MLPC Feedback on the Administration of Muslim Law (Amendment) Act 2017

OVERVIEW

This paper is made up of 5 parts. It follows the sequence set out in the AMLA (Amendment) Bill:

Part 1 – Divorces and the Syariah Court

Part 2 – Wakaf /Nuzriah

Part 3 – Marriages

Part 4 – Inheritance

Part 5 – Amendments proposed in our 2014 and 2016 Papers which are not addressed in 2017 AMLA Bill

REFERENCES TO EARLIER PAPERS

On 18 November 2014, the MLPC had submitted to the Minister-in-charge of Muslim Affairs our Paper on the Review of the AMLA ('**2014 Paper'**). On 29 August 2016, we submitted an Addendum to the Review of AMLA **('2016 Paper'**). We are grateful that our inputs in those 2 papers had been considered. To avoid prolixity, we will not be rewriting any parts of those 2 papers where our recommendations in those papers have been addressed, based on the Consultation Paper and the AMLA Amendment Bill 2017. **The 2014 and 2016 papers are annexed to this Feedback Paper**.

Where the earlier issues rose in our 2014 and 2016 reappear in this present Feedback Paper, our views and recommendations herein supersede our earlier position. Where clarification is felt necessary, we would be most willing to explain and discuss further any part of our paper.

Part 1: Divorces and the Syariah Court

Amendment of Section 34B

Proposed Section 34B – Clarification on Powers of Registrar and Appointment of More Deputy Registrars

1. The provision for the appointment of additional deputy registrars is welcomed as it recognises the increasing complexity and workload of the Syariah Court ("SYC") and the commitment to enhance its capability. We wish to take this opportunity to place on record that in the 20 years since the major amendments of 1998, which came into effect in 1999, we have witnessed personally the growth and development of the Syariah Court in both capacity and capability.

2. The provision that the registrar of the Court can exercise all of the jurisdiction and powers which may be exercised by a president under the specified sections lends greater clarity.

Amendment of Section 35-Jurisdiction

3. In our 2014 Paper, MLPC had highlighted that the under the current section 35 of AMLA, there is no requirement for a party to have any connecting factor with Singapore, so long as parties are both Muslims or it is a Muslim marriage[1].

4. Given the easy accessibility of Singapore, we had asked for a review of this clause on the basis that 'Singapore could be seen as an attractive place for forum shopping' and the problems that could arise if a party were to commence an action in Singapore, even though there is already another divorce action filed in another country.

[1] In OS 45176, an American wife had commenced divorce against her husband, a UK national, in Singapore. They had married in Saudi Arabia and lived there from 1990 to 2004. Neither party was domiciled or resident in Singapore. The wife did so because she wanted her divorce to be conducted by a Syariah Court proper. In her affidavit, she explained why she did not file an action in Saudi Arabia. One impediment was the difficulty in obtaining a visa to enter the country.

5. Our recommendation was for there to be some form of connecting factor to Singapore before the SYC could exercise its divorce jurisdiction. We had suggested that a party could do this by proving he or she had been habitually resident for **at least 1 year** preceding the commencement of the divorce summons. We had recognised that the length of time is subject to policy considerations and specifically referred to a situation whether we should be consistent with the Women's Charter requirement of 3 years or to have a different timeline for AMLA.

6. We thus have no objection to the 3 year requirement. We note that affected parties do have recourse as they can still commence an action in their own country of origin or where they have citizenship. As the requirement only pertains to divorce, they are also not prevented from availing themselves of other options with respect to maintenance and child custody under the Women's Charter and Guardianship of Infants Act respectively.

Revisiting our 2014 and 2016 recommendation to amend section 35 to confer jurisdiction to the Syariah Court to hear ancillary issues if divorce had been obtained and registered or concluded in a foreign jurisdiction

Why this amendment is necessary despite the Court of Appeal ("CA") decision in the case of *TMO v TMP* (2017) SGCA 14 ("*TMO*")

7. We had in our 2014 paper requested for a provision that SYC to have jurisdiction where parties have been divorced overseas in a court of competent jurisdiction. We had asked for a similar provision to the powers granted under the Women's Charter in 2011 (sections 121A to G). We note that this request has not been included in the AMLA (Amendment) 2017.

8. **The points that we flagged in our 2014 paper were raised long before either *TMO in* the neither Court of Appeal nor Haniszah *bte Atan v Zainordin bin Mohd* [2016] SGHCF 5 [2]at the High Court[3] .**

[2] Decision of Debbie Ong JC dated 1 April 2016
[3] TMO v TMP is the redacted version of Haniszah bte Atan v Zainordin bin Mohd.

9. In between our 2014 paper and the announcement of the 2017 proposed amendments, the CA issued a GD on 21 February 2017 in the case of ***TMO***.

10. By way of background, the issue before the CA was whether parties, both of whom were Singaporeans to a Muslim marriage whose marriage had been dissolved by an Order of the Syariah Court of Johore Bahru, may seek financial relief consequential upon the divorce from the Singapore Court.

11. The parties had been married in 1998 under Muslim law, registered with the ROMM here. In 2008, they moved to Johore. A few years later, the husband filed for divorce in the Johore Syariah court. The wife alleged that she first knew about the divorce only after she received a Johore court order dated 20 March 2012 granting interim custody of the 2 children to the husband.

12. On 10 April 2012, the Johore Syariah Court granted dissolution of parties' marriage. The Wife claimed **she was unaware of the divorce** until after she asked her lawyers to do a search. It was **not** a situation where both parties consciously wanted to avoid bringing a case in the Singapore Syariah Court.

13. On 26 September 2012, the wife applied to the Singapore Syariah Court for ancillary reliefs of nafkah iddah, mutaah and division of matrimonial assets. The hearing was held on 21 August 2013 whereupon the Singapore Syariah Court granted nafkah iddah and mutaah to the wife, and ordered that these be paid from the husband's share of the nett proceeds of the matrimonial flat.

14. The Singapore Syariah Court refused to grant any order for the **division of the matrimonial assets** on the basis that under section 52(3) of AMLA; such orders could only be made by the Syariah Court where the divorce proceedings were before the Syariah Court itself and the divorce decree were made by it. It made the distinction that orders for nafkah iddah and mutaah came under section 51(2) and 52(2) of the AMLA and were therefore not subject to the same conditions prescribed in section 52(3) on the division of matrimonial assets.

Ramifications of the CA's decision in *TMO*

15. Our position is that the CA's decision is extremely useful **where the party to a Muslim marriage who would have been able to have the opportunity to resolve the outstanding issue of division of matrimonial assets in our Singapore Syariah Court if the divorce had taken place in Singapore, finds himself or herself unable to do so purely because it was done outside Singapore.** However, by inserting a clause that the Syariah Court has the jurisdiction and power to deal with the matrimonial assets of parties who had obtained a divorce in a foreign court, we can to a large extent, plug this gap and clean up the paradoxical situations that have arisen .

16. The CA, in determining the answer to the sole question it was addressing its mind to, had no need to consider how sections 51(2), 52(2) and 52(3) operate side by side. These sections refer to the ancillary powers of nafkah iddah, mutaah and division of matrimonial assets which are the usual powers exercised **as a whole** by the Syariah Court at a divorce hearing. The Court of Appeal was focussing only on the parties' matrimonial flat in Singapore which had to be resolved.

Differences between the 2 systems on the ancillary issues

17. Section 51(2) is the power to grant maintenance during the period of iddah. It is similar to the civil law maintenance where a wife is entitled to maintenance from the husband. However, the similarity ends there. Under the Women's Charter and common law, the wife who is entitled to maintenance until she remarries or upon death. In a Muslim divorce, the wife is only entitled for the duration of her iddah period and it is the practice that this is rounded up to 3 months. Another difference is that there are increasingly cases in the civil courts where the Courts have deemed that there be no order for the maintenance of a wife who is financially independent. There is also the situation of wives who have an obligation to maintain an incapacitated husband which does not apply in a Muslim marriage. There are therefore differences that exist between the two systems which may not be apparent at first glance.

18. Section 52(2) is on mutaah. This is referred to as a consolatory gift and is computed on a lump sum basis, based on the duration of marriage. It is conceptually different from the civil law concept of lump sum maintenance where the lump sum is based on future needs. The multiplicand and multiplier method used in the civil courts have no

application at the Syariah Court, which uses a per diem calculation based on the number of days of marriage against the husband's ability to pay.

19. A perusal of the CA's judgement in *TMO* indicates that the CA did not delve into the Syariah Court's decision on why the latter has the powers to exercise section 51(2) and section 52(2) but not section 52(3). This is understandable, given that under section 56A of the AMLA, the decision of the Syariah Court and Appeal Board is final.

20. This is where a deep appreciation of the background to the evolution of powers in the Syariah Court on the ancillary issues is not only helpful but extremely necessary.

The circumstances which led to the 1999 amendments granting jurisdiction and powers to the Syariah Court on the ancillary issues

Past situation where parties divorced by Kadi went to High Court for a determination of the ancillary issues

21. Prior to major amendments in 1999, Muslim couples were caught in a position where they did not know where to go after they had been divorced by a Kadi under section 102 of AMLA. In those days, parties who had been divorced by a Kadi outside the Court, were caught in a bind when were subsequently realised they could not get an Order at the Syariah Court on the basis that the Syariah Court could only make an order where there was a divorce application, and since they were already divorced, they could not commence an action in the Syariah Court.

22. This led to a situation where Muslims went to the High Court to obtain declarations on their matrimonial property and other ancillary issues. The CA obliquely acknowledged that it was aware of this situation , in its reference at the last paragraph of its judgement, to the CA case of ***Madiah bte Atan v Shamsudin bin Surin*** (1998) 2 SLR 32.The CA noted that while the facts of the case in Madiah involves a similar situation with that of the *TMO* case, it presumed that the CA in Madiah's case had come to the conclusion that Women's Charter did not apply because it was influenced by section 3(2) of the Women's Charter .

23. With respect, while there may be some factual similarities in Madiah and *TMO* in that they were already validly divorced before coming to the Syariah Court, the legal situation viz the Syariah Court had changed since the 1999 amendments. This change in legal position appears to not have been highlighted to the Court of Appeal. Prior to the coming into force of the 1999 amendments, Madiah could not have begun a case in the Syariah Court at all, hence her action in the High Court. Subsequent to the 1999 amendments, someone in Madiah's situation is able to file an application in the Syariah Court by applying the amended section 102 of AMLA. The form *'registration of divorce by kadi'* makes that clear.

24. Concomitant with the amendment to section 102, Section 52(3) was introduced into the AMLA giving the Syariah Court the powers to deal with the ancillary issues of a couple who had been divorced by a Kadi. From 1999, it is absolutely clear that the Kadi can only register a divorce but go no further. The powers to make orders on the division of matrimonial assets can only be exercised by the Syariah Court and not by a Kadi.

25. So while we concur with the CA in so far that the decision in Madiah's case is not applicable to *TMO*'s case, our view is premised on the fact that the 1999 AMLA amendments had effectively cleaned up the situation of Muslim parties divorced by Kadi. There was no longer the problem of such parties having to worry as to which Court to go to resolve their ancillary issues and so the Madiah situation will not arise again.

26. Besides the 'divorce by Kadi' situation, there were 2 other types of cases pre-1999 amendments which are important to recall as they provide a useful guide on the measures taken to address a particular problem which is the subject of our discussion here – the lack of jurisdiction or power of the Syariah Court .

Past situation where parties went to High Court to vary a Syariah Court Order

27. One category of cases involved parties who filed an application in the civil courts to

vary a Syariah Court Order. The reason given for doing so was because they had been rejected by the Syariah Court as there was no provision then that empowered the SYC to vary its own order[4]. The leading case was ***Muhd Munir v Noor Hidah*** **[1990] SLR 999** where Justice Chan Sek Keong (as he then was) distinguished between jurisdiction and powers as follows:

"A Court may have jurisdiction to hear and determine a dispute in relation to a subject matter but no power to grant a remedy or make certain order because it has not been granted such power, whereas if a court has the power to grant a remedy or make a certain order, it can only exercise that power in a subject matter in which it has jurisdiction'.

28. Since the parties were already divorced, the Syariah Court was then no longer seised of the matter and could not vary their own orders. This was perplexing to the aggrieved parties especially since at times the variation sought for were merely on extension of time to sell the matrimonial flat. This problem was neatly solved through legislation, by inserting section 52(6) of the AMLA –

> *"The Court may, on the application of any interested person, vary or rescind any order made under this section,"*

29. The insertion of section 52(6) put a stop to parties running to the High Court to have their ancillary matters reheard under the guise of a variation. They could thereafter avail themselves of the Syariah Court and seek a variation under the same regime.

<u>Past situation where parties went to the High Court to enforce a Syariah Court order</u>

30. The other historical lesson we can draw upon is ***Salijah bte Ab Latef v Mohd Irwan bin Abdullah Teo*** **[1996] SGCA 32**. This was one of several cases where one party sought the intervention of the High Court to enforce a Syariah Court order on the matrimonial flat. The case went up to the Court of Appeal after her application was turned down by the High Court. The Court of Appeal then allowed her appeal by holding that a **mandatory injunction** could be granted in the High Court for parties seeking to enforce a SYC order. In its judgment, the CA stated that ***'it was for the***

[4] See Parliamentary Select Committee Report on AMLA Amendments 1998

legislature to make the necessary amendments to the AMLA to enable the Syariah Court to either enforce its own orders, or to make them equivalent, for the purposes of the Supreme Court of Judicature Act, to orders of the High Court. Alternatively the Syariah Court could be given equivalent powers of enforcement as the Subordinate courts'.

31. Subsequent to this, the AMLA was amended in 1999 whereby the Orders of the SYC could be registered at the Family Court for enforcement purposes, with the strict provision that the **Family Court could not vary or change any SYC Order**. In 2010, refinements were made through a further amendment in that parties need not even make a formal application, which had turned out to be cumbersome and costly to many, to register a Syariah Court order. A deeming provision was inserted (Section 53 of AMLA) making a Syariah Court order an order of the district court for purposes of enforcement.

Clear signal on status of Syariah Court order

32. For completeness, we would also state that the 1999 amendments created a new section 56A which made it clear that any decision of the Syariah Court or the Appeal Board shall be final and conclusive and cannot be challenged, appealed against, reviewed, quashed, or called into question in any court and shall not be subject to any Quashing Order, Prohibiting Order, Mandatory Order or injunction in any Court on any account. Again, this resolved the problem of jurisdiction on variation and enforcement. This new section 56A was also a very strong signal on the respect and regard to be accorded to the Syariah Court.

Legislative amendment needed to resolve and clarify present situation

33. We are of the view that notwithstanding the *TMO* decision, an amendment giving the Syariah Court the power to hear cases where parties had been divorced overseas is necessary. If such a clause exists, the problem in *TMO*'s case would not had arisen at all as there would have been no need for the Syariah Court to hold that it did not have jurisdiction or power to make a ruling on the matrimonial flat. There would have been no necessity for the wife to take out any action in the High Court. We had raised this issue in our 2014 paper, well before the *Haniszah Atan* and *TMO* cases came to light.

34. The enactments of the various amendments into AMLA in 1999 which we have highlighted have proved to be very effective in addressing the problems that existed at the prevailing time.

35. We are of the view that a similar approach can be taken at this opportune moment. The CA decision in *TMO* is welcomed in that there is comfort in knowing that no party to a Muslim marriage will be left without a legitimate forum to have his or her ancillary issues heard. The root of the problem however can be resolved neatly through legislation. In this regard, the words of Judicial Commissioner Debbie Ong in **Haniszah Atan's case** (*TMO)* at the High Court remain relevant. In her GD, she had stated that ***'whether the current lacuna in which the Appellant is unable to obtain a division order in both Courts ought to be plugged, and if so, ought to be addressed as a provision in the AMLA or the SCJA, is a matter for Parliament to decide'.***

36. The CA had to fix an existing problem of a gap in the Syariah Court's jurisdiction to hear ancillary matters for a foreign-obtained divorce. We have shown through *Salijah* and other cases the parallels with the past on how a legislative amendment can solve this issue at its root.

37. We take cognisance of the CA's finding that 'there is no lacuna' and that Chapter 4A of the Women's Charter, which empowers the High Court to order financial relief consequent upon divorces granted by overseas courts were these are recognised as valid in Singapore, can apply to Muslims. We note that the CA had cited the speech by then MCYS Minister Vivian Balakrishnan, in Parliament on 10 January 2011, and observed that as the Minister **had not specifically mentioned Muslims** in the relevant part of his speech, then 'there is nothing to suggest that Parliament intended to provide this remedial measure only to non-Muslims'. It would have been clearer from the beginning if there was an actual reference by the Minister on this point.

38. The **2009 Report of the Law Reform Committee of the Singapore Academy of Law on Ancillary Orders after Foreign Divorce or Annulment** which contained a

very comprehensive study into and proposed the introduction of Chapter 4A of the Women's Charter did actually contain a specific reference on this issue and the Committee's position was that **it (section 4A of Women's Charter) would not apply to Muslim divorces.** The introduction of this current set of AMLA Amendment 2017 in Parliament provides an opportunity for a review of this issue[5].

39. It is pertinent to note that in its concluding paragraph of its decision, the CA in *TMO*'s case said it was departing from another CA decision of *Madiah* on section 3(2) of the Women's Charter. Based on what we have highlighted in this paper, we cannot rule out the possibility of a future Court of Appeal coming to a different decision than *TMO*, just like how they departed from *Madiah*. It is unfortunate that in *TMO*, the respondent husband was unrepresented and the CA thus did not have the benefit of opposing arguments or submission than what was canvassed at that hearing, especially with regard to the evolution of jurisdiction and powers of the Syariah Court. Our view is that by making this issue absolutely clear through legislation, we prevent future doubts and unnecessary revisits on this. The positive development of the legal situation with respect to issues of jurisdiction between the Syariah Court and the Civil Courts arising out of the amendments of 1999 and 2008 are very useful precedents.

Implications of the TMO decision

40. While we appreciate the CA's accommodating approach, and acknowledge that this

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[5] At paragraph 69 of the **2009 Report of the Law Reform Committee of the Singapore Academy of Law on Ancillary Orders after Foreign Divorce or Annulment: 'We do not make any recommendations in respect of, and our recommendations do not affect, the law and practice of the Syariah Courts in Singapore"**.

It further added that '**in domestic law practice, the Syariah Court deals with practically all ancillary matters after divorce and the concurrent jurisdiction of the civil court is mostly invoked to enforce orders made by the Syariah Court .Under the AMLA, there is no division of primary and ancillary jurisdiction when it comes to ancillary matters after dissolution of a marriage, so it does not appear to have its hands tied like the civil courts after it recognises a foreign divorce. Where the Syariah Court makes such orders, there is no problem with the Family Court lending its usual assistance in their enforcement. We have therefore excluded matters falling within the Syariah jurisdiction from our proposals.'**

2. At paragraph 71 of the said Law Reform report, it reiterated that '**omission of Muslim marriages and consequently the talak from our proposal will not be a problem because the Syariah Court can assume jurisdiction anyway (and its orders can be enforced with the usual assistance of the Family Court).**

decision provides a safety net where any lacuna, if any, arises in future, we are concerned with the significance and implications of the *TMO* decision. We are of the view that there are strong reasons for the Syariah Court to be the forum for cases where parties who have been divorced overseas to have their ancillary issues heard, in totality, in Singapore.

Differences in treatment for parties who have been divorced outside the Syariah Court of Singapore

41. With the *TMO* decision, we are now in a situation where there is a difference in the treatment in 2 situations of parties having divorced outside the **Singapore** Syariah Court. For parties who have been divorced by a Kadi, section 102 grants the **Singapore** Syariah Court the power to make an order on the division of the matrimonial assets. For parties who are divorced overseas, the **Singapore** Syariah Court does not have the power to do so. On the ground, the public will likely be very confused and puzzled at this dichotomy and may lead to controversy, which can be averted through legislation.

Single judge hearing the case

42. Applying the facts in *TMO,* our view is that it would be for the parties' benefit if the same Syariah Court President who heard the arguments for nafkah iddah and mutaah could make the decision on the division of matrimonial assets. This is extremely important as financial matters can be interlinked and normally do. We reemphasise here that the Syariah Court Order in *TMO*'s case had directed that the husband had to pay the nafkah iddah and mutaah from his share of the nett proceeds of the matrimonial flat. In that sense, can the Family Court judge who hears *TMO* case relook the issue of matrimonial flat in isolation? What if one party prefers a Transfer rather than a sale in the open market, or what if there are no nett proceeds (negative sale)? Would parties then have to go back to the Syariah Court again to vary the order on nafkah iddah and mutaah, in view of section 56A where no decision of the Syariah Court can be changed by the civil court? Where a single hearing in one Court could have resolved the issues all together in one hearing, we run the real risk of having

parties go from one forum to another, on the same set of facts. The impact on parties is immense.

43. We would clarify here that nothing we state is meant to be regarded that the civil court is not competent to hear on the ancillary issues. What we are saying is that it would be more comprehensive and definitely neater if the same Court hears all the ancillary issues upon divorce, as there would be overlapping issues. By analogy, the Family Justice Court has embraced a Judge-led approach where a single judge is in charge of a particular divorce case and handles all issues which are related, from the divorce itself to maintenance, children issues, and assets. This is intrinsic recognition that we cannot underestimate the value of a single judge (or President) hearing the issues altogether.

44. In the Syariah Court, the practice in recent years is that any variation application is to be heard, as far as practicable, by the same judge who made the original order. This is another outward manifestation on the advantages of having the same judge handling the matter. Amongst others, precious judicial resources are used optimally.

Link between orders for nafkah iddah and mutaah and division of assets - on quantum and mode of payment

45. There are various decisions of the Appeal Board which establish the practice that the amount of payment of nafkah iddah and mutaah can be a factor in the quantum of the award on the division of matrimonial assets. In ***Jumain Bin Yusof v Jamilah Bte Ali*** **[1997]2 SSAR 61** and ***Jam Hari Bin Jaafar v Fatimah Bye Saayan*** **[1996] 2 SSAR 46**, the non-payment of nafkah iddah and mutaah, amongst other things, increased the wife's share of the nett proceeds of the division of the matrimonial flat. As the matrimonial flat is usually the asset with the highest value, it is a very important tool in considering the manner in which the ultimate financial payments can be ordered. It can also be a consideration on when assessing the division of other assets such as the CPF, stocks and shares and businesses. In situations where the husband may not have the cash to pay the nafkah iddah or mutaah, or when there are insufficient proceeds from the sale of the matrimonial property, the CPF amount awarded to the wife from the husband's CPF can be a very useful tool in ensuring there is a method to ensure

the wife gets her fair and just share of the matrimonial assets on an overall basis.

46. It is trite law that if the division of assets is to be heard in the Family Court, then civil law will apply. Section 17 of the SCJA makes this absolutely clear. While one can argue that on paper, the principles behind division of matrimonial assets in Women's Charter and under AMLA appear *in pari materia*, the application of such principles may not be exactly the same. This is because specific issues peculiar to Muslim law may arise – including but not limited to nusyuz or inherited property. On the issue of indirect contributions, the roles and responsibilities of the husband and wife in a Muslim marriage may also have specific nuances. There is also a difference in how the 2 systems have treated the CPF as a matrimonial asset. The pooling of the CPF method adopted in the Family Court is not practised in the SYC, principally due to the different ways in which each Court regards the role and responsibility of the parties in the marriage.

Avoiding multiplicity of proceedings

47. Following the CA decision, the parties in *TMO* scenario will now find themselves having a divorce from a Johore Syariah Court, an order on nafkah iddah and mutaah from our Syariah Court and potentially an order on the matrimonial flat from our Family Court. The time taken and costs expended could be unbearable for many. Parties would be spared the infinite stress, and added costs, of having to move from one Court to another. We should avoid parties having to undergo multiple or duplicitous proceedings.

48. There could also be situations where parties take unfair advantage of the *TMO* decision to further prolong and frustrate the other party. Upon knowing or suspecting that his or her spouse had commenced an action in Singapore Syariah Court, the spouse then quickly applies for a divorce in another jurisdiction. He or she may obtain a divorce quicker overseas due to our system of having the prescribed or specific activities first pre-commencement of divorce application, which can take several months.

49. In a scenario akin to *TMO*, one spouse could unilaterally obtain a divorce without the

other knowing until it is already over. Through no fault of the party who has been divorced without prior knowledge of the divorce, he or she will now have to go through the process of having nafkah iddah and mutaah resolved in the Syariah Court and division of assets in the Family Court. In such a situation, the distress, trauma and inconvenience to the victimised party may not be adequately covered by whatever costs the law may provide. As counsels, we have come across various scenarios including a divorce in India where a wife unilaterally obtained a Kadi divorce by claiming that her husband was impotent when this was not true[6].

There could also be situations peculiar to Muslim marriages

50. There is another compelling reason for granting of jurisdiction to the Syariah Court. Lawyers have noticed an increasing number of migrated Singaporeans who go through a divorce process at the local mosque or imam in their new country, e.g. New Zealand or Australia, but there is no Court order confirming the divorce. All they have are documents issued by the local bodies [e.g. Muslim councils, imams] where they live. Meanwhile their matrimonial assets in Singapore remain unresolved. Based on the *TMO* decision, it would at first appear that they can avail themselves of the Family Court. However, under the relevant provision of the Women's Charter, they would have to satisfy the requirement that their divorce has been obtained from a Court of competent jurisdiction. It can be foreseen that this could be a dispute on this itself if all the documents are not from judicial bodies but from imams, mosques, and other religious bodies. This is especially so in countries which do not have the equivalent of our Syariah Court. Therefore, if these parties fail to meet the Family Court requirements of producing a divorce certificate from court, then they would have to attend at our Syariah Court first, and then the *TMO* situation will arise again, i.e. after the nafkah iddah and mutaah decisions, they go over to the Family Court to resolve the matrimonial asset issue.

Divorces which fall outside the remit of the Court but are recognised under the law of the country in which it was obtained

51. This issue has arisen in the United Kingdom, per ***H v H (Talaq divorce) [2008] 2 FIR***

[6] Syariah Court Summons no 47116 (unreported) , **Mohamed Saleem v Jana Muna Fathima Dishad Parveen *("Saleem")***

857[7], a case involving a couple who had married in Pakistan but went on to live in England for more than 20 years. The husband subsequently went back to India while the wife remained in England. The wife filed for a divorce in England in the civil courts under the **Family Law Act** (there being no equivalent to our AMLA or Syariah Court). The husband responded by claiming that he had already obtained a divorce by talak in India and sought a declaration that the talak divorce was a valid divorce according to English Law. After hearing submissions on the status of talak in Pakistan, the Court granted the declaration on the basis that although the wife had not been given notice of the talak divorce or the opportunity to take part, the talak was the prevailing form of divorce in the country of origin of both parties. One key factor in this case was whether the husband was seeking recognition of the talak in order to exclude the wife from obtaining financial relief in the UK per the **Matrimonial and Family Proceedings Act 1984.** We are flagging cases like this to show how they too can come to our shores, as elaborated below. We are fortunate to have the AMLA and the Syariah Court which, if granted the power to make ancillary orders on a divorce obtained overseas, all other eligibility requirements being met, can readily handle such cases at one single hearing.

Situations where the validity of the divorce itself in issue

52. In an almost parallel situation with the UK case cited above, there have been instances where after a party files for divorce in the Syariah Court the other party raises a challenge that the divorce is not proper. In *Saleem*'s case, the man (a Singaporean) was not informed that his wife (an Indian national) had sought divorce by a Kazi in India. When he found out there was a divorce based on impotency, he obtained a medical report from a Singapore doctor confirming that he was certainly not. He thus filed for divorce in our Syariah Court. The wife objected to the application on the basis that parties were already divorced as in India and that under the Kazi Act; a divorce by Kazi is legally valid. In this instance, the Singapore Syariah Court allowed the husband to continue with the divorce in Singapore when the wife subsequently declined to come down to Singapore. The Singapore Syariah court duly made an order dealing with the matrimonial property, a HDB flat.

[7] Islamic Family Law in the UK by Raffia Arshad [Sweet& Maxwell], 2010.at page 131

53. As lawyers, we would advise clients to have the validity of the divorce resolved in the particular country where the divorce is alleged to have been obtained. However, clients have concerns over the ability to receive justice and the resources required. In countries where there is no equivalent of the Kazi Act or a Syariah Court, the affected persons may really have no avenue for recourse at all except for our Syariah Court. This is an issue of vital importance for them as this involves their personal status. Parties are affected by the question as to whether the current divorce will result in the first, second or third talak. The complexities in the interpretation of effective and ineffective talak should most appropriately be handled by the Syariah Court.

54. As things stand, while the existing section 35 of AMLA gives the Syariah Court the jurisdiction, there is uncertainty as to whether the Court can make any order on the validity of the divorce overseas even though under section 35(2) (b), the Syariah Court can determine disputes relating to divorces known in the Muslim Law as fasakh, cerai taklik, khuluk and talak. We therefore recommend that an additional line be inserted in this sub-section to clarify that the Singapore Syariah Court is entitled to make a determination on the issue of the validity of the divorce itself. This is in keeping with the situation the UK courts found itself in *H v H*.

Changing demographics and profile

55. We would emphasise that our intent in requesting for this particular provision that the Syariah Court has the jurisdiction and power to deal with all ancillary issues for parties who have obtained an overseas divorce, is largely based by our observation of the changing demographics in the profile of parties who appear at the Syariah Court. There are more and more Singaporeans who now live overseas but still maintain close links with Singapore. There are also more marriages between Singaporeans and persons of other nationalities. It is already very stressful for them to come back to Singapore to seek a registration of their divorce formally. They will bear increased costs and emotional stress if they now have to go through both Syariah Court (to obtain their nafkah iddah and mutaah) and then to the Family Court for their division of matrimonial assets.

56. We thus urge a reconsideration of our recommendation. We do believe that our

recommendation for the Syariah Court to be empowered to hear and make orders on parties who have obtained a divorce overseas is justified and necessary. As lawyers who handle divorces at both the Syariah Court and Family Court, we have the utmost faith and the highest regard for both systems. The views contained herein are based on our collective observations over the years, well before *TMO* case. It was pressing enough for us to flag this by writing formally to the Minister in 2014. We feel that it is imperative to insert the provision now and not wait for another round of amendments.

57. We recognise that the TMO decision is a safety net to cover any residual issues over jurisdiction and power and it is a comfort knowing that no Singaporean will find himself in a situation where he or she has no Court to go to seek a resolution.

What about parties who do want the civil court to hear their dispute on ancillary issues

58. For parties who feel that they would want the Family Court to be the forum, there is still the option of section 35A where they can apply for leave to commence or continue civil proceedings involving disposition or division of property in divorce or custody of children. We acknowledge the possibility of there being unique issues which we may foresee now, given the complexities in today's globalised world. We also empathise with parties who may be reluctant, for various reasons including having multiple assets in different jurisdictions, to have their ancillary matters being heard in our Syariah Court. The option for them to go to the civil courts is still open to them.

New sections 43A and 43B – refer parties for Counselling

59. Para 7. – On the whole, the insertion of the provisions for counselling are welcomed. They signal a child-centric approach which we align ourselves to. Our concerns are more on the consequences or recourse of non-compliance of an order to attend counselling. Of particular concern is the provision that the Syariah Court proceedings be stayed if counselling has not been completed. The following typify the thoughts we have in our minds -

i. Potential for abuse by a party as a delaying tactic to the prejudice of the other party - it can be by a parent who has the de facto care and control and is bent on denying access to the other party, or a spouse who is determined to resist the divorce or prolong the divorce proceedings.

ii. Will there be a need to file a formal application to waive the counselling process if a party is missing, based overseas or evading counselling? Will it be too cumbersome for parties?

iii. Will the order for costs be sufficient to address the problems of non-compliance? What if parties are impecunious, or plainly recalcitrant?

60. We therefore suggest that wider discretion be given to the Court to deal with various circumstances that may make it impractical for parties to attend counselling–e.g. the Court may make such a determination upon the application of a party **or of its own motion**. The Court may allow the process to continue without staying the proceedings.

Examination and assessment of child by experts

61. We welcome this provision on the use of child experts. It is a question of resources and we look forward to hearing more on the resources to be given to make this work.

62. The services mentioned in section 43B are similar to those provided by the Family Court at CFRC (Child Focus Resolution Centre) and CAPS (Counselling & Psychological Services). It is a combination of in-house and out-sourced services. We note that parties at the Family Court do not have to pay from their own pockets for these services.

63. For Muslims who are already undergoing such processes, pursuant to their applications under Guardianship of Infants Act, it may be convenient for them to continue at the CFRC and CAPS. We had in our 2014 paper (paragraphs 53 to 55) suggested using the Family Court resources. We suggest that the civil proceedings be allowed to continue despite divorce summons being issued in the Syariah Court. Muslim parties can then avail themselves of resources available in the Family Court.

64. It would be a saving and optimisation of resources if the same pool of experts in children issues be tapped for both Family Court and Syariah Court. As it is, many of the agencies in partnership with Syariah Court are also collaborating with the Family Court. The final decision on any issue will still be recorded or made at the Syariah Court so there will be no dilution of the Syariah Court's functions or standing.

65. Our concern on resources is based on our observation of both the Family Court and Syariah Court. At the Family Court, the counselling and mediation services which used to be available to all are now no longer open where the matrimonial assets exceed $3 million[8]. These persons are now required to attend private mediation at their own costs. At the Syariah Court, there is currently no distinction of categories of persons required to undergo counselling and mediation. This is an area which should be closely monitored and reviewed as the services envisaged under the proposed amendments are labour intensive and may be costly.

New section 46A – 'before' and 'during application'

"Activities to be attended before ***making application to Court for divorce"***

66. We understand that this provision is not mandating a new process but putting into legislation a practice that has been going on for a long time now , i.e. of attending counselling prior to being allowed to initiate the originating summons which technically kicks off the Court divorce process proper.

67. In the past, different terminologies have been used. A party would have to file a 'complaint form' consisting of a long questionnaire. This complaint form has since been renamed to a more neutral sounding 'a registration form'. It is upon the submission of this form that parties will be notified of a counselling date, at an agency in partnership with the Syariah Court.

68. It is only upon the conclusion of the counselling that party will be notified of an "Appointment to file Originating Summons". Previously, it was "Appointment to file

[8] Practice Directions came into force in October 2016

Case Statement".

69. We note that in this proposed amendment, the term used is the generic 'Application to Court'. We assume that this generic sounding term is to avoid confusion as to when the court process actually starts. This is because most lay persons would understandably think that once they have submitted the 'registration form', they have submitted themselves to the jurisdiction of the Court.

70. Under the current rule 9 of the Muslim Marriage and Divorce Rules, it is specified that all proceedings in the Court shall be commenced by originating summons. The reference was primarily only the mode itself. For clarity, we propose that an additional line be added into the subsidiary legislation, as follows: *"Notwithstanding the actual date of the issuance of the originating summons by the Court, for the purposes of these Rules, the date of commencement of proceedings before this Court shall be deemed to be the date the application form for divorce is submitted to the Syariah Court".*

71. We would like to highlight that the need to make clear the differences in timing on the commencement dates surfaced in the High Court case of ***Pereira Dennis John Sunny v Faridah bte V Abdul Latiff*** **(2016) SGHCR 9** *("Pereira").*

72. Pereira's case highlighted how one party can exploit the time lag between the submission of the Registration Form and the commencement of Syariah Court proceedings? In Pereira's case, the Registration Form was submitted to the Syariah Court on 28 July 2015 and the Originating Summons (OS) was issued by the Syariah Court on 29 March 2016, a time lag of 8 months. The other party filed an OS in the High Court on 6 November 2015, for declarations on the shares of parties in respect of 4 properties held in the parties' joint names. In effect, what he wanted to do was to have the properties disposed of without invoking matrimonial laws on division of assets, but on strict property laws.

73. Due to the commencement dates of the court application, on which came first, the

High Court was held to have jurisdiction and the properties were thus dealt not under matrimonial laws. As acknowledged in the judgment by the AR Colin Seow, *"it is true that that the High Court **will not apply** the principles of Muslim law in the determination of interests in matrimonial properties between parties who are Muslims or who were married under the provisions of Muslim law (see section 17A (7) of the SCJA)"*.

74. The concern therefore that a party can exploit the time lag between the submission of the registration form and the filing of the Originating Summons is real.

75. It is noted that under the proposed section 46A (2) different times may be prescribed for different prescribed parties in different specified circumstances. There must be clarity on how a request by counsel or parties should be made. Clearer guidelines would be welcomed.

> *"(3) No application for a divorce in accordance with the Muslim law is to be made to the Court, and **no counterclaim (our emphasis)** is to be filed in proceedings for a divorce in accordance with the Muslim law, by a prescribed party in a specified circumstance, unless the prescribed party —*
>
> *(a) has attended the applicable specified activity;*
>
> *(b) **is an excluded party (our emphasis); or***
>
> *(c) is allowed by the Court under subsection (4) to do so."*

76. We would request that definition of 'excluded party' be made clearer than appears in the current proposed amendment. This is to avoid confusion on interpretation.

<u>'Counterclaim'</u>

77. We note that in subsection (3), 'no counterclaim is to be filed in proceedings for a divorce in accordance with the Muslim law' unless the prescribed party had attended a prescribed activity. This is a curious piece of legislation as there is no mention of any 'counterclaim' anywhere else in the AMLA. The closest equivalent is at rule 12

of the Muslim Marriage and Divorce Rules where the term 'cross-application' is used is made in the context of a Memorandum of Defence. Under the proposed amendments, by the time parties file the Memorandum of Defence, the parties would have already undergone the various specified activity. That would make the addition of a 'counterclaim' redundant.

78. Is the introduction of the 'counterclaim' here a formalisation of a new process, different from the 'cross-application'? At the moment, when one party files the Case Statement, the other party responds by way of a Memorandum of Defence whereby the party can state whether he or she agrees to the Defence. There is anecdotal evidence that where the Plaintiff refuses to go ahead with the divorce, and where no cross-application is filed, the Defendant can still make an application to the Court to allow him or her to proceed based on the Defence.

79. Based on the manner in which this proposed amendment is drafted, the Counterclaim appears to be a new procedure and is independent of the current Memorandum of Defence or the cross-application. This ought to be clarified.

Proposed Amendment section 46(4)

80. We note that there is a provision (Section 46A (4)) that even though a prescribed party in a specified circumstance has not attended the applicable specified activity and is not an excluded party, the Court may, **upon the application of the prescribed party**, and on such terms as the Court thinks fit, allow the prescribed party **to apply to the Court for a divorce** in accordance with the Muslim law. Will this entail an additional layer, i.e. a formal application, which can be yet another set of costs to parties? It also sounds confusing as it suggests an 'application' be made 'to apply to the Court for a divorce'.

81. There could be situations where there could be genuine reasons that would make it impossible or impractical for a party to attend the prescribed activity – he or she could be based overseas, suffering from a physical or medical condition, etc.

82. In this regard, we would propose the following additions to new section 46A(4) :

"s 46A (4) Despite subsection 3(a) and (b), even though a prescribed party in a specified circumstance has not attended the applicable specified activity and is not an excluded party, the Court may, upon the application of the aggrieved prescribed party and on such terms as the Court thinks fit, allow the aggrieved prescribed party to apply to the Court for a divorce in accordance with Muslim law. For the purposes of this entire section "the aggrieved prescribed party" shall mean the innocent prescribed party who has not been deliberately absent from the applicable specified activity."

83. We propose the above wording because in practice, it may difficult to obtain the consent or cooperation of one party to attend counselling and the innocent party must be allowed a recourse to seek leave to commence proceedings notwithstanding the fact that the other party has failed, refused and/or neglected to attend the applicable specified activity. Further, we would like to highlight that it would be better if the definitions of "prescribed activity" and "prescribed party" are expressly stated in the body of the legislation instead of a subsidiary legislation or by way of a notification in the gazette.

Specified activity once proceedings have started

84. It appears that section 46A has 2 parts – specified activity *prior* to making the application for divorce, and *after* the application for divorce has been made. We recommend inserting specific headers to demarcate the two time periods.

Proposed Section 46A (7) - Stay proceedings

85. Under section 46A (7), we note that the Court has powers to stay proceedings until the defaulting party attends the specified activity. Our fear is that this may be a default position and it will be the cooperating party who has the onerous task of convincing the Court to advance the case whereas the other party may be wilfully not cooperating. It ought to be made clear that just as the Court may stay proceedings, the Court also has the discretion to proceed if one party does not cooperate. This is in line with the current situation where Court notices contain a warning that if a party does

not attend Court, the Court can continue with the case in his absence.

Section 46A (9) - Parenting Plan

86. Under subsection (9), 'A parenting plan prepared during a specified activity may, with the consent of every party who prepared it, be admitted in evidence in the Court'.

87. We have concerns as to whether this will cause prejudice since parties are not represented during the specified activity. The dichotomy here is that proceedings are only regarded to start upon the filing of the Originating Summons, yet here the parenting plan may be admitted in evidence in Court. We do note that this is where both parties consent but even then, there could be issues on the admissibility of such evidence. The rule that any document prepared and information provided in the course of a specified activity is not to be admitted in evidence in the Court or any Court, as set out in subsection (8) is sound and encourages parties to speak freely, without having to worry about the same being used against them. Parties who do not wish to have their parenting plan be used later in Court could raise allegations that the consent during their specified activity was not genuine. Our view is that it would be neater if at the time of filing the Originating Summons, parties are made to file a Parenting Plan which is clearly admissible in Court. If a parenting plan is submitted into prior to Court, then it should be without prejudice to his or her right to change position.

88. On subsection (10), we are generally aligned with the measures to introduce or to mandate prescribed activities for parties. We are curious as to why a Minister's sanction is needed for this since this slew of activities appear to be mainly operational matters.

Proposed section 46B - Divorce by husband's pronouncement

46B.—(1) A man may apply to the Court for a divorce in accordance with the Muslim law.

89. This is a curious piece of legislation as it is common knowledge that men have been applying for divorce for as long as the SYC existed. Is this clause simply to make the

situation for men consistent with for women under section 47? We note from the **1998 Select Committee Report on the Amendments to AMLA** that this proposed amendment was raised by a particular lawyer, but it was not taken up then. It is a surprise to find this about 20 years later, when there has not been any indication that this is a problem.

90. Whatever the case, it is odd to start the clause with 'a man'. Surely a 'married man' would be more accurate and consistent with 'a married woman' under section 47 for completeness. It would also send a signal to married man that the pronouncement of talak is to be treated very seriously and is it is to be done, should be in Court. In this regard, we respectfully suggest that this signal be articulated emphatically to the public.

91. Section 46B (3) is also open to many interpretations: -

> *"If the wife concerned consents to the divorce, the man may pronounce a divorce, and the Court must, on payment of the prescribed fees, cause the divorce to be registered."*

92. It is trite that under Muslim law, the husband has an inalienable right to pronounce the divorce. As the consent of the wife is not a requirement, such phraseology has given rise to the question as to whether her consent is now a requisite.

93. In short, the manner in which this clause is worded seems to be a combination of law and procedure, which may end up in confusion rather than clarity. One way is to separate the substantive issue of the consent with the administrative requirement of payment of fees so that the latter appears to be a consequence of the former rather than a legal requirement.

<u>New sections 54A - Unauthorised audio or visual recording in Court</u>

94. No objections. We fully support this.

New section 54B - Contemptuous behaviour

95. We fully support the new provisions under section 54B. The decorum of the Court must be maintained at all times.

All Court proceedings to be held in camera

96. In this vein, we are recommending that a further provision be made stating that all Court proceedings are conducted in private. Due to the very personal nature of a divorce, especially where there are children, no one apart from the parties themselves should be present in Court during the course of the hearing. There have been instances of persons sitting in the Court room during the hearings and this should stop. Exceptions can be made by Court based on the need, for example, a physically challenged person but the general rule should be maintained as a matter of course. In granting permission to a non-litigant to be present, the Court may, in its discretion, impose the necessary conditions to be complied with.

97. In the Family Court, there is a bifurcated system between the divorce itself which was traditionally heard in open Court and the hearing for ancillary reliefs which must be heard and determined in Chambers (rule 81(2) of FJR.

98. Since a Practice Direction in 2015, **'the *general rule is that ALL hearings in a Family Justice Court shall be heard in camera pursuant to section 10(1) of the Family Justice Act. Members of the public are not entitled to attend such hearings'. 'Notwithstanding this, a Family Justice Court may hear any matter in an open and public Court if the Court is satisfied that it is expedient in the interests of justice, or for sufficient reason, to do so'.***

Repeal of section 46

99. We therefore recommend that section 46 of the AMLA, which currently states that 'every trial or hearing in Court shall be held in public', be repealed and changed.

Section 56B (4) – Child Representative

100. The current section 56B essentially covers the protection of members of the Court and Appeal Board etc. However, we note that there is a proposed section 56B (3) which extend this protection to 'a Child Representative'. This is the first and only time this term' Child Representative' appears in the proposed amendments. There is no definition of a Child Representative anywhere.

101. It is not clear as to who is this Child Representative. How is this Child Representative appointed and what is his or her specific role, apart from the generic words in section 56B (4) that he or she is appointed to represent the interests of the child in any proceedings involving the child, or the custody or welfare of the child'. Is this proposed Child Representative similar with the Child Representative scheme which came into being in the Family Court under the Family Justice Rules 2014[9] ?

102. What is clear is that this Child Representative does not belong to the group or professionals who examine and assess the child for the purposes of preparing expert evidence (under new amendment section 43B).

103. So while we are in favour of any scheme which ultimately will be in the best interests of the child, we are unclear as to the details here and look forward to knowing more about this Child Representative which has appeared on only this section 56(B) in these amendments. We suggest that the experience of the Family Court in this scheme thus far be gleaned.

[9] Under sections 30 to 34 of the FJR, the Family Court may, amongst others, appoint a Child Rep either on its own initiative or on an application of either party, if the Court if of the opinion that it is in the best interests of the child to do so. The Child Rep represents the voice of the child as well as presents an objective assessment of the arrangements which are in the best interests of the child. Anyone wishing to be appointed a Child Rep has to undergo specialised training conducted by the Court itself. At the moment, the Child Rep panel is made up of both lawyers and non-lawyers (mainly psychologists and social workers).

Part 2: Wakaf/Nuzriah

Amendment of Section 58(3A) - Wakaf – Appointment of Mutawali and powers of MUIS

> *"(3A) The appointment, on or after the date of commencement of [section 15(a) of the Administration of Muslim Law (Amendment) Act 2017], of a trustee of a wakaf or nazar am, under an instrument creating, governing or affecting the wakaf or nazar am, is void unless the trustee was appointed with the prior approval in writing of the Majlis.";*

104. In previous years, the High Court had been called upon to address the issue of whether, amongst others, a mutawalli is a trustee and whether a trustee of a wakaf comes under the Trustees Act. These cases, and the recent decision in ***Sharif Valibhoy and others v Ariff Valibhoy*** **[2016] 2 SLR 301**[10] , emphatically affirm the current position in AMLA that the appointment and removal of a trustee of a wakaf / nazar is under the sole purview of the Majlis. On the whole, we welcome the proposed amendments to section 58(3A) in further clarifying the powers of MUIS in respect of this issue.

New Section 58(7) – What if MUIS is the potential litigant?

> *'Court must not entertain or proceed with any proceedings relating to the appointment or removal of either of the following unless the Majlis consents in writing ……'*

105. We understand the purport of section 58(7) and understand the rationale. We also take cognisance of JC Kannan Ramesh's words in the Valibhoy case that 'the court's processes are not to be used to deliberately undermine the statutory authority afforded by Parliament to the Majlis. However, we would like to raise a few concerns as follows:-

[10] Decision by Kannan Ramesh JC dated 29 January 2016

a. While the proposed amendment is likely to enhance the Majlis' power to manage trustees / mutawalli, an equally important area to be looked at is the enhancement of the management of wakafs themselves; perhaps more could be done to develop rules pertaining to wakaf management and governance;

b. The proposed amendment may be seen as yet another measure to exclude the public from having access to wakaf issues; this may be allayed if rules could be formulated to allow relevant persons a channel where genuine grievances and disputes could be aired and resolved; such rules would further enhance governance, transparency and accountability;

c. There may be natural justice issues where the potential Defendant is MUIS itself;

106. We are also curious as to the mechanism that MUIS will use to resolve the dispute and what is the next step if MUIS declines to give consent in writing.

Section 60 – Nazar/Nuzriah and Hibah?

107. Under section 60 of the AMLA, no nazar involving more than one-third of the property of the person making the same shall be valid in respect of the excess beyond such one–third. This section was deliberated upon in the High Court in ***Mohamed Ismail v Mohammad Taha*** **[2004]** whereupon it was held that the nuzriah of the testator was limited to one-third of the estate and accordingly reduced the proportionality of bequeaths to fall within this limitation in section 60.

108. *Ismail's* case also appeared to doubt the validity of a nuzriah (at least a nuzriah of the type in that case) under Muslim law. This was however soon followed by a fatwa to the effect that a nuzriah was basically a valid instrument under Muslim law albeit subject to conditions. There is at this point some discrepancy between the High Court decision in *Ismail* and the said Fatwa on nazar/nuzriah.

109. Some members of the public are known to adopt the fatwa (in spite of Ismail's case) and create nuzriah instruments. When the maker of the nuzriah instruments dies, interested parties seek to give effect to the nuzriah as part of estate proceedings in the Family Probate Court. The differences between section 60 of AMLA, *Ismail's* case and the Fatwa mentioned in the preceding paragraph causes uncertainty and confusion. It is believed that it is only a question of time before disputes on the validity of such nuzriah would be litigated in the Family Probate Court.

110. A clarification would be extremely useful, if not necessary; perhaps through an amendment of section 60. First it has to be decided whether a nuzriah (such as the one in Ismail's case) is enforceable or not. We note that there may be major issues to be resolved, such as :-

(a) How to ensure there is no "injustice" or improper motive;
(b) The issue of stamp duty payable upon the operation of the nuzriah.

111. We feel that there should be a comprehensive review of this issue before a decision is made on enforceability. If the ultimate decision is to enable enforceability, then s60 should be accordingly amended, incorporating such provisions as necessary to enhance clarity, for example, on the validity of the excess 1/3 portion in the nuzriah and the formalities on making a Nazar.

112. Since more cases are coming to Court with nuzriah instruments, the earlier this review is done and completed the better. We would recommend that in such a review, the hibah also be looked at as there are now cases of the validity of a hibah being raised in Court[11].

[11] **HAJA MAIDEEN S/O MOHD ALI MARICAR V ROSHAN BEGUM MD ALI M (HC OS 1021/2015),** which is ongoing, the Court had made an order for MUIS to provide an opinion on whether a Hibah executed to gift a HDB flat held in the sole name of a mother to her daughter, was valid. In response, MUIS had provided an opinion letter setting out the formal requirements for a Hibah to be valid in Islamic Law and applied the same to the case.

Amendment of section 61

"(3) The Majlis may establish and maintain for each wakaf or nazar a separate sinking fund for that wakaf or nazar for prescribed activities."

113. No objection save for a consideration as to whether there could be clearer guidelines on the percentage of net income of the sinking fund , whether a tiered system should be specified rather than a generic ' not exceeding 20%'.

114. We would suggest that the relevant wakaf bodies, mutawallis and beneficiaries be consulted on the specifics and the criteria of the sinking fund required. On the wakaf issues, we had raised several proposed amendments in our paper in 2014 and we seek that they be considered in this round of amendments as well.

Amendment of section 74

"(3) The trustees of any mosque under any written instrument must manage the mosque subject to the provisions of this Act. (3A) The Majlis has power to remove, and to appoint a mutawalli in the place of or in addition to, any existing trustee of a mosque if it appears to the section (4), the following subsections:"

115. No objections. As stated earlier, we welcome the clarity it provides on the roles and obligations of the relevant parties.

New sections 94A and 94B

"Marriage preparation programme "

116. We have no issue on the proposal for specified persons to undergo marriage preparation programme.

Consent to application for solemnisation of marriage of a minor

117. While we agree in principle, we are concerned whether the applications in section 94B (1) and (3) will be another costly step for parties.

Part 3: Marriages

Amendment of section 95 – Wali

118. The initiative to introduce safeguards to protect the interest of women below 21 years of age in a Muslim marriage is welcomed. However we are of the view that the amendment to section 95 to prohibit the rights of a wali to all women to be wedded, subject to written approval, is restrictive and unduly cumbersome.

119. We are of the view that the proposed amended section 95 should be modified to read that " a marriage cannot be solemnized by the wali of a woman, if either party to the intended marriage is below 21 years of age, unless on the application of parties….".

120. We recommend qualifying the application of the proposed amended section 95 to women below 21 and their wali as this would be sufficient to curb the problems envisaged and rationales outlined in the Consultation Paper, without being perceived as derogating the rights of the lawful wali in the majority of Muslim marriages. Whilst we appreciate that the thrust of this amendment is merely to create an approval mechanism prior to the registration of such marriages in ROMM, it may be perceived by members of the public to be curtailing the rights of the lawful wali to solemnize a marriage. Perhaps a more practical approach would be to mandate that such solemnization by a wali must be witnessed by a kadi or naib kadi of ROMM, as is the usual practice for most solemnisations in Singapore.

Amendment of Section 100 To 106 Registration of Marriages

121. No issue. Technical procedure only.

Part 4: Inheritance

Amendment of section 111 – no issue

122. We note that section 112 is retained in its present form. We urge that this clause reviewed periodically, especially on concept and applicability of harta sepencarian.

Section 114 – Proof of Law

123. We note that our recommendation in our 2014 paper to update the list of books was not taken up. We urge this be reviewed periodically as there have been instances where, on a strict interpretation of the legislative provision, judges at the probate courts have been reluctant to accept any position on Muslim Law which is not derived from any of the books listed in the current section 114 of AMLA. This is unduly restrictive and deprives the Court from having the benefit of relying on other contemporary sources and texts on Muslim law. In this regard, whilst we appreciate that the books cited in section 114 of AMLA are useful from the basis of a legal exposition for the purposes of legal submissions, we propose that the list be "open" and not exhaustive. A possible approach could be a reference made in section 114 of AMLA to authoritative text or sources on Muslim law that shall be published and periodically revised by MUIS on its website or on a circular to be specified. This would be useful for development of our own caselaw as it would be able to draw upon the most updated sources of authority or texts on Muslim law as approved by MUIS.

Repeal and re-enactment of section 116 and repeal of section 117

"Administration of estate of Muslim dying intestate

116.—(1) in granting letters of administration to the estate of a Muslim who dies intestate, the court may if it thinks fit grant letters of administration to any next-of-kin of the Muslim or any other person entitled to a share in the estate under the Muslim law."

124. We note the removal of the line 'to the exclusion of the widow. We have no objection to this.

125. We note that with the removal of section 117, the legislation has made the question of who has the right to the grant of letters of administration more gender neutral. Again, we have no objections to this.

126. Our concern is whether the new amendment is clear enough. Will the widow have equal right to the Grant of the LA even though she has fewer shares according to the Inheritance Certificate?

Section 118 – Will of Married Woman

127. Even though this was not in the proposed amendments, we are of the view that it would be consistent with the overall tenor of the 2017 amendments to delete the words 'with or without the concurrence of their husbands'.

Repeal of Section 125 – Household Property

128. We are happy that our recommendation in our 2014 paper for the removal of this clause has been accepted.

Repeal and re-enactment of Section 143 - "Inspection and Search

129. No issue

Part 5: Other Amendments

Other amendments not contained in the 2017 AMLA (Amendment) Bill

130. We propose to include all the proposed amendments we had asked for in 2014 and 2016:

i. Jurisdiction of Syariah Court to hear divorce where marriages solemnised outside Singapore [Paragraphs 11 to 13 of our 2014 paper (annexed)]
ii. Re-registration of foreign marriages [Paragraphs 17 to 23 of our 2014 paper]
iii. Mechanism in Syariah Court to ascertain status of marriages overseas [Paragraphs 24 to 28 of our 2014 paper]
iv. Powers to make orders for injunctive relief [Paragraphs 29 to 33 of our 2014 paper]
v. Inheritance Certificate – where the deceased is not a Sunni or a Sunni from a school (mazhab) other than Shafii and whether SYC to be appraised of any financial instruments deceased may have made [Paragraphs 50 to 51 of our 2014 paper]
vi. Orders on children [Paragraph 56 of our 2014 paper]
vii. Registration of the talak without having to wait until all the ancillaries are dealt with [Paragraphs 57 to 58 of our 2014 paper]
viii. Registration of rujuk within prescribed timelines in S 102 and 107 [Paragraphs 59 to 63 of our 2014 paper]

Conclusion

We share the objectives of the MCCY that these present amendments are intended to achieve the following:

(1) Reinforce Muslim institutions
(2) Enhance the management of Muslim assets
(3) Strengthen Muslim families

We have raised actual cases from the ground to illustrate the issues our clients face and we hope that by doing so, we can help to improve the practice and enhance the development of Muslim Law in Singapore. We are very mindful of how Muslim Law can and should be applied within the context of Singapore. That is why on certain issues, we have recommended more research and study before making any amendment. On certain issues however, we have urged for early implementation.

We remain ever ready, able and willing to continue the conversation.

Ahmad Nizam Abbas

Chairman of Muslim Law Practice Committee

of the Law Society of Singapore