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of JMA 17

Mer 14/10/08

1. Summary of comments - Judicial Matters Amendment Bill [B48-2008]

Clause No.	Commentator	Comment
Clause 1. Amendment of section 113 of the General Law Amendment Act 46 of 1935	Women's Legal Centre (WLC) (08 JMA 01)	(i) The WLC questioned the constitutional validity of the original section. The section was overly broad and lacked definition. The terms 'child and 'the body of the child' were not defined which means interpretation of the offence was left to prosecuting authorities and this was open to abuse. The section also contained a reverse onus provision, in contravention of section 35(3) (h) of the Constitution, 1996, which provides for the right to a fair trial including the right to be presumed innocent. There is no justification for the infringement of the accused's right to be presumed innocent and it is contended that the provision of section 113 (2) is unconstitutional. (ii) The Centre recommended that the section be repealed in its entirety and that all matters to do with the concealment of birth be dealt with in terms of the Choice of Termination of Pregnancy Act 92 of 1996; or alternatively that the provision should be redrafted in line with the Constitution and Births and Deaths Registry Act.
	Commission for Gender Equality (CGE) (08 JMA)	The commentator suggests that the proof of death of a child before its remains are disposed of should be established if a contravention of this provision is to be sustained; otherwise there is a risk of conflation with the crime of murder.



	<p>Lisa van der Linde (08 CPA 03)</p> <p>Bethany O'Connor - All Nations South Africa Association (08 JMA 05)</p> <p>Michelle Pughe-Parry – Baby Safe (08 JMA 06)</p>	<p>The commentator requests that the amendment prohibits the unlawful disposal of the body of a newborn baby. Calls on the government to provide Safe Havens for destitute mothers and to implement a policy that would allow a mother to return to the Safe Haven to be reunited with her child should her situation improve.</p> <p>Is pleased the amendment has been introduced but is concerned it does not address the need to create places of care and rescue for unwanted infants and to assist mothers with services and resources. The issues that should be addressed are:</p> <ul style="list-style-type: none">(i) The need to discourage women from abandoning newborn infants which should remain a criminal and punishable offence.(ii) Places of safety should be identified where newborn infants can be taken for protection (hospitals, clinics, police stations, designated churches or NGO's) and women choosing this option should be free from prosecution.(iii) Every woman who has a pregnancy test or delivers a baby at a hospital should be informed of the alternatives, perhaps through hospital staff distributing printed materials.(iv) Adequate and clear signage should be displayed at all hospitals and clinics to advertise such counseling services and places of safety. <p>Is pleased the issue of 'baby dumping' is to be addressed, it is hoped that the amendment will help prevent this from happening. Three issues need attention:</p> <ul style="list-style-type: none">(i) The need to discourage women from abandoning newborn infants which should remain a criminal and punishable offence.(ii) Places of safety should be identified where newborn infants can be taken for protection (hospitals, clinics, police stations, designated churches or NGO's) and women choosing this option should be free from prosecution.(iii) Every woman who has a pregnancy test or delivers a baby at a hospital should
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	<p>Fish Hoek Baptist Church (08 JMA 08)</p> <p>Youth With A Mission (YWAM) (08 JMA 14)</p>	<p>be informed of the alternatives, perhaps through hospital staff distributing printed materials.</p> <p>It is hoped the amendment will go a long way to discouraging infanticide in South Africa. Three issues need to be addressed:</p> <ul style="list-style-type: none">(i) The need to discourage women from abandoning newborn infants and which should remain a criminal and punishable offence.(ii) Places of safety should be identified where newborn infants can be taken for protection (hospitals, clinics, police stations, designated churches or NGO's) and women choosing this option should be free from prosecution.(iii) Counseling should be provided for pregnant mothers to explain; the penalties and legal implications of baby abandonment; the psychological impact and contact details of counseling services offering alternatives to abandonment. <p>Commends Parliament for addressing the issue of baby abandonment. Currently the section keeps infanticide illegal but does not empower desperate new mothers with simple options that would allow them to save their babies lives.</p> <ul style="list-style-type: none">(iv) The need to discourage women from abandoning newborn infants which should remain a criminal and punishable offence.(v) Places of safety should be identified where newborn infants can be taken for protection (hospitals, clinics, police stations, designated churches or NGO's) and women choosing this option should be free from prosecution.(vi) Every woman who has a pregnancy test or delivers a baby at a hospital should be informed of the alternatives, perhaps through hospital staff distributing printed materials.
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<p>Clause 6 Amendment of section 56 of the Criminal Procedure Act 51 of 1977</p>	<p>Commission for Gender Equality (CGE) (08 JMA)</p> <p>Haj Swart – Chief Magistrate Mitchell's Plain (Unnumbered)</p>	<p>The suggested amendments to the provision are supported by the commentator. However, concern is raised at the lack of a check and balance system to protect accused persons against unnecessary conviction. It is proposed that a notice must provide for the accused to be advised of the implications of admitting guilt and his or her rights to legal representation.</p> <p>The commentator points to the:</p> <ul style="list-style-type: none">• Failure by SAPS officers to effectively make use of the admission of guilt system• Failure by Prosecutors to properly screen and release accused in terms of s57A of the Act• Clogging of court rolls with minor offences• Minor offences on court rolls not being investigated by SAPS and withdrawn after several postponements <p>Minor offences include assault (common), crimen inuria, possession of dagga and others. Accused are arrested and detained over the weekend for these minor offences. SAPS refuses to release the accused on a written notice in terms of section 56 because they have certain arrest targets. In many instances arrests are made and accused detained in respect of minor offences for which a written notice and admission of guilt fine could have been issued. The suggestion is made that:</p> <ol style="list-style-type: none">(i) SAPS to be compelled to issue a written notice for the accused to appear in court, as opposed to arresting the accused, in all offences in respect of which a peace officer, on reasonable grounds believes that a Magistrates Court, on convicting an accused of that offence will not impose a fine exceeding the maximum amount. The word 'may' in section 56(1) should be replaced with the word 'shall'.(ii) A new sub subsection should be inserted after section 56(1) "if an accused is alleged to have committed an offence and a public prosecutor is of the opinion that a magistrate court, on convicting such accused of that
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<p>Clause 8. Amendment of section 57A of Act 51 of 1977</p>	<p>Commission for Gender Equality (CGE) (08 JMA)</p>	<p>The commentator supports the clause but proposes the inclusion in the notice referred to in the clause of some advice for the accused, in respect of the impact of a conviction and his or her right to legal representation.</p>
<p>Clause 9. Amendment of section 60 of Act 51 of 1977</p>	<p>Commission for Gender Equality (CGE) (08 JMA)</p>	<p>The commentator supports an enquiry into the accused ability to pay bail and proposes the following test: Where there is a likelihood that the amount of bail will cause undue prejudice or hardship to the accused then a separate enquiry must be held into the ability of the accused to pay the sum of money or any other appropriate sum or impose conditions in lieu of bail.</p>
<p>Clause 10. Amendment to section 79 of Act 51 of 1977</p>	<p>Commission for Gender Equality (CGE) (08 JMA)</p>	<p>The Commentator is concerned that numerous directives are issued by the NDPP but are not implemented and proposes that all NDPP directives that affect accused persons must be made available to all legal practitioners.</p>



Clause 12. Amendment of section 285 of Act 51 of 1977	Commission for Gender Equality (CGE) (08 JMA)	(i) The commentator supports the amendment; however, concern is expressed that the wording of section 5(b) will cause confusion. (ii) Concern is expressed that the lack of timeframes for the procedure set out in the section could lead to unnecessary detention and therefore where an accused is arrested in terms of section 285 then he or she must be dealt with by a competent court within 24 hours of the arrest.
Clause 13. Amendment of section 309 of Act 51 of 1977	Commission for Gender Equality (CGE) (08 JMA)	The commentator welcomes the deletion of this section but queries the consequences in respect of the Black Administration Act (BAA) and suggests appeals relevant to the BAA should only be deleted when the BAA is completely repealed or substantial prejudice may be caused.
Clause 14. Amendment of section 309C of Act 51 of 1977 – subsections (4),(5) and (6)	Commission for Gender Equality (CGE) (08 JMA)	The commentator proposes that in the interests of justice petitions should be considered by two judges.
Clause 17. Amendment of section 341 of Act 51 of 1977	Commission for Gender Equality (CGE) (08 JMA)	The commentator proposes any fine that may be specified in a notice referred to in the section must be determined by a Chief Magistrate of that jurisdiction, in consultation with affected municipalities, road traffic authorities and prosecutors. The amounts of the fines should be reviewed once every two years and then the Chief Magistrate, in consultation with these parties, should decide whether to increase, decrease or retain the amount of fines levied in respect of any schedule 3 offence listed in section 341.



Clause 22.

Amendment of section 1 of the Intestate Succession Act 81 of 1987

Professor Wouter de Vos -
Rhodes University
(08 JMA 02)

- (i) Contends that the proposed amendment, which allows unmarried same-sex partners to inherit, while their heterosexual counter-parts cannot is at risk of a challenge of unfair discrimination. Prior to the Civil Union Act 17 of 2006 the omission of the Intestate Succession Act to recognize same-sex life partners who had undertaken mutual duties of support was unconstitutional but now these parties can formalise their relationships. The Domestic Partnership Bill will address the concerns of parties in respect of intestate succession and place same-sex and heterosexual partnerships on the same footing, which will not be the case should this amendment be passed.
- (ii) Also the amendment limits the application of the clause to cases where the court is satisfied the partners in question were not able to formalise their relationship under the Civil Unions Act. What would these circumstances be? Why would partners not be able to formalise their relationship under this Act?
- (iii) The commentator notes that the amendment proposed by s1(8)(a) covers the concerns raised in *Gory v Kolver* 2007 (3) BCLR 249 (CC) for legal certainty in respect of estates that have been finalised. It is in the interests of legal certainty that retrospective application of declarations of constitutional invalidity be regulated. Equality considerations may demand that such an amendment only apply prospectively (such as access to legal services in order to challenge transfers.)

Prof Christa Rautenbach –
North West University
(08 JMA 01)

Contends that the proposed amendment is fraught with problems and is premature:

- (i) Unfair discrimination: Why should same-sex partners should be favoured by the amendment whilst heterosexual partners are not included as intestate heirs. The Civil Union Act 17 of 2006 makes it possible for same-sex partners to formalise their partnership and Draft Domestic Partnership Bill of 2008 should eventually give the option to heterosexual partners to formalise their relationships. The fact that the Civil Union Act is in operation to protect same-



		<p>sex partners, whilst the Domestic Partnership Bill which has to protect heterosexual partners, is still in the making, seems to favour the former above the latter. This differential treatment boils down to discrimination in terms of section 9 of the Constitution of South Africa, 1996, as well as the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000. Since there are no reasonable or justifiable reasons for the discrimination between the two forms of relationships, the discrimination will in all likelihood be unfair.</p> <p>(ii) Court order: in terms of the amendment a surviving same sex partner would not automatically qualify as an intestate heir. A court application is required and the court has to be satisfied that there was a relationship which qualifies as a partnership with reciprocal duties and support which could not be formalized in terms of the Civil Unions Act. Is this fair? It places an extra burden on same sex partners and given the costs and time of litigation such partners may not bother to go to court, excluding themselves from inheriting.</p> <p>(iii) Judicial amendments to section 1 of the Act have to be considered first. Piecemeal amendments to the legislation should be discouraged. There have been a number of decisions dealing with the meaning of spouse in terms of the Act. (<i>Daniels v Campbell</i> 2004 7 BCLR 735 (C) where the court ordered the word "spouse" as used in the Intestate Succession Act included the surviving partner to a monogamous Muslim marriage; and the word "survivor" as used in the Maintenance of Surviving Spouses Act included the surviving partner to a monogamous Muslim marriage. <i>Bhe v Magistrate, Khayelitsha</i> (Commission for Gender Equality as Amicus Curiae); <i>Shibi v Sithole</i>; <i>South African Human Rights Commission v President of the Republic of South Africa</i> 2005 1 SA 580 (CC): The Constitutional Court extended section 1 of the Intestate Succession Act 81 of 1987 to polygamous customary marriages. <i>Hassam v Jacobs</i> (unreported case of the CPA no. 5704/04 delivered on 18 July 2008): The High Court extended the word "spouse" as used in the Intestate Succession Act to the surviving partner of a polygamous Muslim marriage; and the word "survivor" as used in the Maintenance of Surviving Spouses Act to the surviving partner of</p>
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	<p>Law Society of South Africa (08 JMA 03)</p> <p>Martinus Cronje (Researcher: South African Law Reform Commission) (08 JMA 04)</p>	<p>a polygamous Muslim marriage.</p> <p>(iv) The commentator also points to various other Acts which use the words 'spouse' 'survivor', 'dependent' which need to be considered to see what the implications of the Civil Union Act and Domestic Partnerships Bill will be, only then should amendments to the Intestate Succession Act be considered.</p> <p>(i) To make subsection 8 retrospective to 27 April 1994 is legally untenable. It will open the floodgates of litigation against intestate heirs who have lawfully acquired such an inheritance.</p> <p>(ii) Subsection 8(b) the words 'on notice' should be defined as 'had been duly served with a summons or notice of motion, as the case may be, prior to said date of transfer, in whatever manner may be prescribed by the rules of court, out of which said legal process has been issued'. Any other written or oral notice shall not be deemed as a notice, unless with good cause shown and only under exceptional circumstances, with special leave from a court of law which has the jurisdiction to rule on the challenge.</p> <p>(i) Subclause (c) which provides for the insertion of subsection 8 only applies to a partner in a same-sex life partnership in which the partners have undertaken reciprocal duties of support <i>if the court is satisfied</i> that the partners in question were not able to formalise their partnership as set out in the Civil Unions Act 17 of 2006. This means a High Court order is required as the magistrate's court would not have jurisdiction. Is this advisable?</p> <ul style="list-style-type: none">• The delay and costs of obtaining such a court order would place this remedy out of the reach of many people.• Is the question whether the partners were able to formalize their marriage so difficult that the court must be called upon in each case to make the
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		<p>decision? Is it not an equally difficult question to determine whether the partners were "involved in a life partnership in which the partners have undertaken reciprocal duties of support", but the court is not expressly called upon to decide this question.</p> <ul style="list-style-type: none"> • There are many difficult questions facing an executor during the administration of an a estate where the court is not involved, apparently though parties would be forced to approach the court even if all interested parties agreed on the course to be followed?
<p>Clause 23. Amendment of Part 1 of Schedule 2 to the Criminal Law Amendment Act 105 of 1997</p>	<p>Commission for Gender Equality (CGE) (08 JMA)</p>	<p>This clause is supported by the commentator as it brings the law in line with international obligations.</p>
<p>Clause 27. Amendment of section 79 of the Promotion of Access to Information Act 2 of 2000 (PAIA)</p>	<p>Open Democracy Advice Centre (ODAC) (08 JMA 07)</p>	<p>From 2001-2008 disputes around PAIA have been resolved in the High Court. There are no rules dealing with PAIA in the Magistrates Court. The Rules Board was supposed to make rules 12 months after PAIA came into operation. This deadline was extended by the Judicial Matters Second Amendment Act 55 of 2003 until the 31st March 2005.</p> <p>The Rules Board compiled PAIA rules in 2005. They were sent to the Minister for her approval and for tabling in Parliament on 28 April 2005. They were sent back with queries from DOJ officials. In June 2006, the Minister approved the rules; they were tabled in Parliament on 23 June 2006, and then withdrawn on 24 June 2006. On 6 February 2007 the Rules Board met with the Deputy Minister and Minister; and then with the Department on 3 April 2007; the Rules Board redrafted in line with the Departments objections and sent final changes through to the Minister on 13 September 2008. The Rules were approved by the Minister in February 2008 and tabled in Parliament on 19 February 2008.</p>



		<ul style="list-style-type: none"> (i) Concern is expressed that the amendment seeks to allow the Rules Board a further extension, namely 'before 31 December 2008', which means a total extension of seven and a half years. (ii) The Committee is urged not to extend the deadline for passing the Rules but rather to address the contents of the Rules which have been tabled.
<p>Clause 28. Substitution of section 89 of the Promotion of Access to Information Act 2 of 2000</p>	<p>Commission for Gender Equality (CGE) (08 JMA)</p>	<p>The commentator is of the view that the substitution is untenable. On the basis that:</p> <ul style="list-style-type: none"> (i) It is too broad and absolves officials of all wrongdoings. Already an official may escape liability for wrongdoing on the basis of the common law doctrine of vicarious liability. The extension of wide protection to officials for incorrect decisions is dangerous. (ii) The extension of excessive protection to officials who may not comply with legitimate requests for information will defeat the purposes of PAIA. (iii) Any person who wishes to enforce compliance with PAIA must approach the High Court which is expensive, to grant officials excessive protection will prejudice the public as officials will find it easier not to comply with legitimate requests. (iv) Members of the public are still not benefitting from PAIA. <p>Any excessive protection offered to officials should be rejected as it would impact on section 32 rights of access to information.</p>
<p>Clause 29. Amendment of section 7 of the Promotion of Administrative Justice Act, 3 of 2000</p>	<p>Commission for Gender Equality (CGE) (08 JMA)</p>	<p>The commentator supports this amendment.</p>



Clause 31. Insertion of section 10A to the Promotion of Administrative Justice Act, 2 of 2000	Commission for Gender Equality (CGE) (08 JMA)	The commentator rejects the insertion of this clause on the basis of the excessive protection that will be extended to officials and the fact that rights will be infringed in terms of section 33 of the Constitution. Should the right of any person need to be limited then the legislature should preferably draft a general limitation clause. Seeking to enact legislation with low threshold protective provisions that will affect the right to administrative action is offensive to the Constitution and must be avoided.
Clause 36. Transitional provisions	Commission for Gender Equality (CGE) (08 JMA)	The commentator supports the provisions.
General Comments	Commission for Gender Equality (CGE) (08 JMA)	The commentator contends that the references to Attorney-General in our legislation are confusing and unlawful and such references should be removed and replaced with the correct delegations (whether National Director of Prosecutions, Deputy Director, Senior and other Prosecutors).