Phone + 27 12 420 4502 Email immogen.visser@up.ac.za Address Law Building (Room 4-31),
Fax + 27 12 420 4499 Website www.centreforchildlaw.co.za University of Pretoria, Pretoria, 0002

THE CENTRE FOR CHILD LAW

Our ref: M Courtenay **27 May 2013**
Your ref:

TO: THE PORTFOLIO COMMITTEE ON JUSTICE AND CONSTITUTIONAL DEVELOPMENT
ATTENTION: MR V RAMAANO
90 PLEIN STREET
CAPE TOWN
PER EMAIL
vramaano@parliament.gov.za

Dear Sir:

RE: COMMENT ON THE JUDICIAL MATTERS AMENDMENT BILL [B7-2013]

1. We refer to the aforementioned Judicial Matters Amendment Bill ('Amendment Bill') as well as the invitation for comment on the proposed amendments. Having regard to the Amendment Bill, The Centre for Child Law ('CCL') makes the following submissions in respect of the proposed amendments:

Clause 27

2. The CCL supports the proposed amendment to section 51 of the Criminal Law Amendment Act 105 of 1997 as it correctly reflects the changes to the law required by the Constitutional Court in the judgment of *Centre for Child Law v Minister of Justice and Constitutional Development and others (National Institute for Crime Protection and Reintegration of Offenders as Amicus Curiae) 2009 (6) SA 632 (CC); 2009 (2) SACR 477 (CC); 2009 (11) BCLR 1105 (CC).*

Clause 36

3. It is acknowledged that clause 36 seeks to streamline the process of evaluating criminal capacity, to which the CCL has no objection. However, the CCL is concerned that such streamlining detracts from the real debate regarding criminal capacity, namely, whether to retain the presumption that children between the ages of 10 and 14 years are rebuttably presumed to lack criminal capacity.

4. In this regard it is important to note the content of section 8 of Child Justice Act 75 of 2008 ('Child Justice Act') which prescribes that the Cabinet member for the administration of justice must re-evaluate the issue of criminal capacity within 5 years of it being put in operation.

5. The CCL urges this Committee to prompt the Intersectoral Committee for Child Justice– established pursuant to section 94 of the Child Justice Act – to carry out its legislative duty to

investigate the issue of criminal capacity; it appears that this has yet to occur despite the Child Justice Act being in operation already for some two-and-a-half years.

Clause 42

6. The CCL supports the amendment to section 77(3) of the Child Justice Act. In this regard we refer the Committee to our comments at paragraph 2 hereabove.

7. We are however somewhat confused by the amendment of section 77(4) of the Child Justice Act, in particular the insertion of what would be section 77(4)(c) of the Child Justice Act. The amendment in question reads as follows "*together with a sentence of correctional supervision imposed in terms of section 75*". Our confusion stems from two alternative scenarios:

   7.1. First, does the amendment seek to provide the courts with the necessary authority to impose a sentence of correctional supervision over-and-above a sentence of direct imprisonment? In which case the CCL is concerned that it would not be used, as in almost all instances it would be considered unduly harsh and set-aside on automatic review or on appeal.

   7.2. Second, does the amendment seek to provide the courts with the necessary authority to impose a period of correctional supervision in instances where a period of direct imprisonment has been suspended? In other words, correctional supervision together with a suspended sentence. The CCL would support such an amendment but would however request that it be further deliberated in order to clarify the intention of this clause, and the wording to be used.

8. The CCL does not support the proposed amendment to section 77(5) of the Child Justice Act. It is our considered opinion that through the inclusion of the words "take into account" the amending section weakens the protections afforded to children and detracts from the rehabilitative aims of the Child Justice Act. We are unaware of any case law or 'problem' that gives rise to this suggested amendment.

Clause 44

9. The CCL broadly supports the proposed amendments to section 85 of the Child Justice Act as they correctly reflect the position adopted in both *S v FM (Centre for Child Law as Amicus Curiae) [2012] 4 All SA 351 (GNP); 2013 (1) SACR (GNP)* and *S v LM (Faculty of Law, University of the Western Cape: Children Rights Project of the Community Law Centre and Others Amici Curiae) [2013] All SA 110 (WCC); 2013 (1) SACR 188 (WCC).*

10. The CCL is, however, concerned that amendments may still give rise to certain interpretative issues in respect of the applicability of the provision in respect of regional courts. In order to cure this the CCL would recommend that the proposed amendment read in relevant part as follows:

(c) whether the child in question was represented by a legal representative; or
(d) whether the child in question appeared before either a district or regional court sitting as a child justice court.

11. The CCL also wishes to draw it to the attention of the Committee that the provision, in its current form, detracts from the principle that a child must not be treated more severely than an adult would have been treated in the same circumstances. It does so by expressly excluding children who receive suspended sentences from its protective ambit. This is contrary to the position adopted in respect of adults at section 302 of the Criminal Procedure Act 51 of 1977 which does not make this distinction. The CCL would recommend an additional amendment which would read in relevant part as follows:

(b) **16 years or older but under the age of 18 years, and]** has been sentenced to any form of imprisonment **[that was not wholly suspended,]** or any sentence of compulsory residence in a child and youth care centre providing a programme ...

Clause 46

12. Please see the comments above (paragraphs 3 – 5) regarding criminal capacity.

Amendments to the Divorce Act 70 of 1979

13. The CCL has noted with concern the complete absence from this Amendment Bill the amendments aimed at curing the unconstitutionality of the Divorce Act insofar as the Constitutional Court ruled in the matter of *Johncom Media Investments Ltd v M and Others (Media Monitoring Africa as Amicus Curiae) 2009 (4) SA 7 (CC)*. This relates to the privacy of children in divorce proceedings.

14. In the original draft Amendment Bill which was circulated by the Department of Justice and Constitutional Development to the CCL for comment, aimed at reflecting the Constitutional Court's judgment. Our comment at the time was to the effect that the Department's approach was too sweeping, and perhaps limited freedom of expression rights more broadly than the judgment required.

15. Nevertheless, the CCL considers this to be an imperative amendment, not only because it arises from the Constitutional Court judgment that is protective of children's rights, but also because the law is currently frequently breached by the media. Furthermore, the SALRC made recommendations along the lines determined by the Court some years before that hearing.

16. We had previously proposed the following amendment to section 11of the Divorce Act contained in the Judicial Matters Amendment Bill [B – 2010].

17. "If at any stage during proceedings in terms of this Act, it appears to the court that there is a likelihood that harm may result to a person under the age of 18 years as a result of the hearing of

any evidence, the court may, of its own accord or on application by any interested party, order that the proceedings be held behind closed doors, and that no person be present unless his or her presence is necessary for the proceedings."

18. We had previously proposed the following amendments to section 12 of the Divorce Act contained in the Judicial Matters Amendment Bill [B – 2010]. They are set out below:

"No person shall publish in any manner, including in a newspaper or periodical publication, by radio or television broadcast, or by other means of electronic communications or otherwise make known to the public or a section of the public, the identity of, or any information that may reveal the identity of any party or child in any divorce action, unless authorized by the court in exceptional circumstances."

19. The CCL would urge the Committee to include the amendments in the present Amendment Bill and allow for comment thereon. Media organisations would no doubt also wish to make comments as this relates to the balance between the protection of children's rights on the one hand and freedom of expression on the other.

Conclusion

20. We trust that the above submissions will assist the Committee in finalising the Amendment Bill.

21. If oral submissions are to be presented to the Committee, the CCL requests an opportunity to do so.

Yours faithfully

Prof Ann Skelton
Director: Centre for Child Law