorce Act is to be read as excluding the words in strike-out text below:

“(a) entered into ~~before the commencement of the Matrimonial Property Act, 1984~~, in terms of an antenuptial contract by which community of property, community of profit and loss and accrual sharing in any form are excluded;”.
5. The order in paragraph 4 above shall not affect the legal consequences of any act done or omission or fact existing before this order was made in relation to a marriage concluded on or after 1 November 1984.
6. Pending any remedial legislation as contemplated in paragraph 3 above, and pursuant to this Court’s conclusions in the present case and in Case CCT 364/21 *EB (Born S) v ER (Born B) N.O. and Others*, which has been decided simultaneously with the present case, the Matrimonial Property Act is to be read as including, as section 36A, the following provision:

“(1) Where a marriage out of community of property as contemplated in paragraphs (a), (b) or (c) of subsection 7(3) of the Divorce Act, 1979 (Act 70 of 1979) is dissolved by the death of a party to the marriage, a court may, subject *mutatis mutandis* to the provisions of subsections 7(4), (5) and (6) of the said Divorce Act, and on application by a surviving party to the marriage or by the executor of the estate of a deceased spouse to the marriage as the case may be (hereinafter referred to as the claimant), and in the absence of agreement between the claimant and the other spouse or the executor of the deceased estate of the other spouse (hereinafter referred to as the respondent), order that such assets, or such part of the assets, of the respondent as the court may deem just,

be transferred to the claimant.

(2) For purposes of subsection (1), paragraph (a) of subsection 7(3) is to be read as excluding the following words: ‘before the commencement of the Matrimonial Property Act, 1984’.”.

- 7. The order in paragraph 6 shall have no effect on the validity of any acts performed in respect of the administration of a deceased estate that has been finally wound up by the date of this order and no claim as contemplated in paragraph 6 may be made by or against the executor of a deceased estate that has been finally wound up by the date of this order. . . .”.*

1.3 Mediation Act

- 1.3.1 The purpose of the amendments to the Mediation Act is to give effect to the *Centre for Child Law* judgment by extending the scope of the functions of the Office of the Family Advocate.

- 1.3.2 In the *Centre for Child Law* judgment, the Constitutional Court made the following order:

“1. The order of the High Court, Gauteng Local Division, Johannesburg, declaring section 4 of the Mediation in Certain Divorce Matters Act 24 of 1987 to be inconsistent with the Constitution and invalid is confirmed to the extent that it precludes never-married parents and married parents who are not going through a divorce, and their children, from accessing the services of the Office of the Family Advocate in the same manner as married parents who are divorced or going through a divorce do.

- 2. The declaration of invalidity referred to in paragraph 1 shall not be retrospective and is suspended for a period of 24 months to enable Parliament to cure the defect in the Mediation in Certain Divorce Matters Act giving rise to its invalidity.*

- 3. During the period of suspension referred to in paragraph 2, the Mediation in Certain Divorce Matters Act shall be deemed to include the following additional provision:*

“Section 4A

- (1) The Family Advocate shall—*

(a) after an application has been instituted that affects, or is likely to affect, the exercise of any right, by a parent or non-parent with regard to the custody or guardianship of, or access to, a child; or after an application has been lodged for the variation, rescission or suspension of an order with regard to any such rights, complete Annexure B to the regulations, if so requested by any party to such proceedings or the court concerned, institute an enquiry to enable them to furnish the court at the hearing of such application with a report and recommendations on any matter concerning the welfare of each minor or dependent child of the marriage concerned or regarding such matter as is referred to them by the court.

- (2) Any Family Advocate may, if they deem it in the interest of any minor or dependent child concerned apply to the court concerned for an order authorising him or her to institute an enquiry contemplated in sub-section (1)(a).*

- (3) Any Family Advocate may, if they deem it in the interest of any minor or dependent child concerned, and shall, if so requested by a court, appear at the*

hearing of any application referred to in sub-section (1)(a) and may adduce any available evidence relevant to the application and cross-examine witnesses giving evidence thereat.”

4. *Should Parliament fail to cure the defects within the 24-month period mentioned in paragraph 2 above, the reading-in will continue to be operative.*

5. *...”.*

2. CLAUSE-BY-CLAUSE ANALYSIS

Ad Clause 1

2.1 Clause 1 amends section 6 of the Divorce Act, which is a consequential amendment because of the proposed amendment of section 4 of the Mediation Act.

Ad Clause 2

2.2.1 Clause 2 amends section 7 of the Divorce Act, which provides for the division of assets and for the maintenance of parties at the dissolution of their marriage. The effect of the proposed amendment in clause 2 is to provide for the application of the redistribution remedy to marriages out of community of property irrespective of whether such marriage was entered into before or after 1 November 1984, and that the pension interests of a party to a marriage may be taken into account for the determination of patrimonial benefits for all such marriages out of community of property.

2.2.2 Clause 2(a) amends section 7(3)(a) of the Divorce Act, to extend the ambit of section 7(3)(a) to include all marriages entered into in terms of an antenuptial contract by which community of property, community of profit and loss and accrual sharing in any form are excluded, regardless of when it was entered into, by deleting the words “entered into before the commencement of the Matrimonial Property Act, 1984”. This will enable the court granting a decree of divorce in respect of all such marriages, subject to certain specified provisions, on application by a party to the marriage, and in the absence of an agreement between them regarding the division of their assets, to order that such assets of the other party be transferred.

2.2.3 Clause 2(b) amends section 7(7)(a) of the Divorce Act. Section 7(7)(a) of the Divorce Act provides that the determination of patrimonial benefits to which the parties to any divorce action may be entitled shall be deemed to include the pension interest of a party as a part of their assets, subject to paragraphs (b) and (c). Clause 2(b) deletes the reference to paragraph (c), which is a consequential amendment following the deletion of section 7(7)(c).

2.2.4 Clause 2(c) amends section 7(7)(b) of the Divorce Act by substituting the reference to “his” with the reference “that party” to provide for gender neutral legislation.

2.2.5 Clause 2(d) deletes section 7(7)(c) of the Divorce Act. Section 7(7)(c) excludes the pension interests of a party from being deemed to be an asset of that party for the determination of patrimonial benefits to which the parties to a divorce action may be entitled in respect of a marriage out of community of property entered into on or after 1 November 1984.

Ad Clauses 3 and 4

2.3 Clauses 3 and 4 amend sections 8 and 12 of the Divorce Act, respectively. These amendments are consequential, following the proposed amendment of section 4 and the short title of the Mediation Act.

Ad Clause 5

- 2.4.1 Clause 5 amends the Matrimonial Property Act by inserting a new section 24A to provide for the distribution of matrimonial property in respect of a marriage out of community of property which is dissolved because of the death of a spouse, regardless of when the marriage was entered into.
- 2.4.2 Section 24A(1) provides that a court may, on the dissolution of such a marriage by death, on application by a surviving spouse or the executor of the deceased spouse's estate, in the absence of any agreement regarding the division of assets in favour of the applicant, and subject to certain provisions of the Divorce Act which provide for the redistribution remedy for marriages out of community of property dissolved by decree of divorce, order that such assets, or such part of the assets, of the surviving spouse or the estate of the deceased spouse, as the case may be, as the court may deem just, be transferred to the applicant.
- 2.4.3 Section 24A(2) provides in paragraph (a) that a redistribution claim may not be made by or against an executor of a deceased estate that has been finally wound up. Paragraph (b) provides that subsection (1) will have no effect on the validity of any exercise of power, duty, function, procedure, process, provision or any other act performed in respect of the administration of a deceased estate that has been finally wound up.

Ad Clause 6

- 2.5 Clause 6 substitutes section 4 of the Mediation Act in order to extend the functions of the Office of the Family Advocate, which include mediation services to children, parents and interested parties involved in disputes relating to the fulfilment and exercising of parental responsibilities and rights; conducting investigations and making a report and recommendations to the court regarding the best interest of the child; assisting parents and interested parties to reach agreement on disputed issues relating to a child; and carrying out any other function assigned by any other law.

Ad Clause 7

- 2.6 Clause 7 amends the short title of the Mediation in Certain Divorce Matters Act by substituting the word "Divorce" with "Family".

Ad Clause 8

- 2.7 Clause 8 amends the long title of the Mediation Act to indicate the general purpose of the Mediation Act in light of the proposed amendments to the Mediation Act.

Ad Clause 9

- 2.8 Clause 9 is the short title.

3. CONSULTATION

The Office of the Chief Master of the High Court and the Department of Home Affairs were consulted in the drafting and finalising of the proposed amendments to the Divorce Act and the Matrimonial Property Act. The Office of the Chief Family Advocate and the Department of Social Development were consulted in the drafting and finalisation of the proposed amendments to the Mediation Act, and they support the Bill.

4. IMPLICATIONS FOR PROVINCES

None.

5. FINANCIAL IMPLICATIONS FOR STATE

The Bill does not create substantial and new financial implications.

6. PARLIAMENTARY PROCEDURE

6.1 In determining how a Bill must be tagged, the tagging test as formulated in the Constitutional Court judgment of *Tongoane and Others v Minister for Agriculture and Land Affairs and Others* 2010 (8) BCLR 741 (CC) (*Tongoane*) must be considered. In *Tongoane*, the Constitutional Court confirmed and upheld the “substantial measure” test as formulated in *Ex Parte President of the Republic of South Africa: In re Constitutionality of the Liquor Bill* [1999] ZACC 15.

6.2 In *Tongoane*, the Constitutional Court held as follows:

“[56] In resolving this issue, this Court held that the heading of section 76, namely, “Ordinary Bills affecting provinces” provides “a strong textual indication that section 76(3) must be understood as requiring that any Bill whose provisions in substantial measure fall within a functional area listed in Schedule 4, be dealt with under section 76.” It went on to hold that “[w]hatever the proper characterisation of the Bill . . . a large number of provisions must be characterised as falling ‘within a functional area listed in Schedule 4’, more particularly, the concurrent national and provincial legislative competence in regard to ‘trade’ and ‘industrial promotion’”. Accordingly, “[o]nce a Bill ‘falls within a functional area listed in Schedule 4’ it must be enacted in accordance with the procedure in section 76.

[57] . . .

[58] . . . What matters for the purposes of tagging is not the substance or the true purpose and effect of the Bill, rather, what matters is whether the provisions of the Bill “in substantial measure fall within a functional area listed in Schedule 4”. This statement refers to the test to be adopted when tagging Bills. This test for classification or tagging is different from that used by this Court to characterise a Bill in order to determine legislative competence. This “involves the determination of the subject matter or the substance of the legislation, its essence, or true purpose and effect, that is, what the [legislation] is about”.

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

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

“[69] The tagging of Bills before Parliament must be informed by the need to ensure that the provinces fully and effectively exercise their appropriate role in the process of considering national legislation that substantially affects them. Paying less attention to the provisions of a Bill once its substance, or purpose and effect, has been identified undermines the role

that provinces should play in the enactment of national legislation affecting them. The subject-matter of a Bill may lie in one area, yet its provisions may have a substantial impact on the interests of provinces. And different provisions of the legislation may be so closely intertwined that blind adherence to the subject-matter of the legislation without regard to the impact of its provisions on functional areas in Schedule 4 may frustrate the very purpose of classification.”. (Footnotes omitted)

- 6.3 The test for tagging focuses on all the provisions in the Bill and it compels the consideration of whether the purpose and effect of the subject matter of the Bill, in a substantial measure, fall within the functional areas listed in Schedule 4 to the Constitution. Although the Bill deals with matrimonial property law in respect of the dissolution of a marriage due to divorce or death of a spouse, it also speaks to the dissolution of a marriage out of community of property referred to in section 7(3) and (3A) of the Divorce Act as well as a customary marriage entered into in terms of an antenuptial contract referred to in section 7(2) of the Recognition of Customary Marriages Act, 1998 (Act No. 120 of 1998) (“Recognition of Customary Marriages Act”). “Marriages” are not listed in Schedule 4, Part A to the Constitution as a functional area of concurrent national and provincial legislative competence, but cultural matters; indigenous law and customary law are listed.
- 6.4 Whether a Bill’s subject matter in substantial measure falls within the functional area of indigenous law, was considered in *Tongoane*, where the Constitutional Court held:

“[74] The first is to recognise that statutes do not ordinarily deal with indigenous law in the abstract. They do so in the context of specific subject matter of indigenous law, such as matrimonial property, intestate succession, or the occupation and use of communal land, as CLARA does. Therefore any legislation with regard to indigenous law will ordinarily and indeed, almost invariably, also be legislation with regard to the underlying subject-matter of the indigenous law in question. The mere fact that a statute that repeals, replaces or amends indigenous law might have a different subject-matter of its own, does not detract from the fact that it also falls within the functional area of indigenous law.”.
- 6.5 The Constitutional Court held that the provisions of CLARA that dealt with communal land rights in substantial measure affect “indigenous law and customary law” and “traditional leadership” that are functional areas listed in Schedule 4 to the Constitution.
- 6.6 In applying the substantial measure test, the Department and the State Law Advisers examined the contents of the Bill and considered whether the provisions in the Bill fall within Schedule 4 to the Constitution, and if so, whether the provisions of the Bill in a substantial measure fall within a concurrent national and provincial legislative competence.
- 6.7 The State Law Advisers are of the view that the purpose and effect of the Bill in substantial measure deal with the division of matrimonial property on the dissolution of marriages and customary marriages and subsequently fall within the functional areas of cultural matters and customary law as listed in Schedule 4, Part A to the Constitution. The State Law Advisers are of the opinion that the Bill is an ordinary Bill affecting provinces and must be tagged as a section 76 Bill. The Bill must be dealt with in accordance with the procedure established by section 76(1) of the Constitution.
- 6.8 The Department disagrees with the aforementioned opinion of the State Law Adviser. The Department is of the view that the Bill should be tagged as a section 75 Bill, because the Bill does not, in substantial measure, deal with the division of matrimonial property on dissolution of customary marriages and as such, does not fall within areas of cultural matters and customary law as listed in Schedule 4, Part A to the Constitution. The Department is of the following view:

- (a) The proposed section 24A(1) references one type of customary marriage, referred to in section 7(2) of the Recognition of Customary Marriages Act. The remedy is applicable to those customary marriages and the Bill only seeks to regulate redistribution on dissolution by death, in line with the *EB* and *KG* judgment. This does not “in substantial measure” implicate customary law.
- (b) The Bill does not have a substantial impact on customary and indigenous law to the same extent or in the same way as legislation such as CLARA or the Recognition of Customary Marriages Act and it does not seek to introduce or regulate that which is regulated in terms of customary law. The Department is of the view that although the Bill provides for the division of matrimonial property on dissolution of a marriage out of community of property by death, clause 5 is only one of nine clauses in the Bill and none of these refer to customary law. The Department is of the view that the Bill in “substantial measure” does not implicate customary law if considered in totality.

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

“Referral of Bills to National House

39. (1)(a) Any Parliamentary Bill—

- (i) *which directly affects traditional or Khoi-San communities or pertaining to customary law or customs of traditional or Khoi-San communities; or*
- (ii) *pertaining to any matter referred to in section 154(2) of the Constitution, must, in the case of a Bill contemplated in subparagraph (i) and may, in the case of a Bill contemplated in subparagraph (ii), before it is passed by the house of Parliament where it was introduced, be referred by the Secretary to Parliament to the National House for its comments.*

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

6.10 The Department and the State Law Advisers are therefore of the view that it is necessary to refer this Bill to the National House of Traditional and Khoi-San Leaders in terms of section 39(1)(a)(i) of the Traditional and Khoi-San Leadership Act since it contains provisions which directly affect traditional or Khoi-San communities or pertain to customary law or customs of traditional or Khoi-San communities.

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