Sender's Fax: 6533 5700
Sender's DID: 6530 0233
Sender's Email: sam@lawsoc.org.sg

Our Ref: LS/9/FLP2/Gen/10-14/AC.so
Your Ref: MCYS 76-02-01

22 October 2010

Ministry of Community, Development
Youth and Sports
MCYS Building
512 Thomson Road
Singapore 298136

BY E-MAIL ONLY
E-mail: reach@reach.gov.sg
No of Pages: 8 Page(s)
(including this page)

THE LAW SOCIETY OF SINGAPORE

39 South Bridge Road
Singapore 058673
Tel: 6538 2500
Fax: 6533 5700
Email: lawsoc@lawsoc.org.sg
Website: www.lawsociety.org.sg

PRO BONO SERVICES OFFICE
1 Havelock Square Level 5
Subordinate Courts Complex
Singapore 059724
Tel : 6536 0650
Tel : 6534 1564 (CLAS)
Fax: 6534 5237
Email: ProBonoServices@lawsoc.org.sg
Email: CLAS@lawsoc.org.sg

Dear Sirs

PUBLIC CONSULTATION ON THE DRAFT WOMEN'S CHARTER (AMENDMENT) BILL

We refer to the letter received on 22 September 2010 from Ms Ng Mie Ling of the Ministry of Community Development, Youth and Sports seeking the Law Society's views on the above-mentioned public consultation.

We enclose a copy of the feedback from the Law Society's Family Law Practice Committee for your attention.

Thank you for giving the Society the opportunity to give our views on the matter.

Yours faithfully

Alvin Chen
Director, Representation and Law Reform

Encs.

DATE: 22 October 2010

~ THE LAW SOCIETY OF SINGAPORE ~

FEEDBACK ON THE PUBLIC CONSULTATION ON THE PROPOSED AMENDMENTS TO THE WOMEN'S CHARTER AND THE DRAFT WOMEN'S CHARTER (AMENDMENT) BILL

THE LAW SOCIETY
OF SINGAPORE

CONTENTS

1 INTRODUCTION

The Ministry of Community Development, Youth & Sports ("MCYS") invited the Law Society ("the Society") on 13 September 2010 to provide its views on the draft Women's Charter (Amendment) Bill ("Bill"). We thank the MCYS for this opportunity to give our views on the draft Bill.

We now set out the feedback of the Society's Family Law Practice Committee ("the Committee") on the draft Bill.

2 GENERAL OBSERVATIONS

The Committee notes that the proposed amendments to the Women's Charter have been categorised according to whether the measures: (a) facilitate marriages in Singapore; (b) address divorce and its impact; or (c) strengthen the enforcement of maintenance orders. Although such classification may be useful in signalling the policy rationale of the respective measures, these rationales are not necessarily mutually exclusive for any particular measure. Thus, measures seeking to strengthen the enforcement of maintenance orders, when transplanted to the institution of marriage, may have the unintended effect of affecting the policy of facilitating marriages in Singapore and reducing the incentives of the relevant party or parties to marry. It is necessary for consistent messages to be conveyed to members of the public so that they are fully aware of the overarching policy rationale of the proposed amendments. Equally important, the legislative amendments in the Bill should be drafted clearly not only to achieve the intended policy rationale of the relevant amendment, but also to minimize the possibility of unintended consequences arising from competing policy rationales.

3 CLAUSE 2

The Committee notes that the introduction of section 12A and the amendment to section 17(2)(f) are intended to mitigate the risk of divorce amongst couples who are minors and previous divorcees, which is reportedly the highest. MCYS is considering requiring the following specific groups to attend and successfully complete customised marriage preparation courses before the issuance of the marriage licence or special marriage licence, such as:

(a) couples where both or at least one party is a minor; and
(b) couples where both or at least one party is previously divorced and there are children entering the remarriage.

While there are no doubt policy reasons in favour of adding a formal requirement to make the attendance and successful completion of such courses a pre-requisite for the grant of a marriage licence, the principle of requiring only certain groups to undergo compulsory pre-marital counselling appears to be discriminatory as it is contrary to Article 12 of the Singapore Constitution.

Firstly, the differentiation of minors and divorcees from other persons who satisfy the requirements of section 17(2) may not be founded on rational and intelligible differentia. If the objective of the amendment is to reduce divorce rates, there seems to be no rational or overriding reason to exclude such other persons from the ambit of section 17(2)(f).

Secondly, even if the objective of the amendment is only to reduce divorce rates for certain "high-risk" groups (which may change with time), there appears to be no rational relation or nexus between the objective and the differentiating criteria. The proposed amendment does not deal equally with all persons of a certain well-defined class. Indeed, the classification of minors and divorcees does not appear particularly well-defined given that it seeks to incorporate potential spouses who may not be minors or divorcees.

Even if this classification is accepted as a matter of practicality, the proposed amendment seeks to stipulate such courses for divorcees who were not at fault in obtaining their divorces. It is also not clear why MCYS has adopted a "presumption" (together with the accompanying stigma) that all divorcees are at a higher risk of another failed marriage, given that in some cases such divorcees may in fact be in a better position to put things right in their remarriage. Nevertheless, assuming that there is empirical evidence supporting the "presumption", the fact remains that "no-fault" and "at-fault" divorcees are treated similarly even though they are differently situated and there may be other "high-risk" groups which are more similarly situated with "at-fault" divorcees.

Such discriminatory treatment of divorcees may also have the unintended consequence of encouraging the filing of nullity writs, as persons intending to remarry will be mindful of the requirement to attend the courses if they are treated as divorcees.

Further, the proposed changes may have the unintended effect of couples choosing to marry in other jurisdictions in order to avoid the compulsory marriage preparation course.

The Committee therefore recommends that MCYS reviews the constitutionality of the proposed sections 12A and 17(f) in view of the issues raised above.

4 CLAUSE 3

4.1 Section 17(2A) – (2B): Declaration of arrears

The Committee notes that the introduction of the above sections will require divorcees who are remarrying to declare in the presence of their new spouses whether they have any maintenance arrears towards their ex-wife or children from their previous marriage(s). This measure is not intended to deter remarriages, but to increase the enforcement of maintenance orders.

The Committee is of the view that to make the declaration a pre-requisite for the grant of a marriage licence appears incongruous with the nature of the other formal requirements of obtaining a marriage licence under section 17(2), which go to the validity of the marriage. If the measure is not intended to deter remarriages, a failure to make a declaration concerning maintenance arrears arising from a previous marriage should not be a bar to the remarriage.

Practically, it is not clear whether this measure will actually increase the enforcement of maintenance orders given that the remarrying divorcee may only declare at a certain point in time that he does not owe any maintenance arrears but thereafter proceeds to default on maintenance payments. Another likely scenario is that the remarrying divorcee declares that he does owe maintenance arrears but is not deterred from continuing to default on such payments.

There may also be unintended consequences of requiring the declaration. Firstly, the new spouse may be deemed to be put on notice, by virtue of the remarrying divorcee's declaration, of the latter's tendency to default in maintenance payments. Should the remarriage also result in a divorce, the remarrying divorcee may rely on the declaration as a defence in any maintenance default proceedings that the new spouse knew of his tendency to default in maintenance payments but yet chose to enter into the remarriage.

Secondly, the measure unnecessarily embarrasses some remarrying divorcees who owe maintenance arrears, not because they are recalcitrant in defaulting on maintenance payments, but because they are unable to afford the payments due to their low income or other extenuating circumstances. In such cases, the measure would not address the underlying problem of maintenance defaults or achieve the objective of increasing enforcement of maintenance orders.

Thirdly, there may be cases where the measure would actually deter the new spouse from marrying the divorcee (in view of the uncertainty of the "deemed notice" effect of the declaration) or discourage the parties from being formally married (so that the remarrying divorcee can continue to default on maintenance payments without being subject to the inconvenience and stigma of making the declaration). While these cases may or may not be common in future, they will detract from the policy intention to facilitate marriages in Singapore.

In view of the above, the Committee recommends that MCYS should focus on measures to encourage defaulters to pay up during maintenance default proceedings, instead of attempting to incentivize defaulters to pay up under a completely different forum which is meant to promote the institution of marriage, as the defaulter's response to such incentives is uncertain and the new spouse's incentive to marry may be reduced.

In this connection, MCYS may wish to examine how to improve the enforcement of maintenance payments by: (a) "self-employed" persons whose exact income are difficult to trace; and (b) persons who may not have a high official income but have a high net-worth and/or are drawing their income from informal sources which are difficult to trace.

4.2 Section 17(4): Verification of accuracy of information in statutory declaration

The Committee notes that section 17(4) is intended to allow the Registrar of Marriages ("Registrar") to obtain necessary information from a District Court or a Magistrate's Court to verify the accuracy of the information stated in a statutory declaration required under section 17(2A).

The Committee is of the view that it is not clear from the drafting of section 17(4) whether the Registrar is required to verify the accuracy of the information in the statutory declaration in every case and under what circumstances such verification is required. These matters should be clarified in the Bill.

5 CLAUSE 5

The Committee notes that the introduction of section 50 is intended to empower the Court to make it mandatory, in all divorces involving children below 21 years,

for parties to attend counselling and mediation to address child-related issues and to attempt to agree on what is the best interests of the child.

However, the drafting of section 50(2A) does not appear to correspond with the policy intention. It is not clear whether the compulsory mediation in limb (a) is intended for parties to address child-related issues only or to assist in reconciliation of the parties as well. Although limb (b) appears to be directed more towards addressing child-related issues as it is expressly provided that the Court may order the parties' children to attend, it is restricted to counselling and excludes mediation.

In addition, section 50(2D) allows an unreasonable party to apply for an order to stay the divorce proceedings and to obtain costs, on the basis that the parties have not attended the requisite mediation or counselling sessions. The Committee is concerned this facility may be abused by an unreasonable party as it is easier to obtain a stay of the divorce proceedings under this section as compared to the normal procedure.

Also, lawyers should have a role to play in the mediation or counselling sessions as they have the necessary legal expertise to give legal advice to their clients, as compared to the mediators or counsellors appointed by the court or the Minister, as the case may be. This should be made clear in the Bill.

Lastly, mediation has always been a voluntary medium for dispute resolution in the Family Court. With the suggested changes, it seems that mediation is now compulsory and parties no longer have a choice. Such an approach suggests a policy shift in the approach to dispute resolution and if mediation is made mandatory, parties may just pay lip service to the mediation process.

6 CLAUSES 6 & 7

6.1 Sections 71(1)(d) and 71A: Banker's Guarantee

The Committee notes that the introduction of the above sections is to empower the Court to order a maintenance defaulter to post a banker's guarantee against future defaults and to specify the mechanics for payment out under such a banker's guarantee in the event of maintenance defaults.

It is not clear whether the person to whom maintenance is owed can still make a demand on the banker's guarantee to the bank upon a maintenance default, as section 71A(1) provides that that person *may* make a complaint to court regarding such default.

The Committee is also of the view that it is not legally correct for the excess amount under section 71A(3) to be offset against the amount of any future maintenance, as this is not yet due to the person to whom maintenance is owed.

6.2 Sections 71(2B) – (2D): Credit Bureaus

The Committee notes that the introduction of the above sections is to allow claimants of maintenance, their caregiver or a person that they authorise, to report maintenance debts to credit bureaus.

The Committee is of the view that this measure needs to have sufficient safeguards as an inaccurate or false report of the maintenance debt owed by a defaulter may be reported to the credit bureau. In such circumstances, indemnity and liability issues would naturally arise.

6.3 Sections 71(1)(f) and 71C: Community Service Orders

The Committee notes that the introduction of the above sections is to empower the Court to impose a 40-hour community service order on maintenance defaulters.

The Committee is of the view that this measure may not have the desired effect as it serves more to embarrass the maintenance defaulter, than to ensure that the defaulter is able to discharge his maintenance liability and avoid future maintenance defaults. The likelihood of embarrassment of the maintenance defaulter is also inconsistent with the rationale of the current bankruptcy regime not to embarrass bankrupts. It is hard to see how community service orders, which is meant to address offenders who have caused harm to the community by, for example littering, are appropriate for a private debt incurred by the maintenance defaulter. Moreover, such orders would be a harsh sanction on maintenance defaulters who are genuinely unable to discharge their maintenance liabilities.

22 October 2010