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Mar 14/10/08

**DEPARTMENT'S RESPONSES ON COMMENTS RECEIVED ON THE JUDICIAL MATTERS AMENDMENT BILL
[B48-2008]**

CLAUSE NO	COMMENTATOR	RESPONSE
Clause 1 Amendment of section 113 of the General Law Amendment Act, 1935 (Act 46 of 1935)	Women's Legal Centre (WLC) (08JMA01)	<p>(i) When the Department received the proposal of the WLC, it consulted with a number of roleplayers, among others, the National Prosecuting Authority and members of the judiciary. Comments received indicate that the provisions should not be repealed as they still serve a very useful and definite purpose. Responding to the view that the provision lacks definition because terms such as "child" and "body of the child" are not defined, some of the roleplayers expressed the view that it is not necessary to have definitions. The Department agrees with this. Terms such as these are to be found in case law and in other Acts of Parliament, for instance in sections 258 and 259 of the Criminal Procedure Act, 1977 and the Children's Act, 2005. (Depending on the Committee's decision on this clause, sections 258 and 259 of the Criminal Procedure Act, 1977, might need to be amended consequentially). While the current provision does contain a reverse onus, clause 1 is intended to address this and deletes section 113(2), containing the reverse onus.</p> <p>(ii) The Department is of the view that the provision, as amended, is necessary and should be retained. This view was recently confirmed by the National Prosecuting Authority. The Choice on Termination of Pregnancy Act, 1996, and the Births and Deaths Registration Act, 1992, have specific objects in mind, namely the regulation of termination of pregnancies and the registration of births and deaths, respectively. The clause in question, on the other hand, is intended to criminalise the unlawful disposal of a child's body, a very problem in society as is evident from an article in the City Press of 10 July 2008, titled "Birth concealment rocks Gauteng". This article highlighted the investigation of six cases of concealment of births in one week in Johannesburg. A Gauteng police spokesperson said the following:</p> <p style="padding-left: 40px;">"We have never had so many concealment of birth cases reported in such a short period of time and this matter is of grave concern for us as it is not one of those easily policeable matters. It shows the temperament of our society."</p> <p>Repealing the provisions in question could aggravate the existing problem. It should also be mentioned that in other countries, such as Canada and Australia, the offence of concealment of births is regulated either in the criminal codes or in "stand-alone" legislation.</p>

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	Commission for Gender Equality (CGE) (08JMA)	This proposal has a bearing on issues relating to the investigation of such matters, which are best dealt with by the investigating officer and the prosecutor involved. It is inappropriate to regulate this in legislation. If the amendment is accepted, the prosecutor will be the Director of Public Prosecutions having jurisdiction. The prosecutor will decide on the facts in the docket whether to institute a charge of murder, culpable homicide or a contravention of the provision under discussion or even to put a charge of contravening the provision as an alternative charge. It should also be borne in mind that a contravention of section 113 of the General Law Amendment Act, 1935, is a competent verdict of murder or culpable homicide. (See sections 258 and 259 of the Criminal Procedure Act, 1977.
	Lisa van der Linde (08JMA03)	Noted. The General Law Amendment Act, 1935, is not the appropriate legislation in which matters relating to the line functions of the Department of Social Development should be dealt with.
	Bethany O' Connor – All Nations South Africa Association (08JMA05)	Noted. The General Law Amendment Act, 1935, is not the appropriate legislation in which matters relating to the line functions of the Departments of Social Development and Health should be dealt with.
	Michelle Pughe-Parry (Baby Safe) (08JMA06)	Noted. The General Law Amendment Act, 1935, is not the appropriate legislation in which matters relating to the line functions of the Departments of Social Development and Health should be dealt with.
	Fish Hoek Baptist Church (08JMA08)	Noted. The General Law Amendment Act, 1935, is not the appropriate legislation in which matters relating to the line functions of the Departments of Social Development and Health should be dealt with.
	Youth with a Mission (YWAM) (08JMA14)	Noted. The General Law Amendment Act, 1935, is not the appropriate legislation in which matters relating to the line functions of the Departments of Social Development and Health should be dealt with.
Clause 6 Amendment of section 56 of the Criminal	Commission on Gender Equality (CGE) (08JMA)	Noted. The summons issued by a prosecutor in terms of section 54 and the written notice issued by a peace officer under section 56 of the Criminal Procedure Act, 1977, which are handed to accused persons by police officials warn accused persons that if they fail to appear on the date and at the place mentioned therein, they can be arrested and sentenced to a fine or imprisonment. The summons does

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Procedure Act, 1977 (Act 51 of 1977)	Mr HAJ Swart – Chief Magistrate, Mitchells Plain (Unnumbered)	<p>state if the accused person disputes the charge and does not intend paying the admission of guilt fine, and if the accused person wishes to make use of a legal practitioner, the accused can apply for legal aid at the local Legal Aid Officer if he or she cannot afford a legal practitioner. Consideration could be given to adapting these forms to include what the CGE has in mind. It is suggested that this possibility be taken up with the relevant roleplayers. It will not require any amendment of the provisions in question.</p> <p>(i) Removing the discretion of peace officers totally to issue written notices may give rise to unintended consequences. Inflexible provisions are often not advisable. There may be situations where a discretion is necessary. Rather than removing the discretion entirely, consideration could possibly be given to requiring the National Commissioner of the SAPS to issue national instructions on the issuing of written notices, where the emphasis is on police officials being required to issue written notices in certain circumstances.</p> <p>(ii) Section 56 of the Criminal Procedure Act, 1977, deals with the issuing of a written notice by peace officers as a method of securing the attendance of an accused person at a magistrate's court. Mr Swart's proposal to use section 56 to empower a prosecutor to issue a written notice when the accused's presence at court has already been already secured may not be appropriate from a drafting point of view. Section 57A already caters for something similar to what Mr Swart is suggesting but is not entirely the same. Section 57A provides that a prosecutor may, after an accused person has appeared in court and whether the accused is in custody or has been released on bail or warning, cause a written warning to be served on the accused person, in respect of which the accused person may pay the admission of guilt fine set in the notice, whereafter the accused person does not have to appear in court again. The matter, however, stays on the court roll until the person can pay the admission of guilt fine. What section 57A does not cater for and which seems to be the rationale behind Mr Swart's proposal, is for the prosecutor to be able to issue a written notice before the accused person appears before the magistrate in court, although the accused person is already at the magistrate's court on the day in question, his or her attendance having been secured by another means. The notice contemplated by Mr Swart will, as in the case of a written notice under section 56, include a date for the accused person to appear in court some time in the future and also include an amount as an admission of guilt fine, the payment of which will result in the accused person not having to appear in court on the set date. The proposal would seem to have merit. However, it is suggested that the proposal be taken up with relevant roleplayers and be dealt</p>

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		with at a later stage in the next Judicial Matters Amendment Bill the Department prepares for the 2009 session of Parliament.
Clause 8 Amendment of section 57A the Criminal Procedure Act, 1977 (Act 51 of 1977)	Commission on Gender Equality (CGE) (08JMA)	The summons issued by a prosecutor in terms of section 54 and the written notice issued by a peace officer under section 56 of the Criminal Procedure Act, 1977, which are handed to accused persons by police officials warn accused persons that if they fail to appear on the date and at the place mentioned therein, they can be arrested and sentenced to a fine or imprisonment. The summons does state if the accused person disputes the charge and does not intend paying the admission of guilt fine, and if the accused person wishes to make use of a legal practitioner, the accused can apply for legal aid at the local Legal Aid Officer if he or she cannot afford a legal practitioner. Consideration could be given to adapting these forms to include what the CGE has in mind. It is suggested that this possibility be taken up with the relevant roleplayers. It will not require any amendment of the provisions in question.
Clause 9 Amendment of section 60 of the Criminal Procedure Act, 1977 (Act 51 of 1977)	Commission on Gender Equality (08JMA)	Noted. The proposal of the CGE seems to be more restrictive than what is contained in clause 9. Clause 9 requires a separate inquiry in every case where the payment of a sum of money is to be considered as a condition of bail, while the proposal of the CGE seems to suggest that a separate inquiry must only be held where there is a likelihood that amount of bail will cause undue prejudice or hardship. Besides the above observation, the question is raised whether the proposal amounts to anything different to what is already contained in the clause. Clause 9 envisages three scenarios in the separate inquiry: (i) If the accused is unable to pay any sum of money, the court must consider appropriate alternatives. (ii) If the accused is able to pay a sum of money, the court must consider an amount which is appropriate in the circumstances. What is appropriate should be left to the discretion of the presiding officer in the particular circumstances. (iii) If the accused is unable to pay the sum of money, the court must consider the release of the accused in terms of a guarantee.
Clause 10 Amendment of section 79 of the Criminal Procedure Act, 1977 (Act 51 of 1977)	Commission on Gender Equality (CGE) (08JMA)	It might not be appropriate in all cases to make directives issued by the National Director of Public Prosecutions available. Directives are largely intended for internal use by prosecutors and could contain information which would constitute grounds for refusing access to information as envisaged in the Promotion of Access to Information Act, 2000. Some directives issued do, however, become public documents when they are required to be tabled in Parliament, for instance section 105A(11) of the Criminal Procedure Act, 1977, requires the NDPP to issue directives relating plea and sentence agreements, which must be submitted to Parliament.

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Clause 12 Amendment of section 285 of the Criminal Procedure Act, 1977 (Act 51 of 1977)	Commission on Gender Equality (CGE) (08JMA)	(i) It is not clear what the CGE has in mind in this regard. (ii) It is not necessary to set timeframes. Section 50(1)(a) of the Criminal Procedure Act, 1977, provides that any person who is arrested with or without a warrant of arrest for committing an offence or for any other reason, must, as soon as possible, be brought to a police station, or in the case of an arrest by warrant, to any other place mention in the warrant. Section 50(1)(c) provides that if an arrested person is not released by reason that no charge is to be brought against him or her or bail is not granted in terms of section 59 of 59A, the arrested person must be brought before a lower court as soon as reasonably possible, but not later than 48 hours after the arrest. (The reference to "subsection (5)(b)" in line 46 should possibly be amended to read: "subsection (5))".
Clause 13 Amendment of section 309 of the Criminal Procedure Act, 1977 (Act 51 of 1977)	Commission on Gender Equality (CGE) (08JMA)	Section 309A of the Criminal Procedure Act, 1977, deals with appeals against convictions and sentences of traditional leaders, as provided for in section 20 of the Black Administration Act, 1927. This section is not being repealed or amended.
Clause 14 Amendment of section 309C of the Criminal Procedure Act, 1977 (Act 51 of 1977)	Commission on Gender Equality (CGE) (08JMA)	Noted. Clause 14 proposes that all petitions must be considered by two judges and not only one, as is the case at present.
Clause 17 Amendment of section 341 of the Criminal Procedure Act, 1977 (Act 51 of 1977)	Commission on Gender Equality (CGE) (08JMA)	Clause 17 is in essence a consequential amendment to the amendment contained in clause 7. Clause 7 is intended to do away with the situation where members of the judiciary (magistrates) set fines and to bring uniformity in admission of guilt fines and spot fines (as provided for in clause 17) throughout the country. The Minister, when determining the offences and the amounts for the offences, will consult with relevant roleplayers.
Clause 22	Professor Wouter de	(i), (ii) and (iii) The concerns raised are noted. Discussions have been held with officials of the South

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Amendment of section 1 of the Intestate Succession Act, 1987 (Act 81 of 1987)	Vos – Rhodes University (08JMA02)	African Law Reform Commission who were involved in the Commission's investigation on same-sex unions and domestic partnerships, as well as with officials of the Department of Home Affairs who are responsible for promoting the draft legislation on domestic partnerships. Flowing from these discussion it would seem as if the further promotion of clause 22 might be problematic. It has been established that the envisaged legislation on domestic partnerships will, among others, deal with the rights to succession of unregistered partnerships, that heterosexual and same-sex unregistered domestic partnerships. Because the problems sought to be addressed by the amendments contained in clause 22 are already partially addressed and will be fully addressed in other legislation, it is proposed that clause 22 be omitted from the Bill.
	Prof Christa Rautenbach – University of the North West (08JMA01)	The concerns raised are noted. Discussions have been held with officials of the South African Law Reform Commission who were involved in the Commission's investigation on same-sex unions and domestic partnerships, as well as with officials of the Department of Home Affairs who are responsible for promoting the draft legislation on domestic partnerships. Flowing from these discussion it would seem as if the further promotion of clause 22 might be problematic. It has been established that the envisaged legislation on domestic partnerships will, among others, deal with the rights to succession of unregistered partnerships, that heterosexual and same-sex unregistered domestic partnerships, Because the problems sought to be addressed by the amendments contained in clause 22 are already partially addressed and will be fully addressed in other legislation, it is proposed that clause 22 be omitted from the Bill.
	Law Society of South Africa (08JMA03)	The concerns raised are noted. Discussions have been held with officials of the South African Law Reform Commission who were involved in the Commission's investigation on same-sex unions and domestic partnerships, as well as with officials of the Department of Home Affairs who are responsible for promoting the draft legislation on domestic partnerships. Flowing from these discussion it would seem as if the further promotion of clause 22 might be problematic. It has been established that the envisaged legislation on domestic partnerships will, among others, deal with the rights to succession of unregistered partnerships, that heterosexual and same-sex unregistered domestic partnerships. Because the problems sought to be addressed by the amendments contained in clause 22 are already partially addressed and will be fully addressed in other legislation, it is proposed that clause 22 be omitted from the Bill.
	Marthinus Cronje	The concerns raised are noted. Discussions have been held with officials of the South African Law

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	(Researcher: South African Law Reform Commission) (08JMA 04)	Reform Commission who were involved in the Commission's investigation on same-sex unions and domestic partnerships, as well as with officials of the Department of Home Affairs who are responsible for promoting the draft legislation on domestic partnerships. Flowing from these discussion it would seem as if the further promotion of clause 22 might be problematic. It has been established that the envisaged legislation on domestic partnerships will, among others, deal with the rights to succession of unregistered partnerships, that heterosexual and same-sex unregistered domestic partnerships. Because the problems sought to be addressed by the amendments contained in clause 22 are already partially addressed and will be fully addressed in other legislation, it is proposed that clause 22 be omitted from the Bill.
Clause 23 Amendment of Part 1 of Schedule 2 to the Criminal Law Amendment Act, 1997 (Act 105 of 1997)	Commission on Gender Equality (CGE) (08JMA)	Noted.
Clause 27 Amendment of section 79 of the Promotion of Access to Information Act, 2000 (Act 2 of 2000)(PAIA)	Open Democracy Advice Centre (ODAC) (08JMA07)	(i) and (ii) The rules have been tabled in Parliament and the extension as proposed in the clause will allow Parliament to deliberate on the draft rules.
Clause 28 Amendment of section 89 of the Promotion of Access to Information Act,	Commission on Gender Equality (CGE) (08JMA)	The exemption from liability under section 89 exists in respect of anything done in terms of the Act and the regulations made under the Act, but in terms of the rules of court. The amendment in clause 28 is intended to extend the exemption from liability to anything done in terms of the rules of court. Provisions of this nature are to be found in many statutes. They are intended to protect functionaries who act in good faith in accordance with the legislation in question. In the case of PAIA it also facilitates decision-making, in most instances by officials (information officers) but not only officials,

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2000 (Act 2 of 2000) (PAIA)		<p>since PAIA is also applicable to private bodies. In other words, the provision is aimed at avoiding situations where decision-makers are too inhibited to make decisions, whether they are right or wrong. It should be borne in mind that the objects of PAIA are, among others, to give effect to the right of access to information, but subject to justifiable limitations aimed at the reasonable protection of privacy, commercial confidentiality and effective, efficient and good governance. These limitations are set out as grounds for refusing access to information in PAIA. Information officers not only have to strive to facilitate access to information for requesters. They are also bound to protect other interests, as set out in PAIA, for instance the interests of third parties. Information officers sometimes have to make decisions which are not always clear cut within the framework of the law. The fact that an internal appeal mechanism has been created recognises that there will be instances where incorrect decisions are made. The CGE argues that section 89 in its entirety is untenable for a number of reasons. The reasons given, with respect, do not seem to substantiate the alleged untenability of the section. The CGE argues that section 89 is untenable because -</p> <ul style="list-style-type: none"> (i) it “absolves officials of all wrongdoing”. Section 89 does not absolve officials of all wrongdoing. It protects officials who are bona fides in their actions. “Wrongdoing” implies something that is done outside the framework of the Act and possibly done in bad faith. An official might make an incorrect decision but that does not necessarily amount to wrongdoing. Even courts can make wrong decisions, against which an appeal can be lodged. (ii) the “extension of wide protection to officials for incorrect decisions is dangerous”. Protection should be afforded to officials who make bona fide incorrect decisions, but not to officials who make incorrect decisions when they act outside the scope of the legislation or in bad faith. (iii) the “extension of excessive protection to officials who may not comply with legitimate requests for information will defeat the purpose of PAIA”. Section 89, however, does not protect officials who do not comply with legitimate requests for information. (iv) “members of the public are still not benefitting from PAIA”. It is not clear on what basis section 89 is the cause of members of the public not benefitting from PAIA. Such an allegation must surely be substantiated by relevant facts and statistics. (v) persons who wish “to enforce compliance with PAIA must approach the High Court which is expensive”, which, in turn, results in officials finding “it easier not to comply with legitimate requests” for information since they have this “excessive protection”. Again, it is not clear on what basis section 89 gives rise to such a situation. Such a conclusion must surely be based on relevant facts and statistics.

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Clause 29 Amendment of section 7 of the Promotion of Administrative Justice Act, 2000 (Act 3 of 2000)(PAJA)	Commission on Gender Equality (CGE) (08JMA)	Noted.
Clause 31 Insertion of section 10A in the Promotion of Administrative Justice Act, 2000 (Act 3 of 2000) (PAJA)	Commission on Gender Equality (CGE) (08JMA)	The responses under clause 28 on what provisions of this nature are intended to achieve, are applicable to the comments made by the CGE under this clause. Administrators who act in good faith and in accordance with the provisions of PAJA should be protected, in the interests of speedy and firm decision-making as far as administrative actions are concerned.
Clause 36 Transitional provisions	Commission on Gender Equality (CGE) (08JMA)	Noted.
General comments	Commission on Gender Equality (CGE) (08JMA)	Noted. Outdated terms such as "Attorney-General" are replaced with the correct terminology when they appear in provisions being amended.