SUMMARY OF WRITTEN SUBMISSIONS AND RESPONSES OF THE DEPARTMENT OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT: MAINTENANCE AMENDMENT BILL [B16 - 2014]

The Portfolio Committee on Justice and Correctional Services invited stakeholders and interested persons to make written submissions on the Maintenance Amendment Bill [B 16 - 2014]. The responses of the Department to the issues raised are set out below:

Submissions/Recommendations by clause

Clause	Name	Submission / Recommendation	DOJ&CD Response
1. General	Sonke Gender Justice (Sonke) Western Cape Ministry of Social Development Commission for Gender Equality (CGE) ABSA Bank (ABSA) COSATU	Commentators indicate that they support the Bill	Noted.
2. Clause 1	CGE	The clause is supported.	Noted.
3. Clause 1	Cape Bar Parliamentary Committee of the GCB (the GCB)	The new category which places an obligation on a maintenance officer to institute an enquiry where good cause exists for the substitution or discharge of a verbal or written agreement will ensure that a *de novo* enquiry need not be held.	Noted.
4.	S Molwana	The discharge or substitution of a maintenance order for a person legally liable to maintain any other person is provided for in section 6(1)(a) of the Act.	Noted.

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5. Clause 1	Van Niekerk, J	(i) A simplified procedure should be created to enable verbal or written maintenance agreements to be made an order of court. While a remedy should be created for those persons who have managed to come to some form of agreement to be able to have the certainty of formalizing their agreements by means of a court order as the Bill does, this remedy should not shut the door on those persons who do not want to involve the courts. (ii) The Legislature should provide clarity on the interaction between agreements reached between parties and maintenance orders that have been made, that is what effect does a verbal/written agreement have on an existing maintenance order? Mr Van Niekerk, a magistrate dealing with maintenance enquries, alleges that evidence is frequently tendered during maintenance matters that the parties have reached an agreement which is in conflict with the existing maintenance order. He contends that the wording of the proposed new section 6(1)(c) would allow maintenance defaulters to raise the excuse of alleged verbal agreements which depart from an existing maintenance order. He goes further to say that if the provision is enacted as is, it may result in complaints being turned down on technical grounds because section 6(1)(b) and (c) are listed in the alternative.	(i) The view is held that where parties can agree on their own on maintenance, there is no reason why they should be forced to go to court, unless they can no longer agree. The Bill does not affect this position. (ii) We do not agree with these contentions. The proposed new section 6(1)(c) envisages the situation where no maintenance order exists at all. The scenario sketched by Mr Van Niekerk cannot happen. If there is an existing maintenance order in place there is no room for any verbal or written agreement between the parties, which conflicts with the order. In a case such as this, the parties must approach the court for the order to be amended if that is what the parties have agreed to. Once a maintenance order is in place it must be complied with to the letter, until it is amended or discharged by the maintenance court. In order to address the concern of Mr Van Vuuren so that there are no ambiguities in this regard, it might be appropriate to re-word the proposed new section 6(1)(c) as follows: "(c) that good cause exists for the substitution or

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			discharge of a verbal or written agreement in respect of maintenance obligations **[which has not been made an order of court in terms of this Act, or any other law]** in respect of which there is no existing maintenance order[1],".
		(iii) There is presently no measure or system in place whereby children placed in foster care can be cross referenced to maintenance payments being made for the same children where the foster care order and the maintenance order are made in different areas/ provinces. As is the case with the Children's Act, the area of jurisdiction for maintenance claims should be limited to the area where the person to be maintained is ordinarily resident. This alignment will ensure the verification of information and prevent any unlawful duplication of payments for children.	(iii) The current provision in terms of which a maintenance beneficiary can only institute a claim for maintenance in the magisterial district of one's place of residence inconveniences beneficiaries who may be working and residing and different magisterial districts. They may be forced to take time off work which could have negative consequences for them. Usually, social workers will be involved in foster care arrangements and any duplication should be picked up by them. Administrative hurdles of the nature sketched by Mr Van Niekerk should not frustrate the object of this clause. Administrative hurdles of this nature must be dealt with in terms of the law.

[1] "maintenance order" is defined in section 1 of the Act as follows:
" 'maintenance order' means any order for the payment, including the periodical payment, of sums of money towards the maintenance of any person issued by ***any*** court in the Republic, and includes, except for the purposes of section 31, any sentence suspended on condition that the convicted person makes payments of sums of money towards the maintenance of any other person;"

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			As suggested by Mr Van Niekerk, in his comments, these observations of his fall outside the scope of the amendment in question.
6. Clause 2	GCB	The mechanism created for the payment of the costs for providing the contact information of the defaulter to the court and the possible recovery thereof by way of the proposed amendment to section 20 of the Act seems to be the most feasible.	Noted.
7. Clause 2	COSATU	The requirement that complainants pay for the cost of providing contact information of defaulters to the court will cause hardship to women as they constitute the majority of maintenance complainants. Commentator proposes that the DOJ&CD establishes a fund from which such costs can be paid.	State funds are limited. The question will inevitably arise why harassment complainants, who are also often women and children, do not enjoy the same benefit in terms of the Protection from Harassment Act, which requires the victim to pay for these costs. The maintenance court can, in terms of clause 8, make an order for the costs to be borne by the maintenance defaulter. The amount payable to the cell phone service providers is R80-00.
8. Clause 2	CGE	(i) The complainant should not have to bear the costs for the provision of information by the service providers. This should be borne by the service providers who could possibly be allowed to levy a charge against the relevant customer. (ii) Revise the clause by inserting the words "as well as any family member" after "providers", on page 3, in line 23.	(i) See the comments in respect of item 7 above. (ii) In terms of section 8 of the Act, a magistrate may, either before or during a maintenance enquiry and at the request of a maintenance officer, require the appearance of any person before a magistrate for examination on

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			information regarding the identification or place of residence or employment of any person who is liable to maintain any other person or the financial position of any person affected by such liability. This provision covers any natural person, including a family member of a person liable to maintain another.
9. Clause 2	Western Cape Social Development	Substitute the words "have not borne fruit" on page 3 , in line 16, for "have failed to locate the whereabouts of the person".	The words used in the Bill and those suggested by the commentator mean the same, namely that efforts to trace the person have not produced successful results. Consideration could be given to substituting the words as per the submission. The Department has no objection. For the Portfolio Committee's consideration.
10. Clause 2	Vodacom	(i) Define the words "prescribed information" (ii) Revise proposed new section 7(3)(d), on	The Act already defines the word "prescribed" to mean prescribed by regulation. It is not advisable to also define "prescribed information", as the Bill and the Act contain words such as "prescribed forms" and "prescribed manner". Clause 2 requires regulations, and prescribed information means that the information will be prescribed in regulations. Role players will be given an opportunity to comment on the regulations to be made, where they can give inputs on the information that will need to be prescribed and that will assist them in providing the information. (ii) Determining the days within which to

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		page 3, in line 31, as follows": (*d*) The information referred to in paragraph *(b)* shall be provided to the maintenance court within 30 days of receiving the notice when the information is available". (iii) In instances where an employer has taken a post-paid contract on behalf of its employee, the contact information of the user will be in the possession of the employer. Therefore, the Bill should make provision for the transfer of the request to the employer of the user. (iv) The Bill should make provision that the fee for furnishing the court with the contact information of the user/defaulter must be paid in full prior to directing the ECSP to provide the court with the prescribed information.	provide the information to the court in legislation may be restrictive and may not work for all the ECSP's since they have not all commented on the 30 day limitation proposed by Vodacom. Prescribing the *dies* will also take away the discretion of the court. Experience has often shown that provisions of an inflexible nature, as proposed, give rise to problems of their own. (iii) Allowing the ECSP to transfer the direction of the court to provide information to a third party may present enforcement challenges for the court. The Bill provides for the ECSP to apply for cancellation of the direction on the grounds, among others, that it does not have the information on its records. In this case the ECSP will be in a position to indicate this to the court and the provisions of section 8 of the Act referred to in item 8 above, can be invoked. (iv) The payment process could be streamlined in the regulations. For this purpose, it is suggested that the proposed new section 7(3)(h) could possibly be amended on page 3 of the Bill in line 52, to read as follows: "payable in the prescribed manner by the person lodging the complaint ....".

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		(v) The direction issued by the court should relate to identifiable data records and a specific time period to allow the ECSP to ascertain with certainty when last the number was used.	(v) Noted. The information that will assist the ECSP's in identifying the person whose details are required, will be prescribed in regulations.
11. Clause 2	Van Niekerk, J	(i) Similar provisions in the Protection from Harassment Act were introduced to deal with a situation where the person/source of the harassment is not known and these powers are utilised to trace the source. Section 8 of the Act grants the maintenance courts powers that are wide enough to obtain information, even from ECSP's.	(i) This clause will be beneficial to maintenance beneficiaries since it will provide the court with contact information of would–be respondents and defaulters. This will contribute to the finalization of maintenance enquiries and proceedings pending against the defaulters. It is the same method used to trace the stalkers. Section 8 of the Act does not have the detailed process provided for in clause 2, and it is therefore inadequate for purposes of tracing defaulters. The mechanism in proposed in clause 2 is also used as a measure of last resort and any directive must be authorized by a court.
		(ii) If clause 2 is retained, the use of ECSP's as a last resort will hinder the investigation of maintenance complaints. A maintenance officer should be able to decide which course of action to take in tracing the defaulter. The requirement that the tracing by ECSP's should be used as a last resort should be deleted from the Bill.	(ii) It is necessary to have uniformity in the tracing of defaulters in the country. The regulation of the use of ECSP's in obtaining information of defaulters is therefore necessary. Allowing maintenance officers a discretion in the use of ECSP's will give rise to inconsistencies. The use of ECSP's as a last resort will save complainants costs to be paid to ECSP's. Only courts should be able to give this authorization

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			where other attempts have failed.
		(iii) The proposed payment of tracing costs should be extended to other institutions that provide information to the court and should not only be applicable to ECSP's, alternatively, the payment of costs should be deleted from the Bill.	(iii) This could possibly be explored by the South African Law Reform Commission in its investigation into the maintenance system, for instance banks could be included. This, however, requires further research and engagement with the institutions in question.
		(iv) If the payment of costs for providing information is retained in the Bill it should be provided for in section 8 of the Act.	(iv) Section 8 of the Act (referred to in item 8 above) deals with a different type of examination of persons by the maintenance officer, while section 20 deals with cost orders. The amendment is appropriately placed in section 20 of the Act.
12. Clause 3	CGE	A penalty provision is proposed in respect of a conviction of a person who wilfully fails to comply with a subpoena or furnishes the court with incorrect information. A fine or period of imprisonment not exceeding one year is proposed.	This is already catered for in terms of existing law, for instance contempt of court, defeating the ends of justice and perjury. See also sections 33, 34 and 35 of the Maintenance Act, 1998, which criminalise similar conduct.
13. Clause 3	Vodacom	The word "any" in clause 3, line 5, includes a juristic person. Therefore, ECSP's should be excluded from the operation of clause 3 if they have complied fully with the directive to furnish the court with contact particulars of the respondent in terms of clause 2.	Clauses 2 and 3 of the Bill serve two different purposes. While clause 2, which amends section 7 of the Act and deals with tracing of defaulters is relevant for the investigation of complaints, clause 3 of the Bill relates to the actual enquiry where a person will be subpoenaed to give evidence. Clause 2 does not involve a subpoena. The ESCP may even be an employer of

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			a person who has an obligation to maintain another person. Therefore, it is not possible to exempt ESCP's from the operation of clause 3.
14. Clause 4	COSATU	The introduction of interim orders in the maintenance regime is welcomed.	Noted.
15. Clause 4	GCB	(i) Interim maintenance orders will go a long way in ameliorating the effects of a long drawn-out maintenance enquiry. The effect of this amendment is that a maintenance court cannot make orders with retrospective effect as an interim order can be substituted with a different order at a later stage. (ii) The Bill should set limits for the conclusion of maintenance enquiries.	(i) Noted. (ii) Setting limits for the conclusion of maintenance enquiries is undesirable as it will take away the discretion of the court. Experience has often shown that provisions of an inflexible nature, as proposed, give rise to problems of their own. The Bill enjoins the court to conclude maintenance enquiries as speedily as possible and to limit postponements. An interim order will compensate for postponements if there is a need for that. An interim order will ensure that the beneficiary receives maintenance and the person obliged to pay maintenance will also not delay the matter unnecessarily as an interim order may not be in his or her favour.
16. Clause 4	Van Niekerk, J	(i) The requirement that *prima facie* evidence must exist before an interim order can be made sets the bar too high.	(i) Orders of this nature cannot be made "in the air". They must be based on some evidence, namely *prima facie*

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			evidence. The need for *prima facie* evidence also caters for cases where the issue of paternity is in dispute.
		(ii) The proposed amendment does not go far enough and does not cater for instances where a respondent makes an offer for an increased maintenance payment which is unacceptable to the applicant. He is of the view that the court should be able to make an order on the basis of the amount offered by the respondent, albeit on an interim basis, which, he argues, will go a long way in addressing the needs of the applicant, as opposed to no relief at all.	(ii) In this regard, Mr Van Niekerk refers to instances where the applicant is not necessarily applying for a maintenance order when there is none in place, but to instances where the applicant is applying for an increase in maintenance when there is already a maintenance order in place. The intention of the clause is, however, to put in place a mechanism for the making of an interim maintenance order when there is none in place. The plain meaning of the words used in the clause, namely "interim maintenance order" implies just this, as does the wording of the provisions of the proposed new section 10(6)(b)(i) and (ii). This is confirmed by the fact that the amendments in the Bill are contained in section 10 of the Act, which deals with enquiries by maintenance courts. If interim orders are to be made in the case of existing maintenance orders, it is suggested that they be included in section 16 of the Act. They should moreover, strictly speaking, from a language point of view, not be referred to as "interim maintenance orders" but should be referred to as "interim orders" substituting existing maintenance

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			orders. In order to achieve the above primary purpose of clause 4 of the Bill, it is proposed that the reference to section 16(1)(b) of the Act in line 31 of the Bill on page 4, be deleted. There is, however, merit in the comments of Mr Van Niekerk which the Portfolio Committee might wish to consider, namely for maintenance courts to be able to make interim orders in the case of existing maintenance orders, relating to any application for the increase, reduction or discharge of maintenance obligations. For the Portfolio Committee's consideration. Any amendments for such purpose would, it is suggested, require further research and possible consequential amendments.
		(iii) "Undue" hardship is an unnecessary requirement and may "nullify the good intentions of the legislature".	(iii) The court will need to establish whether the complainant will suffer some form of hardship, the Bill suggesting "undue" hardship. The concept of interim maintenance orders is something entirely new in our law. "Undue" hardship has therefore been suggested, meaning that the applicant must make out a proper case for an interim order, which, in itself, is quite a drastic measure. The Department therefore proposes the retention of undue hardship rather than "hardship". Orders of this nature should not be

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		(iv) A person against whom a maintenance order is made may also suffer undue hardship, for instance where the respondent cannot afford to continue paying maintenance as a result of having been retrenched. The requirement of the existence of undue hardship operates only in favour of a person to be maintained. This clause should be extended to also cover a person against whom a maintenance order is made.	given lightly. (iv) These comments are made on the assumption that interim orders can also be made in respect of existing maintenance orders. See our comments in paragraph (ii) above.
17. Clause 4	CGE	The Bill should provide that where a matter is postponed for a period of one month or more the making of an interim order must be obligatory.	Providing for an obligatory interim order will take away the discretion of the court. The circumstances may not always warrant such an order, for instance where it is clear that paternity of the child is in issue. The desirability of fixing set periods as suggested is also questioned, as pointed out in item 15 above.
18. Clause 5	CGE	Commentators indicate they support the clause.	Noted.
19. Clause 5	Van Niekerk, J	(i) The deletion of the word "Any" from section 16 and replacing it with a reference to a closed list of courts is a step backward. The definition of "maintenance order" in section 1 of the Act refers to 'any order...issued by any court'. This deletion will weaken the progression of the enforcement of the duty to maintain by the courts other than those listed in the proposed amendment. The proposed closed list of courts, other words, excludes the possibility of any other court ever making a maintenance order, for instance a children's court or a court sitting in a domestic violence matter.	(i) In the light of the definition of "maintenance order" in section 1 of the Act, which provides that a maintenance order means any order issued by any court, it might be prudent to leave this portion of section 16(2)(a) unchanged, as suggested by Mr Van Niekerk.

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		(ii) The provisions of section 16(2)(a)(*aa*) to (*cc*) as they read at present and which require evidence to be heard before a section 16(2) maintenance order can be made, are, in most cases, ignored simply because most maintenance orders are made by consent between the parties and there is no evidence led.	(ii) Noted. This needs to be addressed. A revised clause 5 which addresses this concern, as well as the other concerns raised by Mr Van Niekerk below, is tabled for the Portfolio Committee's consideration: "(2) *(a)* Any court - (i) that has at any time, whether before or after the commencement of this Act, made a maintenance order under subsection (1)*(a)*(i) or *(b)*(i); (ii) that makes such a maintenance order; or (iii) that convicts any person of an offence referred to in section 31(1), shall, subject to paragraph *(b)*(i), make an order directing any person, including any administrator of a pension fund, who is obliged under any contract to pay any sums of money on a periodical basis to the person against whom the maintenance order in question has been or is made, to make on behalf of the latter person such periodical payments from moneys at present or in future owing or accruing to the latter person as may be required to be made in accordance with that maintenance order if that court is satisfied – *(aa)* <u>where applicable,</u> in the case of

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			subparagraph (i), after hearing such evidence, either in writing or orally, as that court may consider necessary; *(bb)* where applicable, in the case of subparagraph (ii), after referring to the evidence adduced at the enquiry or the application for an order by default, as the case may be; or *(cc)* where applicable, in the case of subparagraph (iii), after referring to the evidence adduced at the trial; and *(dd)* where applicable, after hearing such evidence, either in writing or orally, of any person who is obliged under any contract to pay any sum of money on a periodical basis to the person against whom the maintenance order in question has been or is made, that it is not impracticable in the circumstances of the case: Provided that nothing precludes the court from making an order in terms of this subsection if it is of the opinion that the postponement of the enquiry in order to obtain the evidence of the person referred to in subparagraph *(dd)* will give rise to an unreasonable delay in the finalisation of the enquiry, to the detriment of the person or persons to be

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			maintained.".
		(iii) The provision that the court should hear the evidence of the person obliged to pay money under any contract and whom the court intends ordering to pay such money to the court towards maintenance, is not supported. Employers should not be hauled to court because maintenance is an employee's private financial issue. Furthermore, there is no judicial and administrative capacity to cope with such unnecessary duplication of work. Mr Van Niekerk points out that in his experience as a presiding officer in maintenance enquiries, not one employer has ever responded to the request for the employer to give evidence as required by the High Court judgment to this effect. He is concerned that the Bill, which gives effect to this judgment, will have unintended consequences, namely that maintenance enquiries will have to be postponed time and again in order to satisfy this requirement, to the detriment of those in dire need of financial support. This requirement, he therefore suggests, should be deleted from the Bill.	(iii) It needs to be borne in mind that this clause gives effect to a judgment of the High Court. In other words, it is already existing law. Plans will need to be put in place for the effective implementation of the clause. The proposal to delete the clause from the Bill can therefore not supported. However, the revised clause 5, proposed above, is intended to mitigate the effects pointed out by Mr Van Niekerk.
		(iv) Should the proposed requirement referred to in subparagraph (iii) above not be deleted from the Bill, the following proposals are made: (a) All parties that may be affected by an order in terms of section 16(2), i.e. the person *in whose favour* the maintenance order is, was or may be made, the person *against* whom the maintenance order is, was or may be made, as well as the person who is *obliged* under contract to pay any	(iv) Section 16(2) already provides that the court may only make an order such as under discussion "if the court is satisfied .... that it is not impracticable in the circumstances of the case", which requires the court to take all issues into account, that is the needs and circumstances of the applicant and the respondent. The Department, however,

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		sum of money on a periodical basis to the person against whom the maintenance order has been or is made, must be given an opportunity to be heard on the feasibility and practicality of such an order. (*b*) The opportunity to be heard should be in the prescribed format and served/notified in a prescribed manner. (c) Should no evidence or information be provided to the court, the court should be compelled to make an order in terms of section 16(2).	agrees that there might be a need to cater for the situation where the person who is required to make payments on behalf of the respondent, does not avail himself or herself for purposes of giving oral or written evidence, as required by the proposed new subparagraph (dd). This could be achieved by adding the following proviso at the end of section 16(2) as suggested in our revised clause 5, set out above: "Provided that nothing precludes the court from making an order in terms of this subsection if it is of the opinion that the postponement of the enquiry in order to obtain the evidence of the person referred to in subparagraph *(dd)* will give rise to an unreasonable delay in the finalisation of the enquiry, to the detriment of the person or persons to be maintained.". However, it should be borne in mind that the person referred to in subparagraph (dd) can, in terms of section 9(1) of the Act, be subpoenaed to attend the maintenance enquiry and his or failure to do so would attract a criminal sanction. (See section 33 of the Act). The proposed proviso might nonetheless still serve a purpose in the event of undue delays.
20. Clause 6	GCB	This proposed amendment is welcomed as it will	Noted.

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		ensure that maintenance enquiries are concluded as speedily as possible.	
21. Clause 6	CGE	Commentators indicate they support the clause	Noted.
22. Clause 7	GCE	Commentators indicate they support the clause.	Noted
23. Clause 8	CGE	The requirement that the complainant must bear the costs of obtaining the information on the whereabouts of the defaulter from ECSP's will be burdensome to many complainants. This clause should be deleted from the Bill.	The maintenance court can, in terms of section 8 of the Act, make an order for the costs to be borne by the maintenance defaulter. The Bill needs to provide for who will be responsible for the cost of securing the contact information of a person liable to maintain another. Placing this responsibility on the State will give rise to the question why the same assistance cannot be extended to complainants under the Protection from Harassment Act, who are also, mostly women and children. A service of this nature is paid for by the complainant under the harassment legislation. It must also be borne in mind that applications for this service are likely to be numerous and additional State funding is limited, as borne out in the recent Budget debate. The current tariff is R80-00 per request.
24. Clause 9	CGE	Commentators indicate they support the clause.	Noted.
25. Clause 10	CGE	Commentators indicate they support the clause.	Noted.
26. Clause 10	COSATU	The direction by the maintenance officer to transfer the file must be done at the inquiry stage, and the transfer should be standardised.	There may not be a need to transfer at the enquiry stage. The need to transfer will usually arise much later when the order is already in place. The aim of clause 10 is to standardise the transfer procedure.

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27. Clause 11	CGE	Commentators indicate they support the clause.	Noted.
28. Clause 11	COSATU	Blacklisting of defaulters is punitive and will also affect the defaulter's other dependants.	This clause serves a specific purpose which is to ensure that a defaulter does not continue to receive credit while owing on maintenance. The view is held that a clause of this nature will encourage defaulters to make good their maintenance obligations for fear of the consequences of being blacklisted.
29. Clause 11	ABSA	(i) Credit providers will need to implement a process to receive, record and store the orders in a manner that will allow easy access for credit officers to conduct affordability assessments. (ii) The question is raised whether the orders will be delivered to local branches or at the principal address of the credit providers? The administrative burden on the State and credit providers emanating from processing the orders will be alleviated if orders are submitted to one credit provider, eg TransUnion or Experian to which other credit providers will have access. This will mitigate credit risk and ensure the integrity of personal information. Alternatively, the State should deliver all orders to the principal address of the credit provider. However, this will not address the problem of real time credit application and receipt of the orders. (iii) Large credit providers may find it difficult to consolidate receipt of orders and keep up to date with the receipt of such orders for real time credit applications.	(i) Noted (ii) This clause requires the particulars of persons to be submitted in "the prescribed circumstances and in the prescribed manner" to credit providers. It is suggested that the details in respect of these aspects be dealt with in the regulations. (iii) Noted.

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		(iv) Credit providers will need to keep a register of all maintenance orders received. (v) Record retention requirements for credit providers will have to be considered as these orders will have to be considered in perpetuity. (vi) Define the terms "prescribed manner" and "prescribed circumstances" on page 6, in line 45. The appearance of identity numbers of affected persons on the orders will expose them to risks. The National Credit Act and the Protection of Personal Information Act require that the person whose personal information is being communicated to a third party must have consented thereto or there must be justification for communicating such information.	(iv) Noted (v) Noted (vi) The Act already defines the word "prescribed" to mean prescribed by regulation. It is not advisable to define prescribed information, as the Bill and the Act contain words such as "prescribed forms" and "prescribed manner". Clause 11 requires regulations and prescribed information means that the information will be prescribed in the regulations. Role players will be given an opportunity to comment on the regulations where they can give inputs on the matters that will need to be prescribed. Regarding the Protection of Personal Information Act, section 11(1)(c) thereof provides that a responsible party may process personal information of a person if that processing complies with an obligation imposed by law on the responsible person. The concern raised is therefore addressed.
30. Clause 11	Van Niekerk, J	(i) Not all applications made in terms of section 26(2) are granted. The reason for the refusal to grant the order could be that the money was not paid due to the failure of an employer to pay over monies that were deducted from the respondent's	(i) The proposal seems to be practical. A proposal for the Committee's consideration is as follows: "(2A) On **[receipt]** the granting of an application contemplated in subsection (2) by a

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		salary or that the clerk of the court failed to pay the money over to the beneficiary, despite the respondent having paid. Therefore, requiring the maintenance officer to furnish the information of the respondent/accused upon receipt of a section 26(2) application is premature. The information should only be submitted once the court has made an order against the respondent.	maintenance court, the maintenance officer or clerk of the court at the request of the maintenance officer, shall, notwithstanding anything to the contrary contained in any law, in the prescribed circumstances and in the prescribed manner, furnish the particulars of the person against whom a maintenance order has been made and a certified copy of the **[relevant]** order of the court contemplated in subsection (2)*(a)*(i), (ii) or (iii), to any business which has as its object the granting of credit or is involved in the credit rating of persons.".
		(ii) The reference to "relevant order" on page 6, in line 47 could lead to different interpretations.	(ii) See the proposed amendments referred to in subparagraph (i) above.
		(iii) The maintenance officer should be required to submit to the business whose object is the credit rating of persons, a copy of the enforcement order, and not the maintenance order itself. As is the case in civil matters, the particulars of the defaulter information must be furnished to an organisation involved in credit rating after an order in terms of section 26(2) has been granted.	(iii) See the proposed amendments referred to in subparagraph (i) above.
		(iv) Maintenance officers (more particularly prosecutors) are of the view that they should not be involved in the enforcement processes. Placing a duty on maintenance officers to furnish the particulars of the defaulter to credit rating institutions *'upon receipt of a complaint'* will be	(iv) See the proposed amendments referred to in subparagraph (i) above.

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		almost impossible. This function can be performed by the clerk of the court, as is the case in civil matters.	
31. Clause 12	CGE	Commentators indicate they support the clause.	Noted.
32. Clause 12	COSATU & Van Niekerk, J	The requirement that the court must hear the evidence of the employer of the defaulter before making an order will result in delays in finalising cases. The alternative is to encourage employers to co-operate with maintenance orders as a form of community service.	This clause gives effect to a decision of the court in the judgment of S v Nkoele where the court held that a magistrate contemplating an order in terms of section 16 of the Act must also afford the employer of the person with a maintenance liability an opportunity to comment on the feasibility of the order. The view is held that the involvement of the employer of the person with a maintenance liability will ensure enforcement and maximum application of the legislation. While it will be difficult to reach employers of all persons with maintenance obligations, the Department will initiate awareness campaigns when the Bill becomes law. It is, however, suggested that this clause be revised in similar vein to what the Department proposes in respect of clause 5, as captured in item 19(ii) above. The following revised clause is submitted for the Portfolio Committee's consideration: "(1) A maintenance court may – *(a)* on the application of a person referred to in section 26(2)*(a)*; **[or]** *(b)* when such court suspends the warrant of execution under

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			section 27(4)*(b)*[,]; *(c)* when such court suspends the order for the attachment of debt under section 30(1); and *(d)* where applicable, after hearing the evidence, either in writing or orally, of the employer of the person in question, make an order for the attachment of any emoluments at present or in future owing or accruing to the person against whom the maintenance order or other order in question was made to the amount necessary to cover the amount which the latter person has failed to pay, together with any interest thereon, as well as the costs of the attachment or execution, which order shall authorise any employer of the latter person to make on behalf the latter person such payments as may be specified in order from the emoluments of the latter person until such amount, interest and costs have been paid in full: Provided that nothing precludes the court from making an order in terms of this subsection if it is of the opinion that the postponement of the enquiry in order to obtain the evidence of the employer referred to in paragraph *(d)* will give rise to an unreasonable delay in the finalisation of the matter, to the detriment of the person or persons to be maintained.". (Double underlining

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			indicates revised new provisions for the Portfolio Committee's consideration).
33. Clause 12	GCB	The inclusion of sub-paragraph (d) appears to increase the burden of proof for the applicant in respect of the instances set out in sub-sections (*a*) and (*b*). It is suggested that sub-sections (*c*) and (*d*) be combined as sub-section (*c*).	The Department is not sure what this would achieve. Distinguishing sub-paragraph (*c*) from sub-paragraph (*d*) makes the reading easy and clearer. Combining the two subparagraphs, as suggested, will, in our opinion, not change the meaning. However, our proposed amendment (the proviso suggested in item 32 above) might address the matter, ensuring that the applicant's application is dealt with, without any undue delay.
34. Clause 13	CGE	Commentators support the proposed increase of the penalty, but propose that section 26 of the Maintenance Act be amended as follows: "26(c). Where a person against whom an order for the payment of maintenance in terms of section 16 (1) (a) or section 21(3)(a) has been in default for a period of two consecutive months or more then the clerk of the court must immediately upon request by a complainant issue and execute a warrant for the arrest of the person concerned who may then be treated in terms of section 31 and 41 within forty eight hours of such arrest.".	Not supported. Only a court can issue a warrant of arrest for execution by the police. It will be improper for the clerk of the court to issue a warrant or even execute it. The proposal can open doors for abuse of the process.
35. Clause 17	Van Niekerk, J	Ad the proposed new section 39A(2): Sometimes a maintenance investigator is assisted in the execution of some of his/her duties, which are more administrative in nature, by the clerk of the court, e.g. the faxing and posting of notices in terms of sections 16(3) and 29(1) in accordance with Regulation 26(2)(b). Such assistance by the clerk of the court should not be criminalised.	The Department is of the view that any assistance provided by the clerk of the court at the request of a maintenance investigator should not be criminalized. The chances of such a matter being prosecuted are, in our opinion, extremely remote. However, the following amendment to the clause

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		Clause 17 could have such an effect.	(proposed new section 39A(2)) is put forward for the consideration of the Portfolio Committee should the Committee seek certainty: "Any person, other than a clerk of the court who is requested to assist a maintenance investigator in the performance of his or her functions, who has not been appointed as a maintenance investigator in terms of this Act and who –".
36. Clause 13-17	CGE GCB	Clauses are supported.	Noted.
37. Clause 13-17	SONKE	(i) Imprisonment is an inappropriate means by which to enforce maintenance payments. The proposed timeframes are extreme, go beyond what is globally acceptable and are not underpinned by a clear rationale. Furthermore, the imprisonment terms have the following disadvantages: (a) defaulters will not be able to work and, as such, unable to meet their existing and future maintenance obligations; (b) the imprisonment provisions will result in absent parenthood; (c) the proposed imprisonment terms will only serve to secure payment from those debtors who are able but unwilling to pay but will have a devastating effect on those debtors who do not have the financial capacity to meet their maintenance obligations.	(i) The view is held that the Maintenance Act places an emphasis on civil enforcement mechanisms rather than criminal enforcement. The purpose of these civil enforcement mechanisms is to ensure that persons with maintenance obligations comply with maintenance orders. There is a high prevalence of failure to comply with maintenance orders and imprisonment should be utilised as a measure of last resort where efforts to enforce the order have failed. It is trite law (see S vs Zinn, an old Appellate Division judgment) that judicial officers, when considering any sentence to be imposed by him or her for any contravention of the criminal law, **must** take into account a number of factors, for instance the personal circumstances of the accused person, the interests of society and the nature of

Clause	Name	Submission / Recommendation	DOJ&CD Response
			the crime, among others. Non-compliance with maintenance orders is sadly very prevalent in South Africa, with dire consequences. The intention behind the increase in the maximum terms of imprisonment, as proposed in these clauses, is to empower judicial officers to use them in extreme cases of non-compliance, which will also serve as a deterrent. The Department is furthermore of the view that the aspect of sanctions needs to be addressed by way of training in order to bring to the attention of magistrates the wide variety of sentencing options available which could be imposed in appropriate cases. The provisions of section 297 of the Criminal Procedure are particularly relevant in this regard. The Portfolio Committee might wish to consider including a general provision to the following effect at an appropriate place in the Maintenance Act: "The use of imprisonment for non-compliance with any provision of this Act should only be used as a measure of last resort and only for the shortest appropriate period of time.".
		(ii) Clauses 13 and 14 contemplate imprisonment without a fine. Imprisonment without the option of a fine is a serious infringement on the right to freedom.	(ii) These clauses do provide for a fine or imprisonment not exceeding one year, and three years respectively. It must be noted that the person who is

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			convicted for willfully interrupting a maintenance enquiry or the court may not necessarily be the person with a maintenance obligation. In respect of failure to make regular payments, the court has an option not to impose a fine. See also our comments in this regard in paragraph (i) above.
		(iii) The commentator proposes that all sentences should be subject to a period of suspension in order to allow defaulters an opportunity to remedy their failure to pay maintenance.	(iii) The Department is of the view that this will be limiting the discretion of the court with regard to sentencing. This will also render enforcement provisions of the Act ineffective.
		(iv) It is proposed that penalties such as withholding, the revocation or suspension of passports, visa's, drivers and other licenses related to membership of professional bodies be considered as alternatives to imprisonment in respect of any contravention of a maintenance order.	(iv) Although these proposals would need to be researched, the view is held that these mechanisms will only apply to a limited number of defaulters as the majority of them will probably not have passports, visa's and similar licences. It is suggested that this be considered by the South African Law Reform Commission in its investigation.
38. Penalties	COSATU	The question is raised on the strategy that will be used to deal with persons who fail to provide an update of their addresses.	Section 39 of the Act creates an offence and provides for a penalty, among others, for a person who fails to give notice of change of address. The penalty is currently a period of imprisonment not exceeding six months, or a fine. The Bill aims to increase the imprisonment to one year.
39. Clause 18	CGE	The commentator proposes that clause 18 , on page 8, in line 38 be amended as follows:	This clause gives effect to the decision of the High Court in the case of Sv

Clause	Name	Submission / Recommendation	DOJ&CD Response
		"the court may on its own accord or on consideration of the circumstances provided by the respondent or at the request of the prosecutor, convert the proceedings into such enquiry."	Magagula where the court held that the conversion should be in the form of a discretion of the court. The inclusion of the words "on good cause shown" used in the clause, will ensure that the discretion will be only be exercised if it is evident from the facts that it is desirable that a maintenance enquiry be held. The prosecutor, being *dominus litis*, would have decided to institute the prosecution in the first place. Therefore it should be the prosecutor who requests the court to convert the trial into an enquiry. It is, however, the court's prerogative to agree or not to agree to the prosecution's request, in addition to the court being able to do so on its own accord. It therefore does not seem appropriate to allow the respondent to initiate this course of action during criminal proceedings.
40. Clause 18	GCB	The inclusion of the words "on good cause shown" ensures that the discretion will be exercised only once it is evident from the facts that it is desirable that a maintenance enquiry be held.	Noted.
41. Determination of maintenance matters	CGE	In order to ensure compliance with the constitutional rights of the child, swift procedures similar to those applicable in the CCMA which will deal exclusively with maintenance matters, including collection and payment, should be introduced.	While the CCMA deals with labour issues, it is suggested that the South African Law Reform Commission be requested to see whether this is viable.
42. Maintenance investigations	Govender, P	The requirement for complainants to supply bank statements and income and expenditure and disclose work details and salary slips should be	Maintenance officers need all relevant before coming to a decision on whether to institute a maintenance enquiry in the

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		done away with. This information must be submitted only in court and on a need to know basis. This is because the one party can use the information contained therein against the other	first place and on the amount of maintenance payable, which they consider in line with negotiations between the parties. Any form of proof, including bank statements, is necessary to assist in determining the amount to be paid as maintenance. It is not always necessary for a matter to proceed to a full enquiry in court when the amount of maintenance can be settled with a maintenance officer.
43. Payment of maintenance	COSATU	There is a need to create synergies with other bodies, such as banks, that can facilitate the implementation of stop orders as a method of paying for maintenance.	It is proposed that matter be referred to the SALRC for inclusion in its review of the Act.
44. Custody of children and maintenance	Somar Sitlu	(i) The Act should be amended to provide for standing custodians who can deal speedily with issues relating to custody of children. The custodian should have the power to remove a child from the custody of another parent for a certain period. (ii) Unemployed parents use maintenance for their own benefit and not for the benefit of the child.	(i) The SALRC deals with the issue of mediation in its Issue Paper on Maintenance. (ii) A parent who pays maintenance can report the improper use of maintenance money to the social workers who will investigate the claim and take appropriate action.
45. Service of process	Moilwa, R	The Act should be amended to allow electronic service of process in maintenance cases. This method is faster.	The feasibility of this will need to be investigated.
46. Costs	Theresa Meyer	The maintenance applicant must be ordered to pay the legal costs of the other party if his or her application for maintenance fails.	This aspect is dealt with in the Issue Paper of the SALRC on maintenance.
47. Costs	Dr K Moloto	An order of costs against a defendant in a	This aspect is dealt with in the Issue

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		paternity dispute in maintenance proceedings is unfair.	Paper of the SALRC on maintenance.
48. Determination of maintenance	Danie Schutte	(i) The South African maintenance system requires drastic changes. (ii) Maintenance payable should be determined by a panel of financial experts using a sliding scale. This scale could also allow for different rates for different occupations.	(i) Noted. The SALRC is busy with a review of the entire maintenance regime. (ii) The SALRC is dealing with the issue of the determination of the amount of maintenance payable in its Issue Paper on the review of the maintenance system.
49. Maintenance investigations	COSATU	Consideration of the respondent's personal expenditure should be done away with and a system should be introduced in terms of which the amount of maintenance payable is based on individual incomes.	The SALRC is dealing with the issue of the determination of the amount of maintenance payable in its Issue Paper on the review of the maintenance system.
50.	Danie Schutte	The Act should be amended to allow women to obtain a maintenance order during pregnancy. The order should be operative from the date of birth of the child.	The view is held that this issue requires in-depth research, and it is proposed that it be submitted to the SALRC for inclusion in its investigation. It also has a bearing on the *nasciturus* rule.
51. Future maintenance	COSATU	Research should be conducted to investigate the possibility of future maintenance for an unborn child from the estate of its deceased father.	While the Issue Paper of the SALRC covers the question of future maintenance in its Issue Paper, it is proposed that the SALRC be requested to expand the issue by also looking into future maintenance for an unborn child.
52. Spousal maintenance	COSATU	The Bill should provide for spousal maintenance, for example, where it was not addressed during the divorce proceedings.	Section 2 of the Act already provides that the Act applies in respect of the legal duty of any person to maintain any other person, irrespective of the nature of the relationship between those persons giving rise to that duty. The Act does not prohibit a spouse from

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			claiming maintenance, if a need can be proven.
53. Spousal maintenance	Theresa Meyer	The obligation to maintain an ex-wife must be deleted from the Act, alternatively a timeframe must be put in place for such maintenance.	While the Act does not deal with spousal maintenance, particularly in divorce proceedings, section 2(1) refers to this aspect as set out in item 52 above. Section 2(2) of the Act goes on to provide that the Act "shall not be interpreted so as to derogate from the law relating the liability of persons to maintain other persons". The proposal of Ms Meyer might have unintended consequences.
54. Enforcement of orders	Govender, P	In order to prevent the party ordered to pay maintenance from giving priority to his/her personal expenses, an emoluments attachment order should be made simultaneously with the issuing of the maintenance order.	It should be noted that the objective of a maintenance order is not to punish the person against whom an order has been granted, but to ensure that a child is provided for. An emoluments attachment order is utilised where a person obliged to pay maintenance continues to default on payments. It is not necessary to attach the emoluments when a party complies with an order or when it is not known whether the party will default with future payments or not.
55. Payment of maintenance	COSATU	The question is raised on measures that can be put in place to deal with when stop orders are to be implemented against casual labourers.	The Act contains adequate measures for the enforcement of maintenance orders, including whether a person with a maintenance obligation is a permanent or casual employee. The views of the employer where the magistrate contemplates an emoluments attachment order will be useful also where the person with a

Clause	Name	Submission / Recommendation	DOJ&CD Response
			maintenance obligation is a casual employee.
56. Access to children in maintenance disputes	COSATU	The Bill is silent regarding measures to be taken where the other party denies the other access to the child.	The Maintenance Act deals strictly with securing maintenance for maintenance beneficiaries. A parent may not deny the other the right of access to a child. A parent who is unreasonably denied access to a child has the right to approach social workers and this issue is also dealt with in the Children's Act, 2005.
57. Maintenance investigations	Theresa Meyer	(i) Bank statements must be obtained through a summons process. (ii) Courts should be lenient when dealing with maintenance defaulters.	(i) The Act was promulgated with the object of making maintenance processes simpler, speedier, cheaper and effective. Introducing the summons process in maintenance enquiries will negate this object of the Act. (ii) Enforcement of maintenance orders poses a serious challenge to the effective implementation of the Act. It is important to enforce maintenance orders in order to uphold the values relating to the rights of children enshrined in the Constitution. There is a high rate of failure to comply with maintenance orders. If a person has been convicted for failure to comply with a maintenance order, the court will give such a person an opportunity to plead for leniency in mitigation of sentence in terms of the Criminal Procedure Act, 1977.
58.	Govender, P	Instead of suspending the maintenance order	This is not supported. In terms of the

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Suspension of maintenance orders		when a person deliberately stops working, the court should order the parents of a person against whom a maintenance order has been made to pay on his or her behalf.	common law grandparents already have a duty of support in respect of their grandchildren in certain circumstances.
59. Implementation of Bill	COSATU	Emphasis should be placed on monitoring and evaluation of the Bill to ensure implementation and compliance.	Noted. The Turnaround Strategy for Speedy and Effective Implementation of the Maintenance Act contains guidelines to assist users in the implementation of the Act. The Strategy will need to be reviewed to bring it into line with the Bill when it becomes law.
60. Implementation of Bill	Moilwa,R	The courts must be well resourced to execute their mandate effectively.	Noted
61. Maintenance investigations	Theresa Meyer	Courts should be lenient when dealing with maintenance matters.	See comments under item 57 above.
62. Training and awareness	COSATU	(i) In order to sensitise communities on the Bill, the Department of Justice should partner with communities in order to provide them with education and awareness programmes (ii) Officers of the court should be sensitised with regard to gender issues when dealing with maintenance matters.	Noted. Justice College provides training to maintenance officers, maintenance investigators and presiding officers when requested from time to time. The awareness should not be raised with regard to the Bill only. It should be done with regard to the entire maintenance regime
63. Interface with the Domestic Violence Act.	COSATU	The question is raised about the availability of preventative measures that are designed to deal with situations where a maintenance dispute is accompanied by domestic violence.	If elements of domestic violence are identified in a maintenance dispute, that allegation will have to be dealt with in terms of the domestic violence legislation. The Maintenance Act is not suited to deal with domestic violence issues.
64. Interface	Dr K Moloto	Wrongful actions, eg stalking or abuse of a party	The Maintenance Act serves a specific

Clause	Name	Submission / Recommendation	DOJ&CD Response
with the Domestic Violence Act.		in maintenance proceedings should be dealt with in the same proceedings rather than referred to be dealt with in terms of the domestic violence legislation.	purpose, with its own specific jurisdiction. The aim of this Act is to facilitate the securing of maintenance from parents and other persons liable to maintain maintenance beneficiaries, mainly children who have a right to maintenance. The Domestic Violence Act also serves a specific purpose which is the issuing of protection orders in relation to domestic violence. It is only appropriate that when elements of domestic violence surface in an enquiry that should be referred to an appropriate forum, which has jurisdiction to hear such matters.
65. General	COSATU	The Bill should cater for the special needs of rural women.	The Issue Paper of the SALRC deals with the issue of the form of payment of maintenance that is suited for rural settings. It is suggested that the South African Law Reform Commission be requested to see whether this is viable. Such an approach might pose challenges on the basis of unfair discrimination but it needs to be explored nonetheless.
66. General	COSATU	Maintenance should be needs-based, for example, in the case of disabled children who have reached the age of majority.	The Act does not preclude children who have reached the age of majority from being maintained by their parents, as long as such children are not self-supporting.
67. General	Dr K Moloto	The maintenance legislation needs to address the issue of joinder so that a respondent can join in maintenance proceedings with a "suspected"/ putative father in order to absolve himself from	Whether or not a person is the father of a child is a matter of evidence. A person is not precluded from applying for joinder of a party, which the court

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		being identified as the biological father of the child.	must consider.
68. General	Dr K Moloto	The Act should be amended in order to allow for the obtaining of a second opinion on paternity of the child.	Paternity testing is an evidentiary matter and it is dealt with in terms of the law of evidence.
69. General	Dr K Moloto	Assessors should be allowed in maintenance proceedings.	Assessors are usually used in very serious criminal cases, such as murder, to assist the court in questions of fact. Although assessors can provide the court with their opinion on facts, the legal issues are the domain of the court. As such, assessors will not be able to assist a maintenance court with issues such as the determination of maintenance. Assessors will also need to be paid. This will have unnecessary financial implications.
70. General	Dr K Moloto	Legal aid should be extended to respondents in maintenance proceedings.	Nothing prevents a party from applying to Legal Aid South Africa for legal aid. Legal Aid South Africa does offer legal aid to indigent persons in family-related matters. It is doubted, however, whether legal aid is offered to respondents in maintenance matters.
71. General	S Molwana	Section 15 of the Act provides for persons who are in need of maintenance	Noted.
72. General	S Molwana	The investigation of a complaint conducted by maintenance officer is lodged by any complainant who may have interest in the matter.	Noted.
73. General	S Molwana	Section 7(1)(a) of the Act empowers a maintenance officer to obtain statements from any person who may be able to give information concerning the subject of such complaint by gathering information concerning the whereabouts	Noted.

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		of the person liable to maintain another and on the financial position of such person.	
74. General	S Molwana	Section 10 of the Act empowers the court to subpoena any person as a witness in a maintenance matter.	Noted.
75. General	S Molwana	Rule 43 of the High Court rules provides for an alternative route instead of a lengthy and tedious court process where maintenance *pendente lite or* a contribution towards costs of a pending matrimonial action *pendente lite are sought.*	Noted.
76. General	CGE	Proposes the insertion of the following definition in section 1 of the Act: " 'alleged maintenance defaulter' means any person who is liable for the maintenance, upkeep and welfare of any person in terms of any relationship, court order, agreement, law or legitimate expectation and where such liability has not been fulfilled for any period of time;".	No motivation has been provided for this proposal. The terms "alleged" and "maintenance defaulter" do not find any expression in the Act at all. The question must therefore be raised in what context would this definition find application.