

- 5.10.10.2 Such a proclamation may enact the measures necessary for the protection of the life of the nation or public safety.
- 5.10.10.3 Such measures may suspend, for the duration of the declared emergency, the operation of the provisions of this code provided that no derogation of provision 8 will be permissible.
- 5.10.10.4 Such a declaration may apply to the whole of the country or only to a part thereof.

5.10.11 Supervision by the Transitional Executive Council (TEC) (see ANC Submission, p. 22)

- 5.10.11.1 During the duration of the state of emergency the State President shall report to the Transitional Executive Council (TEC) at intervals not longer than one month on the effects of the emergency measures and on the need for their continued existence.
- 5.10.11.2 The TEC shall promptly consider these reports and may revoke the declaration of an emergency or restrict the area of its operation.
- 5.10.11.3 During the duration of the state of emergency the TEC may not be abolished.
- 5.10.11.4 The Election Tribunal may decide on the existence of conditions threatening the life of the nation and its continued existence.²

5.10.12 Election Tribunal

- 5.10.12.1 There shall be an Election Tribunal and ten Regional Election Tribunals, which will be independent and which will be subject to this Code only.
- 5.10.12.2 The Election Tribunal shall act as forum of final decision with respect to the final implementation of this code and shall enforce the principles contained therein.
- 5.10.12.3 The Regional Election Tribunals will act as forums of first instance with respect to the implementation of this code and shall enforce the principles contained therein.

² If any of the other Technical Committees propose structures to be established for the period until the adoption of a new constitution or interim constitution providing for measures and structures controlling states of emergency, this part of the code should be harmonized with such other provisions, provided they are comprehensive and effective in securing the holding of democratic, free and fair elections.

5.10.13 Election Ombud

5.10.13.1 There shall be an Election Ombud and ten regional offices of the Election Ombud which shall be independent en which shall be subject to this code only.

5.10.13.2 The election Ombud shall exercise all the functions conferred upon it by this code.

ANNEXURE A

The following proclamations create self-governing territories. They provide for ethnic-based citizenship.

- (a) Lebowa: Procs R224 and R225, GG 3666 of 29 September 1972 (Reg Gaz 1762).
- (b) Gazankulu: Procs R14 and R15, GG 3772 of January 1973 (Reg Gaz 1735).
- (c) Qwaqua: Proc R203, GG 4461 of 25 October 1974 (Reg Gaz 2060).
- (d) KwaZulu: Proc R11, GG 5387 of 28 January 1977 (Reg Gaz 2417) read with Proc R70 GG 3436 of the 30 March 1972 (Reg Gaz 1594).
- (e) KwaNdebele: Proc R205, GG 6661 of 14 September 1979; Proc R60 GG 7499 of 20 March 1981; Proc R114, GG 9303 (RegGaz 3721).
- (f) KaNgwane: Proc R2104 of 16 September 1977 and Proc 12 of 18 July 1986.

ANNEXURE B



REPUBLIC OF SOUTH AFRICA
REPUBLIEK VAN SUID-AFRIKA

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Vol. 332

PRETORIA, 19 FEBRUARY
FEBRUARIE 1993

No. 14591

GENERAL NOTICES

NOTICE 158 OF 1993

DEPARTMENT OF JUSTICE
EXPLANATORY MEMORANDUMDRAFT BILL ON THE ABOLITION OF DISCRIMINATION
AGAINST WOMEN

INTRODUCTION

1. The Government has recently, on behalf of South Africa, signed a number of important international conventions regarding women. One of these conventions was the Convention on the Elimination of All Forms of Discrimination against Women. This commitment to the ideals embodied in the conventions forms part of a comprehensive programme to abolish all forms of discrimination against women and to promote gender equality. In order to give effect to the contents of the convention an inquiry was conducted under the guidance of the Minister of Justice into remaining forms of statutory and common law discrimination against women. With this a start has been made to purge the statute book of provisions that are contrary to the principles contained in a charter of fundamental rights and especially the principle of equality that provides that there should be no discrimination between persons on the basis of gender. This Bill, which has now been published for comment, is aimed at the elimination of remaining discriminatory provisions against women.

2. The clauses of the Bill are explained with reference to the main features of the Bill.

3. Several discriminatory aspects that need rectification in respect of married women, namely taxation, medical and pension schemes and subsidies, are not addressed in the draft Bill. The reason for this is that the adjustment of these matters is comprehensive and have far reaching implications that require in-depth study. The Government is of the view that these matters require thorough attention.

4. It should be emphasized that the draft Bill is published for comment only and the provisions thereof should not be regarded as final proposals. Comment may be submitted to the Director-General, Department of Justice, Private Bag X81, Pretoria, 0001. The closing date for comments is 31 March 1993.

DIRECTION THAT WOMEN MAY NOT BE PRESENT AT COURT PROCEEDINGS

1. Clause 2 amends section 5 of the Magistrates' Courts Act, 1944. The said section 5 provides that a court may, in the interest of good order and public decency, order that women, minors or the public may not be present at a civil trial. The reference to women arises from a school of thought aimed at the protection of, what is believed to be, the frail nature of women, where necessary, against the repulsiveness of the world. Section 5 is now amended by deleting the reference to women. The public may, in general, still be ordered not to be present, making a specific reference to women unnecessary and discriminating.

2. A similar reference to women in section 78 of the First Schedule to the Defence Act, 1957, is likewise amended by clause 13.

CITIZENSHIP, CONTROL OF ALIENS AND IDENTIFICATION

1. The South African Citizenship Act, 1949, the Identification Act, 1986, the Restoration of South African Citizenship Act, 1986, and the Control of Aliens Act, 1991, contain provisions that result in prejudice to women, and sometimes also to men, regarding the acquisition of citizenship, the inclusion in the population register and the acquisition of the right to enter and reside in the Republic. These provisions are outdated and are amended to conform to the present views regarding gender equality.

2. Clause 4 is an example of the nature of the amendments that are being effected. Clause 4 amends section 3(2) of the South African Citizenship Act, 1949. This section provides that all persons born after 1949-09-02 in the then Union, may claim South African citizenship by reason of birth, provided that—

- (i) the father or mother was a South African citizen by birth; or
- (ii) the father had lawful permanent residence.

such a document as a witness. In view of the fact that women are granted the same contractual capacity as a man, this section is repealed.

PERFORMING HIGH RISK AND UNDERGROUND WORK

Clause 34 amends section 14 of the Occupational Diseases in Mines and Industries Act, 1973. The said section, as well as section 32 of the Minerals Act, 1991, which is amended by clause 48, respectively provides for a prohibition on women to perform high risk work at a controlled mine or industry and to perform underground work in a mine. The object of these sections is to protect women against exploitation or the performance of demanding work in view of their physical and psychological attributes. By the repeal of this provision, women and employers are given the choice to freely decide whether they want to perform such work or, in the case of employers, whether they would want to employ such persons. The proposed clauses 34 and 48 respectively, abolish these prohibitions. The provision is included in the draft Bill for the purposes of debate. It does not denote Government policy on the matter.

AGE OF RETIREMENT

Clauses 37 and 36 amend section 13 and 21 of the Education and Training Act, 1979. The said sections regulate the retirement age of a teacher in permanent employment. A distinction is made between the retirement ages of men and women (65 years in the case of a man and 60 years in the case of a woman). As the retirement age of men is higher than that of women, it may sometimes be experienced as being discriminatory and consequently as being an unfair distinction. The said clauses amend sections 13 and 21 by introducing a general retirement age of 65 years for all teachers.

CONFINEMENT

Clause 39 amends section 17 of the Basic Conditions of Employment Act, 1983. Section 17 provides that a female employee shall not be required or permitted to work during the period commencing four weeks prior to the expected date of her confinement and ending eight weeks after the date of her confinement, in cases where the Act is applicable. Clause 39 deletes the words "or permitted". The result of this amendment is that a woman may not be required to work during the period referred to, but may elect whether she wants to work during that period.

MARITAL POWER

1. The retention of the marital power discriminates against women and is not compatible with the principle of equality which the Government is striving to achieve. The marital power has already been abolished by the Matrimonial Affairs Act, 1984, in respect of marriages entered into after 1 November 1984. The aforementioned Act resulted from the report by the Law Commission regarding, *inter alia*, the status of married women.

2. The marital power is the power of the husband to administer his wife's property, to enter into contracts on her behalf and to sue or be sued in legal proceedings on her behalf. Section 11 of the Matrimonial Affairs Act, 1984, is substituted by clause 41 which abolishes the marital power the husband has over the person and property of his wife in terms of the common law, in respect of all marriages where it still exists. In the light of the present proposals to bring about equality in the status of men and women the question arises whether it is not altogether untenable for the law to protect the marital power of the husband in those instances where it still exists. The marital power also militates against the content of the conventions relating to women, which *inter alia* aims at achieving equality of status between men and women. The retention of the marital power will, in the light of the acceptance of the conventions, be wholly untenable.

3. The complete abolition of the marital power will not result in the wife binding the common estate by incurring debts or entering into contracts without the consent of her husband. A person married in community of property will

have to obtain the consent of the other spouse in many instances where legal acts involve the interests of the common estate.

4. Since women under marital power often require the assistance of their husbands in the performance of legal acts, the abolition of the marital power will result in a number of consequential amendments. Clauses 1, 3, 8, 9, 22, 24, 27, 28, 31, 32, 33, 38, 40 and 47 amend those sections where effect is given to the marital power. The marital power is now abolished completely so that men and women now have equal powers in regard to their assets and contractual capacity.

GUARDIANSHIP

1. The provision regarding guardianship in clause 51 is a substantive one. In terms of the common law the father of a minor child born of a marriage is the natural guardian of such child. This has been embodied in legislation so that the father remains the natural guardian in such circumstances unless the Court orders otherwise. The legal position as it stands at present may, however, give rise to unfairness. In addition, in the light of the equal status afforded to both men and women, the mother should have the same rights as the father in respect of a minor child born from a marriage. Clause 51 therefore amends the common law position by providing that both parents of a minor child have and are entitled to the guardianship and custody of a minor child born from a marriage for as long as the marriage subsists, unless a court orders otherwise.

2. Clauses 10, 23 and 42 are consequential amendments in the light of clause 51.

CONTRACTUAL CAPACITY AND CAPACITY TO LITIGATE

Clause 52 is a substantive provision whereby a woman, irrespective of her marital status has the capacity to perform any legal act and has the capacity to litigate in a court of law in respect of any matter. This clause gives effect to the principle of full equality between men and women.

GENERAL EXPLANATORY NOTE:

[] Words in bold type in square brackets indicate omissions from existing enactments.

————— Words underlined with a solid line indicate insertions in existing enactments.

DRAFT BILL

To abolish remaining statutory discrimination against women; and to provide for matters connected therewith.

BE IT ENACTED by the State President and the Parliament of the Republic of South Africa, as follows:—

Amendment of section 17 of Act 47 of 1937, as substituted by section 29 of Act 88 of 1984 and amended by section 1 of Act 75 of 1987

1. Section 17 of the Deeds Registries Act, 1937, is hereby amended by the substitution for subsection (6) of the following subsection: 5

“(6) A **women married out of community of property, or** person married in terms of a marriage the legal consequences of which are governed by the law of any other country, shall be assisted by his or her **husband** spouse in executing any deed or other document required or permitted to be registered in any deeds registry or required or permitted to be produced in connection with any such deed or document, **unless the marital power has been excluded or** unless the assistance of the **husband** spouse is in terms of this Act or any other grounds deemed by the registrar to be unnecessary.” 10

Amendment of section 5 of Act 32 of 1944, as amended by section 6 of Act 40 of 1952 and section 1 of Act 91 of 1977 15

2. Section 5 of the Magistrates' Courts Act, 1944, is hereby amended by the substitution for subsection (2) of the following subsection:

“(2) The court may in any case, in the interests of good order or public morals, direct that a civil trial shall be held with closed doors, or that (with such exception as the court may direct) **females or** minors or the public generally shall not be permitted to be present thereat.” 20

Amendment of section 111 of Act 32 of 1944, as amended by section 10 of Act 63 of 1976

3. Section 111 of the Magistrates' Courts Act, 1944, is hereby amended by the deletion of subsection (4). 25

[(4) If an unmarried woman is summoned for a contractual debt and is thereafter married in community of property or if a married woman is summoned for such a debt and it subsequently appears that she was married in

community of property, the court may at any time, on application, before or after judgment is given, substitute the husband of such woman for such woman as defendant or judgment debtor.]

Amendment of section 3 of Act 44 of 1949, as amended by section 3 of Act 64 of 1961, section 1 of Act 95 of 1981 and section 1 of Act 70 of 1991

5

4. Section 3 of the South African Citizenship Act, 1949, is hereby amended by the substitution for subsection (2) of the following subsection:

“(2) No person shall be a South African citizen by virtue of subsection (1) if, at the time of his birth—

(a) **[his father]** one of his parents—

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(i) was a person enjoying diplomatic immunity in the Union in terms of any law relating to diplomatic privileges, or was a career representative of the government of another country, or was a person employed in the embassy or legation of such a government or in the office of such a career representative, or was a member of the household or a servant of any such person; and

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(ii) was not a South African citizen or had not been lawfully admitted to the Union for permanent residence therein, and his **[mother]** other parent was not a South African citizen; or

(b) **[his father]** one of his parents was an enemy alien and the birth occurred at a place under occupation by the enemy and his **[mother]** other parent was not a South African citizen; or

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(c) **[his father]** one of his parents was an enemy alien without the right of permanent residence in the Union and was interned or detained in custody in the Union and his **[mother]** other parent was not a South African citizen; or

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(d) **[his father]** one of his parents was a prohibited person or had no right of permanent residence in the Union under the law then in force in the Union and his **[mother]** other parent was not a South African citizen.”

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Amendment of section 4 of Act 44 of 1949, as amended by section 4 of Act 64 of 1961

5. Section 4 of the South African Citizenship Act, 1949, is hereby amended by the substitution in paragraph (b) of subsection (1) of the words preceding subparagraph (i) of the following words:

“(b) section 5 or 6 a South African citizen, and whose father or mother was at the time of such person's birth—”

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Amendment of section 10 of Act 44 of 1949, as amended by section 9 of Act 64 of 1961, section 20 of Act 69 of 1962, section 3 of Act 23 of 1964 and section 2 of Act 95 of 1981

6. Section 10 of the South African Citizenship Act, 1949, is hereby amended—

(a) by the substitution for subsection (3) of the following subsection:

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“(2) Any period during which an applicant for naturalization has been employed outside the Union in the service of the Government of the Union (otherwise than as a person engaged locally) or on a ship or aircraft or a public means of transport registered or licensed in and operating from the Union, and any period during which a **[woman]** person who is an applicant for naturalization has been resident outside the Union with his wife or with her husband while the latter was so employed, shall, for the purposes of subsection (1), be regarded as a period of residence or ordinary residence in the Union and for such purposes the Minister may, in his discretion, regard as a period of residence or ordinary residence in the Union any period during which an applicant for naturalization has been employed outside the Union on a ship, aircraft or public means of transport operating from the Union, and any period during which a **[woman]** person who is an applicant for naturalization has been resident outside the Union with his

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- wife or with her husband while the latter was so employed, notwithstanding the fact that such ship, aircraft or public means of transport was not registered or licensed in the Union.”; and
- (b) by the substitution for subsection (6) of the following subsection: 5
 “(6) The Minister may, notwithstanding the provisions of subsection (1), upon application in the prescribed form, grant a certificate of naturalization as a South African citizen to a **[woman]** person who is an alien and who satisfies the Minister that—
- (a) he is the husband or widower of, or in the case of a woman, she is the wife or widow of a South African citizen and he or she has been 10
 lawfully admitted to the Union for permanent residence therein and has resided in the Union for a period of not less than two years immediately preceding the date of his or her application and after the date of his or her marriage to such citizen; or
- (b) he is the husband of, or in the case of a woman, she is the wife of a 15
 South African citizen, he or she has in terms of any law relating to immigration obtained permission to enter the Union for permanent residence therein and he or she has resided with his wife or her husband in the Union or, while he or she was employed in the service of the Government of the Union, outside the Union for a period of not 20
 less than two years.”.

Amendment of section 17 of Act 44 of 1949, as amended by section 12 of Act 64 of 1961 and section 4 of Act 23 of 1964

7. Section 17 of the South African Citizenship Act, 1949, is hereby amended—
- (a) by the substitution for paragraph (c) of subsection (1) of the following 25
 paragraph:
 “(c) in the case of **[a]** the husband, wife or minor child of a person referred to in paragraph (a) or (b), such husband, wife or child so resides with such person; or”; and
- (c) by the substitution for paragraph (d) of subsection (1) of the following 30
 paragraph:
 “(d) in the case of the husband, wife or minor child of a person who is a South African citizen by birth or descent, such husband, wife or child so resides with such person; or”.

Amendment of section 1 of Act 37 of 1953, as amended by section 31 of Act 93 of 1962 35

8. Section 1 of the Matrimonial Affairs Act, 1953, is hereby amended by the deletion of subsection (4).

[(4) A wife may make an application under subsection (2), and any application to a judge in connection therewith, and may appear in any proceedings under subsection (3), without the assistance of her husband.] 40

Amendment of section 2 of Act 37 of 1953, as amended by section 1 of Act 13 of 1966

9. Section 2 of the Matrimonial Affairs Act, 1953, is hereby amended—
- (a) by the substitution for paragraph (a) of subsection (5) of the following 45
 paragraph:
 “(a) A married woman**[, whether under the marital power or not.]** may be a depositor in any account in a deposit-taking institution as defined in section 1 of the Deposit-taking Institution Act, 1990, and may **[without the consent or assistance of her husband]** execute all necessary documents, give all necessary acquittances and cede, pledge, borrow 50
 against and generally deal with her deposit in such account and enjoy all the privileges and be liable to all the obligations attaching to depositors in any such account in such banking institution**[: Provided that a married woman who is under the marital power, may not, without the consent of her husband overdraw on a current account in**

which she is a depositor in such a banking institution to an amount exceeding the total amount of the deposits standing to her credit in any account in such banking institution]."; and

(b) by the deletion of subsection (6).

[(6) Every wife shall be entitled, without the assistance of her husband— 5

- (a) to receive or sue for remuneration due from her employer for services rendered by her;
- (b) to receive or sue for any compensation, deposit, dividend or proceeds referred to in paragraph (b), (c) or (d) of subsection (1);
- (c) to take out an insurance policy for the purpose of providing for the education or advancement of her child, and to receive or sue for any amount payable in terms of any such policy; and 10
- (d) to institute legal proceedings in connection with any share, policy, tool or implement referred to in subsection (1) which has been alienated or pledged or any right thereunder which has been dealt with without her consent, or in connection with any attachment or sale in contravention of subsection (3), or for the purpose of obtaining an order under subsection (4) or to protect herself against any act by her husband which is or would be unlawful in terms of subsection (1), or in conflict with an order under subsection (4).] 15 20

Amendment of section 5 of Act 37 of 1953, as amended by section 2 of Act 13 of 1966 and section 16 of Act 70 of 1979

10. Section 5 of the Matrimonial Affairs Act, 1953, is hereby amended—

(a) by the substitution for paragraph (b) of subsection (3) of the following paragraph: 25

“(b) the [father] parent of a minor to whom the sole guardianship of the minor has not been granted under subsection (1) or the Divorce Act, 1979, [or upon whom a children’s court has not conferred to exclusive right to exercise any parental powers in regard to the minor,] shall not be entitled by testamentary disposition to appoint any person as the guardian of the minor in any other manner than to act jointly with the [mother] other parent.”; 30

(b) by the substitution for subsection (4) of the following subsection:

“(4) Both parents of a minor (whether or not one of the parents in any proceedings has been granted the sole custody of the minor) shall consent to the marriage of the minor, unless one of the parents has been granted sole guardianship of the minor.”; and 35

(c) by the deletion of subsection (7).

[(7) A wife may make any application referred to in this section, and any application to a court in connection therewith, without the assistance of her husband.] 40

Repeal of section 21A of Act 39 of 1954, as inserted by section 6 of Act 51 of 1973 and amended by section 11 of Act 30 of 1988

11. Section 21A of the Boxing and Wrestling Control Act, 1954, is hereby repealed 45

“[Prohibition in respect of females

21A. (1) No female shall take part in any tournament as a boxer or a wrestler.

(2) No person shall—

- (a) hold or assist in holding any tournament in which any female takes part as a boxer or wrestler; 50
- (b) negotiate with any female with a view to procuring her services as a boxer or wrestler at any tournament.

(3) In the application of this section, “tournament” in relation to a wrestler shall *mutatis mutandis* bear the meaning ascribed thereto in section 1 in relation to a boxer.] 55

Amendment of section 3 of Act 23 of 1957

12. Section 3 of the Sexual Offences Act, 1957, is hereby amended by the substitution for paragraph (g) of the following paragraph:

“(g) any person whose **[wife] spouse** keeps or resides in or manages or assists in the management of a brothel unless **[he] such person** proves that he or she was ignorant thereof or that he or she lives apart from **[her] the said spouse** and did not receive the whole or any share of the moneys taken therein.” 5

Amendment of section 78 of the First Schedule of Act 44 of 1957

13. Section 78 of the First Schedule of the Defence Act, 1957, is hereby amended by the substitution for subsection (3) of the following subsection: 10

“(3) Whenever it appears to a convening authority or a court martial that, in the interests of good order or public morals or the administration of justice or for reasons of security, a trial ought not to be conducted or continued in open court, the convening authority or the court martial may at any time either before the commencement or during the course of the trial, order that persons other than the accused, his counsel and the necessary court officials, **[or females,]** juveniles or other classes of persons, shall not be permitted to be present at the trial.” 15

Repeal of section 11 of Ordinance 5 of 1957 (OFS)

14. Section 11 of the Ordinance on Hospital Officials' Pensions, 1957, is hereby repealed. 20

[Benefits to female member who marries

11. A member who is a female with at least five years' pensionable service, and who, before attaining her pensionable age, is discharged on account of her marriage or retires voluntarily as an officer in contemplation of marriage and marries within three months after such retirement, shall be entitled to an amount equal to twice her own contributions.] 25

Amendment of section 12 of Act 8 of 1959, as amended by section 4 of Act 75 of 1965, section 10 of Act 62 of 1966, section 2 of Act 9 of 1971, section 3 of Act 58 of 1978, section 5 of Act 104 of 1983 and section 4 of Act 92 of 1990 30

15. Section 12 of the Prisons Act, 1959, is hereby amended by the deletion of subsection 5.

[(5) A woman member of the Prisons Service who marries shall be deemed to have retired voluntarily from the service of the Prisons Service in contemplation of marriage with effect from the date of her marriage, or if she discharged her duties on that day, with effect from the day following the date of her marriage, unless the Commissioner approves that she be retained in the service of the Prisons Service.] 35

Amendment of regulation 8 of the Prisons Regulations promulgated by Government Notice No. R.2080 of 1965, as amended 40

16. Regulation 8 of the Prisons Regulations, 1965, is hereby amended—

- (a) by the deletion of subparagraph (iv) of paragraph (b) of subregulation (1);
- (b) by the deletion of subparagraph (iv) of paragraph (d) of subregulation (1);
- and
- (c) by the substitution for subregulation (2) of the following subregulation: 45

“Commissioner may waive qualification

(2) Notwithstanding subregulation (1) but subject to section 12(1) of the Act, the Commissioner may in his discretion in exceptional circumstances, waive any or all requirements of subregulation (1)(a)(i), (ii), (iii) and (vi) in the case of a White male applicant, subregulation (1)(a)(i) and (vi) and (1)(b)(ii) and (iii) **[and (iv)]** in the case of a White female applicant, 50

subregulation (1)(a)(i) and (iii) and (1)(c)(ii), (iii) and (iv) in the case of a Non-White male applicant, and subregulation (1)(a)(i) and (1)(d)(ii), (iii), (iv), (v) and (vi) in the case of a Non-White female applicant.”

Amendment of section 5 of Act 63 of 1962, as amended by section 2 of Act 30 of 1972, section 11 of Act 70 of 1974, section 10 of Act 4 of 1976, section 2 of Act 115 of 1977, section 7 of Act 102 of 1983 and section 2 of Act 29 of 1987 5

17. Section 5 of the Sorghum Beer Act, 1962, is hereby amended—

- (a) by the deletion of the expression “(4)” in paragraph (b) of subsection (1C); and
- (b) by the deletion of subsection (4). 10

[(4) A local authority may with the approval of the Minister determine that the whole or any part of the site or premises referred to in subsection (2) shall be a site or premises on or in which no female person shall at any time be, save when specially authorized thereto by the officer in charge of such site or premises: Provided that a description of any such site or premises or such part of any such site or premises restricted in respect of female persons shall be conspicuously displayed or notified on or in such site or premises.] 15

Amendment of section 16 of Act 63 of 1962, as amended by section 93 of Act 42 of 1964, section 19 of Act 98 of 1965, section 5 of Act 30 of 1972 and section 23 of Act 62 of 1973 20

18. Section 16 of the Sorghum Beer Act, 1962, is hereby amended by the deletion of paragraph (c) of subsection (1).

- [(c) is a female and who while knowing that she is not entitled to do so, enters or remains on or in any site or premises or part of any site or premises restricted in respect of female persons in terms of subsection (4) of section 5 without the permission of the officer in charge of such site or premises;] 25**

Amendment of section 6bis of Act 74 of 1962, as amended by section 4 of Act 12 of 1965, section 2 of Act 83 of 1969, section 24 of Act 62 of 1973 and section 3 of Act 4 of 1982

19. Section 6bis of the Aviation Act, 1962, is hereby amended by the deletion of subsection (5). 30

[(5) Where the premises referred to in subsection (3) are, or any portion of such premises is, situated within an area designated for the entry and departure of international air traffic at the aerodrome in question, the Minister, in the exercise of his powers under subsection (1)(a), or any person to whom permission to sell liquor on those premises was granted in terms of subsection (1)(b) and who has been authorized thereto by the Minister, may, subject, in the case of such a person, to such conditions as the Minister may impose when granting the authority or as may be prescribed— 35

- (a) in such premises or in the portion thereof situated within such area, as the case may be, sell or supply liquor to any person who is not a white person; 40
- (b) notwithstanding the provisions of sections 70 and 73 of the Liquor Act, 1977, permit any female of or above the age of eighteen years to be in any restricted portion of those premises situated within such area.]

Amendment of section 22 of Act 74 of 1962, as amended by section 5 of Act 12 of 1965, section 3 of Act 83 of 1969, section 25 of Act 62 of 1973, section 7 of Act 4 of 1982 and section 2 of Act 1 of 1984 45

20. Section 22 of the Aviation Act, 1962, is hereby amended by the deletion of subparagraph (vi)ter of paragraph (e) of subsection (1). 40

[(v)ter the conditions subject to which any female may in terms of paragraph (a)(ii) of section 6bis(5) be permitted to be in any restricted portion of premises referred to in that paragraph:]

Amendment of section 15 of Act 47 of 1963

21. Section 15 of the Coloured Persons Education Act, 1963, is hereby amended 5
by the deletion of paragraph (g) of subsection (1).

[(g) in the case of a female, if she marries.]

Repeal of section 17 of Act 66 of 1965

22. Section 17 of the Administration of Estates Act, 1965, is hereby repealed. 10

[Letters of executorship to women

17. Letters of executorship may be granted to a woman, but shall not, without the consent in writing of her husband, be granted to a married woman, unless the marital power of the husband has been excluded.]

Amendment of section 72 of Act 66 of 1965, as amended by section 7 of Act 54 of 1970 and section 17 of Act 70 of 1979 15

23. Section 72 of the Administration of Estates Act, 1965, is hereby amended by the substitution for subparagraph (i) of paragraph (a) of subsection (1) of the following subsection:

“(i) by the **[father] parent** of a legitimate minor, who has not been deprived, as a result of an order under subsection (1) of the said section 5 **[of subsection (1) of the said section 4]** or the Divorce Act, 1979, of the guardianship of such minor, **or under section 60 of the Children’s Act, 1960 (Act No. 33 of 1960), or section 58 of the Children’s Ordinance, 1961 (Ordinance No. 31 of 1961), of the territory, of his parental powers over him]; or”.**

Substitution of section 85 of Act 66 of 1965 25

24. The following section is hereby substituted for section 85 of the Administration of Estates Act, 1965:

“Application of certain sections to tutors and curators

85. Sections **[17,] 24, 26, 28 and 36, subsection (2) of section 42, sections 46 and 48, subsection (2) of section 49 and sections 52, 53, 54 and 30** 56 shall *mutatis mutandis* apply with reference to tutors and curators: Provided that—

- (a) any reference in any of the said sections to a will shall, for the purposes of its application under this section, include a reference to any written instrument by which the tutor or curator 35 concerned has been nominated; and
- (b) notwithstanding the provisions of section 17 as so applied, letters of curatorship may be granted to a married woman as curatrix of her husband or his property, without his consent.”.

Amendment of regulation 19 of Chapter III of the General Regulations for the South African Defence Force and the Reserve, published by Government Notice R.1204 of 5 August 1966, as amended 40

25. Regulation 19 of Chapter III of the General Regulation for the South African Defence Force and the Reserve, 1966, is hereby amended by the deletion of subregulation (2). 45

[(2) The services of a female officer of the Permanent Force shall be terminated if—

- (a) she elects to terminate her services for the purpose of marriage on the day preceding the date of her marriage;

- (b) she has in the opinion of the Surgeon-General or an officer designated by him for the purpose, become unfit for uniformed service owing to her pregnancy.]

Repeal of regulation 20 of Chapter III of the General Regulations for the South African Defence Force and the Reserve, published by Government Notice R.1204 of 5 August 1966, as amended 5

26. Regulation 20 of Chapter III of the General Regulations for the South African Defence Force and Reserve, 1966, is hereby repealed.

[Continuation of service of female officers of the Permanent Force who marry

20. (1) A female officer of the Permanent Force shall give written notice of her intention to marry and shall simultaneously inform her officer commanding whether she wishes to continue her service in the Permanent Force in a permanent or temporary capacity after her marriage. 10

(2) A female officer of the Permanent Force who wishes to continue serving in terms of her existing appointment after her marriage may do so and any vacation leave to her credit or leave without pay not exceeding thirty days may be granted to her for the purpose of her marriage. 15

(3) The services of a female officer of the Permanent Force who does not wish to continue her service in the Permanent Force after her marriage or who is serving in a permanent capacity, and wishes to be reappointed in a temporary capacity after her marriage, shall be terminated in terms of regulation 19(2)(a) of this chapter.] 20

Amendment of section 16 of Act 16 of 1967, as substituted by section 6 of Act 14 of 1991

27. Section 16 of the Mining Titles Registration Act, 1967, is hereby amended by the substitution for subsection (5) of the following subsection: 25

“(5) A **[woman married out of community of property, or] person** married in terms of a marriage the legal consequences of which are governed by the law of any other country, shall be assisted by his or her [husband] spouse in executing any deed or other document required or permitted to be registered in the Mining Titles Office or required or permitted to be produced in connection with any such deed or document, **[unless the marital power has been excluded or]** unless the assistance of the **[husband] other spouse** is in terms of this Act or on other grounds deemed by the registrar to be unnecessary.”. 30

Amendment of section 30 of Act 16 of 1967 35

28. Section 30 of the Mining Titles Registration Act, 1967, is hereby substituted for the following section:

“**Endorsement of deed to reflect the change of status of a person**

30. When rights are or a bond is registered in the name of—

(a) a **[woman] person** who since the registration was effected has been married either in or out of community of property or has been married and whose marriage is governed by the law of any country other than the Republic **[or South-West Africa]**; or 40

(b) a **[woman] person** who at the date of the registration was married out of community of property or whose marriage was at that date governed by the law of any country other than the Republic **[or South-West Africa]** and who has since been widowed or divorced. 45

the registrar may on written application by such **[woman] person** (assisted where necessary by **[her husband] such person's spouse**) and on production of the relevant deed or, where there are two or more interdependent deeds, of all such deeds, and of proof to his satisfaction 50

of the change in **[her]** such person's status, record the change on such deed or deeds and in the registers."

Amendment of section 38 of Act 16 of 1967

29. Section 38 of the Mining Titles Registration Act, 1967, is hereby amended by the substitution for subsection (4) of the following subsection: 5

- "(4) The provisions of this section shall not apply if the mortgaged rights are to be transferred or ceded—
- (a) to a person who would not himself be competent to mortgage them; or
 - (b) to two or more persons, unless they take transfer or cession of the rights in undivided shares and renounce in the written consent referred to in subsection (1) the exception *de duobus vel pluribus reis debendi* [; or
 - (c) to a woman unless in the said written consent she renounces any special legal exceptions which she would otherwise be entitled to raise]."

Repeal of section 60 of Act 16 of 1967

30. Section 60 of the Mining Titles Act, 1967, is hereby repealed. 15

[Women witnesses of deeds

60. Any female person who would, if she were a male person, be competent to witness any document intended for registration or filing or production in the Mining Titles Office, shall be competent to witness any such document, and any such document which was witnessed before the commencement of this Act by a female person, shall be as valid as if she had been a male person.] 20

Amendment of section 3 of Act 68 of 1969

31. Section 3 of the Prescription Act, 1969, is hereby amended by the substitution for paragraph (a) of subsection (1) of the following paragraph: 25

- "(a) the person against whom the prescription is running is a minor or is insane, [or is a woman whose separate property is controlled by her husband by virtue of his marital power,] or is a person under curatorship, or is prevented by superior force from interrupting the running of prescription as contemplated in section 4; or"

Amendment of section 216 of Act 61 of 1973, as substituted by section 15 of Act 59 of 1978 and amended by section 15 of Act 83 of 1981, section 10 of Act 70 of 1984 and section 8 of Act 18 of 1990 30

32. Section 216 of the Companies Act, 1973, is hereby amended by the substitution for subsection (3) of the following subsection:

- "(3) In respect of any of the matters referred to in section 211(1) the return referred to in subsection (2) shall contain a statement, signed by a director, a secretary who is a body corporate or an officer of the company, that— 35
- (a) the consent, referred to in section 211, of the director or officer in respect of whom particulars are reflected in such return, has been obtained on a duly completed and signed prescribed form; and 40
 - (b) any person appointed as director or officer of the company, is not disqualified under section 218 or 219; and
 - (c) the written consent under section 218(1)(b) of the husband of any woman appointed as a director of the company has been obtained on the prescribed form]."

Amendment of section 218 of Act 61 of 1973, as substituted by section 17 of Act 59 of 1978

33. Section 218 of the Companies Act, 1973, is hereby amended by the substitution for paragraph (b) of subsection (1) of the following paragraph:

- "(b) a minor or any other person under legal disability [save a married women 50

subject to the marital power of her husband whose written consent to her appointment as a director has, on the form referred to in section 211(1)(a), been lodged with the company];”.

Substitution of section 14 of Act 78 of 1973

34. Section 14 of the Occupational Diseases in Mines and Works Act, 1973, is hereby substituted for the following section: 5

“Performance of risk work by youths

14. [(1) Save as provided in subsection (2),] No [male] person under the age of sixteen years [and no female] shall perform risk work at a controlled mine or a controlled works, and no owner of such a mine or works or person in control of such a mine or works or any part thereof or contractor shall knowingly permit any [male] person under the age of sixteen years [or any female] to perform risk work at such mine or works. 10

[(2) The Minister may, after consultation with the Government Mining Engineer and subject to such conditions as the Minister may determine, authorize an owner of a controlled mine or a controlled works to employ a female in risk work at that mine or works.]” 15

Amendment of section 1 of Act 80 of 1976

35. Section 1 of the Rent Control Act, 1976, is hereby amended by the substitution for paragraph (a) of the definition of “lessee” of the following paragraph: 20

“(a) a sublessee and the widower or widow or divorced or deserted [wife] spouse of a lessee or sublessee who was living with [him] the lessee at the time of [his] the lessee’s death, divorce or desertion;”.

Amendment of section 13 of Act 90 of 1979, as amended by section 5 of Act 52 of 1980

36. Section 13 of the Education and Training Act, 1979, is hereby amended by the substitution for subsection (6) of the following subsection: 25

“(6) The services of a teacher who is employed in a permanent capacity in a post in respect of which a subsidy is paid by the State at a State-aided school, shall be deemed to have been terminated by the governing body with effect from the date on which he attains the age prescribed as his pensionable age by or under any pension law which applies to him, or, in the case of a teacher whose pensionable age is not so prescribed, with effect from the first day of the month following the month in which he reaches the age of 65 years[, in the case of a male, and 60 years, in the case of a female]: Provided that such teacher may thereafter, subject to the provisions of subsection (1)(b), be appointed on a temporary basis.” 30

Amendment of section 21 of Act 90 of 1979, as amended by section 9 of Act 52 of 1980 and section 9 of Act 95 of 1987

37. Section 21 of the Education and Training Act, 1979, is hereby amended by the substitution for subsection (7) of the following subsection: 40

“(7) The services of a teacher appointed in a permanent capacity at a public school, shall be deemed to have been terminated by the Department with effect from the date on which he attains the age prescribed as his pensionable age by or under any pension law which applies to him or, in the case of a teacher whose pensionable age is not so prescribed, with effect from the first day of the month following the month in which he reaches the age of 65 years[, in the case of a 45

male, or 60 years, in the case of female]: Provided that such teacher may thereafter be appointed on a temporary basis.”.

Amendment of section 108 of Act 91 of 1981, as amended by section 15 of Act 42 of 1985

38. Section 108 of the Co-operatives Act, 1981, is hereby amended by the deletion of paragraph (c) of subsection (1). 5

[(d) if such person is a married woman under the marital power of her husband (unless her husband's written consent to her appointment as a director has been lodged with the co-operative);]

Amendment of section 17 of Act 3 of 1983 10

39. Section 17 of the Basic Conditions of Employment Act, 1983, is hereby amended by the substitution for paragraph (b) of the following paragraph:

“(b) require [or permit] any female employee to work during the period commencing four weeks prior to the expected date of her confinement and ending eight weeks after the date of her confinement.”. 15

Amendment of section 33 of Act 61 of 1984

40. Section 33 of the Small Claims Court Act, 1984, is hereby amended by the deletion of subsection 4.

[(4) If an unmarried woman is summoned for a debt based on contract and is thereafter married in community of property, or if a married woman is summoned for such a debt and it subsequently appears that she was married in community of property, the court may at any time, on application, before or after judgement, substitute the husband of that woman as defendant or judgment debtor.] 20

Substitution of section 11 of Act 88 of 1984 25

41. The following section is hereby substituted for section 11 of the Matrimonial Property Act, 1984:

“Abolition of marital power

11. (1) The martial power which a husband has under the common law over the person and property of his wife is hereby abolished in respect of all marriages to which it still applies. 30

(2) The abolition of the marital power does not affect the enforcement of any agreement which has been concluded before the commencement of the Abolition of Discrimination against Women Act, 1993.”.

Repeal of section 13 of Act 88 of 1984 35

42. Section 13 of the Matrimonial Property Act, 1984, is hereby repealed.

[Savings

13. The provisions of this Chapter do not affect the law relating to the position of the husband as head of the family or the law relating to domicile and guardianship.] 40

Amendment of section 1 of Act 72 of 1986

43. Section 1 of the Identification Act, 1986, is hereby amended by the substitution for paragraph (d) of subsection (2) of the following paragraph:

“(d) a person domiciled in the Republic who is in the service of the State or of a statutory body as defined in section 1(1) of the Exchequer and Audit Act, 1975 (Act No. 66 of 1975), or of an institution or a body contemplated in section 84(1)(f) of the Provincial Government Act, 1961 (Act No. 32 of 1961), and performs any functions outside the Republic or has been seconded to the service of the government of any other country (and the [wife] spouse or child of any such person who resides with him), shall, while 50

he is engaged in such service and during a period of two months thereafter, be deemed to be the place where the head office of the State department or administration on the establishment of which he occupies a post, or the head office of the statutory body concerned or of the institution or body concerned, as the case may be, is situated, or, if he expressly so requests, the place where any dwelling of which he is the registered owner is situated.” 5

Amendment of section 4 of Act 72 of 1986

44. Section 4 of the Identification Act, 1986, is hereby amended by the substitution for paragraph (b) of the following paragraph: 10

“(b) all persons domiciled in the Republic who are in the employ of the State, a statutory body as defined in section 1(1) of the Exchequer and Audit Act, 1975 (Act No. 66 of 1975), or an institution or body referred to in section 84(1)(f) of the Provincial Government Act, 1961 (Act No. 32 of 1961), and perform functions outside the Republic or have been seconded to the service of the government of another country, including the **[wife] spouse** or child of such person who resides with him; and” 15

Amendment of section 4 of Act 73 of 1986

45. Section 4 of the Restoration of South African Citizenship Act, 1986, is hereby amended by the substitution for subsection (2) of the following subsection: 20

“(2) Any period during which a person applying for registration as a South African citizen has been employed outside the Republic in the service of the Government of the Republic or on a ship or aircraft or any public means of transport registered or licensed in and operating from the Republic, and any period during which **[a woman] the spouse of a person** so applying has been resident outside the Republic with his or her **[husband] spouse** while the latter was so employed, shall, for the purposes of subsection (1), be regarded as a period of permanent residence in the Republic, and for such purposes the Director-General may, in his discretion, regard as a period of permanent residence in the Republic any period during which an applicant for registration as a South African citizen has been employed outside the Republic on a ship, aircraft or public means of transport operating from the Republic, and any period during which **[a woman] the spouse of a person** so applying has been resident outside the Republic with his or her **[husband] spouse** while the latter was so employed notwithstanding the fact that such ship, aircraft or public means of transport was not registered or licensed in the Republic.” 25 30 35

Amendment of section 5 of Act 73 of 1986

46. Section 5 of the Restoration of South African Citizenship Act, 1986, is hereby amended by the substitution for subsection (2) of the following subsection: 40

“(2) The Director-General may, notwithstanding the provisions of subsection (1), on written application grant a certificate of naturalization as a South African citizen to a **[woman] person** who in terms of an Act specified in the Schedule is a citizen of an independent state and who convinces the Director-General that he or she— 45

(a) is the **[wife] spouse or widower** or widow of a South African citizen; and 45

(b) is lawfully and permanently resident in the Republic and has been so resident for a continuous period of not less than two years immediately preceding **[her] the application** and after **[her] the person's marriage** to such citizen.” 50

Amendment of section 27 of the Natal Code of Zulu Law, published by Proclamation R.151 of 9 October 1987

47. Section 27 of the Natal Code of Zulu Law, 1987, is hereby amended by the deletion of subsection (3).

[(3) A married woman shall be under the marital power of her husband: Provided that the marital power of the husband in a civil marriage out of community of property may be excluded by an antenuptial contract.]

Substitution of section 32 of Act 50 of 1991

48. The following section is hereby substituted for section 32 of the Minerals Act, 1991: 5

“Prohibition on underground work by certain juveniles

32. [(1)] No person under the age of 16 years shall work underground in a mine, and nobody shall cause or permit any such person so to work.” 10

[(2) No female shall work underground in a mine, and nobody shall cause or permit any such female so to work except—

- (a) females holding positions of management and who do not perform manual work; 15
- (b) females employed in health or welfare services; 15
- (c) females who in the course of their studies have to spend a period underground in a mine for training or research purposes; or
- (d) any other females who may occasionally have to go underground in a mine for the purposes of a non-manual occupation.]

Amendment of section 28 of Act 96 of 1991 20

49. Section 28 of the Aliens Control Act, 1991, is hereby amended by the substitution for subsection (1) of the following subsection:

“(1) If the Minister is satisfied that any alien who desires to enter the Republic, is a distinguished visitor who has no intention to reside permanently in the Republic, he may permit the said alien, his [wife,] or her spouse, a dependent child of his or hers and any alien who is in his or her employ and a member of his or her household to enter the Republic without holding any temporary residence permit under this Act.” 25

Amendment of section 31 of Act 96 of 1991

50. Section 31 of the Aliens Control Act, 1991, is hereby amended— 30

- (a) by the substitution for subparagraph (iv) of paragraph (d) of subsection (1) of the following subparagraph:

“(iv) in the case of the [wife] spouse or dependent child of a person referred to in paragraph (i), (ii) or (iii), such [wife] spouse or child was so resident with such person;” 35

- (b) by the substitution for subparagraph (v) of paragraph (d) of subsection (1) of the following subparagraph:

“(v) in the case of the [wife] spouse or dependent child of a person who is a South African citizen, such [wife] spouse or child was so resident with such person; or” 40

Guardianship and custody of a minor

51. During the duration of a marriage, both parents of a minor born from the marriage, may dispose of and are entitled to guardianship and custody of the minor.

Capacity of women to act and to appear in court

52. Notwithstanding her marital status a woman has— 45

- (a) the capacity to contract any legal act; and

(b) the capacity to appear before a court in any matter.

Short title and commencement

53. (1) This Act shall be called the Abolition of Discrimination against Women Act, 1993, and shall come into operation on a date to be fixed by the State President by proclamation in the *Gazette*.

(2) Different dates may be fixed under subsection (1) in respect of different provisions of this Act.

5

NOTICE 159 OF 1993
DEPARTMENT OF JUSTICE
EXPLANATORY MEMORANDUM
DRAFT BILL ON THE PREVENTION OF DOMESTIC VIOLENCE,
1993

INTRODUCTION

1. Acts of violence within the family occur to an increasing extent amongst all population groups. Statistics show that the victims of domestic violence are mostly women and children. Although persons who commit these acts are criminally liable for their deeds offenders are seldom charged, mainly because family members are reluctant to testify against them. Furthermore, existing civil procedures to obtain court interdicts against offenders are cumbersome, unpractical and expensive and can in any event only be issued by the Supreme Court. Practical problems are also experienced with the enforcement of interdicts. The purpose of this draft bill, which is published for general information and comments, is to make a simpler, shorter and more effective procedure possible. A new, more effective system may contribute to a strategy to deal with domestic violence outside the criminal courts in order to maintain family unity.
2. An important provision which is proposed is to provide for conditional warrants of arrest of marriage partners against whom interdicts are issued. Such warrants are to be executed if an offending marriage partner disregards or is about to disregard the interdict issued against him. The purpose of the provision is aimed at preventive action in order to prevent family tragedies.
3. The proposed legislation is in accordance with statutory measures in other countries, and also with the spirit and purport of the proposed Charter of Fundamental Rights which is now being promoted by the Government.
4. A further matter addressed in the proposed draft Bill is rape by a husband of his lawful wife. The present legal position in South African law is that a husband, in terms of a rule of the common law, cannot be convicted of rape of his wife. In 1989 legislation was passed on recommendation of the South African Law Commission which provided that whenever a man has been convicted of assault on his wife and, but for the existence of the marriage between them, could have been convicted of rape, the fact of the rape must be regarded by the court as an aggravating circumstance at the passing of sentence (Criminal Law and Criminal Procedure Act Amendment Act, 1989). There are serious doubts today against the common law rule that a man cannot be convicted of rape of his lawful wife. In Britain, and also in a recent court decision in the Ciskei, it was ruled that a man can in fact be convicted of rape of his lawful wife. Consequently the common law position is adjusted in the draft bill, the effect of which will be that a man will be liable for conviction of rape of his wife in cases where the marriage relationship has broken down and the parties are no longer living together in the same home.
5. The timeous seizure of a fire arm in a case where a marriage partner uses it to threaten family members may contribute to the prevention of domestic violence and family tragedies. The Arms and Ammunition Act, 1969, already comprehensively provides for the seizure of fire arms by the police where such fire arms are used by persons to threaten others. The Act confers powers on police officers to declare persons unfit to have fire arms in their possession and to seize any fire arm in such a person's possession without a warrant. Steps under the said Act are contemplated to ensure that also magistrates are empowered to authorize the seizure of fire arms to prevent domestic violence.
6. This draft bill is published for comments. Comments may be addressed to: The Director-General, Department of Justice, Private Bag X81, Pretoria, 0001. The closing date for comments is 31 March 1993.

CLAUSE 1

1. In this clause the "matrimonial home" is defined as the home or place of residence where the parties to a marriage usually live together or have lived together.

2. The clause further provides that for the purposes of the proposed Act a man and a woman who are living with each other, or who have lived with each other, as husband and wife as if they were married, shall be deemed to be parties to a marriage. The effect of this provision is that the legal remedies provided for in the proposed legislation will also be available to couples who live or have lived together as husband and wife.

CLAUSE 2

1. Clause 2 provides for a court of law to issue certain interdicts. A court is expressly given the power in the case of violence or threats of violence or with respect to residence in the matrimonial home to issue interdicts.

2. Both magistrate's courts and the Supreme Court may issue such interdicts. Interdicts may be issued either temporarily or permanently.

CLAUSE 3

1. Clause 3 provides that whenever a court has issued or intends to issue an interdict under clause 2 and it appears that the person against whom the interdict was or is to be issued would probably disregard it, a provisional warrant of arrest may be issued against such person. If the person against whom the warrant was issued, should later disregard a provision of the interdict or should commit an act which indicates that he is about to disregard the interdict, the warrant of arrest may be executed by any peace officer. A person so arrested will not be released for a period of 24 hours unless the court, or a judge or magistrate in chambers, orders otherwise.

2. A person thus arrested may obviously be charged for the commission of an offence under clause 7 in appropriate cases.

CLAUSE 4

Clause 4 grants jurisdiction to a magistrate's court to issue an interdict or warrant for which this draft bill makes provision.

CLAUSE 5

1. Clause 5 re-enacts section 1 of the Criminal Law and Criminal Procedure Act Amendment Act, 1989, which provides that whenever a man is convicted of assault on his wife and could have been convicted for rape if it were not for the existence of the marriage, the court shall regard the fact of the rape as an aggravating circumstance at the passing of sentence. The clause further provides that the provisions thereof shall not apply in the case where the man may be convicted for rape of his lawful wife in terms of clause 6.

2. This clause confirms the existing position in connection with rape within the marriage subject to the exception provided for in clause 6.

CLAUSE 6

1. Clause 6 amends the rule that a man cannot be convicted for rape of his lawful wife in those cases where the man and his wife during the commission of the act no longer lived in the same home due to the break-down of their marriage relationship.

2. Thus, where a man rapes his wife in circumstances where they no longer live together in the same home due to the break-down of their marriage relationship, he will in future be liable to be convicted for rape.

CLAUSE 7

Clause 7 provides that a person who disregards the terms of an interdict issued by a court under clause 2, shall be guilty of an offence and on conviction be liable to a penalty not exceeding R2 000 or to imprisonment not exceeding 6 months or to both.

CLAUSE 8

Clause 8 authorizes the Minister of Justice to make regulations to prescribe a speedy and simple procedure whereby an application in terms of this Bill may be heard as well as any other matter with regard to which the Minister deems it necessary or expedient to make regulations for the purpose of attaining the object of the proposed Act. The object of this clause is to provide speedy relief to the victims of domestic violence.

CLAUSE 9

Clause 9 repeals the Criminal Law and the Criminal Procedure Act Amendment Act, 1989, which is re-enacted in clause 5.

DRAFT BILL

To provide for certain interdicts in cases of domestic violence and warrants of arrest in connection therewith; to provide that a husband in certain circumstances can be found guilty of rape of his wife; and to re-enact certain provisions relating to rape in marriage; and to provide for matters connected therewith.

BE IT ENACTED by the State President and the Parliament of the Republic of South Africa, as follows:—

Definitions

1. (1) In this Act, unless the context otherwise indicates, "matrimonial home" means the home or place of residence where the parties to a marriage usually live together or have lived together. 5

(2) For the purposes of the provisions of this Act, excluding sections 5 and 6, a man and a woman who are living with each other, or have lived with each other, as husband and wife as if they were married shall be deemed to be parties to a marriage.

Jurisdiction of a court of law to grant certain interdicts 10

2. A court of law may on application by a party to a marriage (hereinafter called the applicant) in appropriate circumstances grant an interdict against the other party to the marriage in terms of which such other party is ordered—

- (a) not to assault the applicant, or not to subject the applicant to any other form of physical violence or to threats of physical violence; 15
- (b) not to assault a child living with the parties or living with one of the parties, or not to subject such child to any other form of physical violence or to threats of physical violence;
- (c) not to enter the matrimonial home or a specified part of the matrimonial home or a specified area in which the matrimonial home is situated or any other place of residence of the applicant; or 20
- (d) to allow the applicant, or any child usually living in the matrimonial home, entry into and to live in the matrimonial home or a specified part of the matrimonial home.

Arrest for breach of interdict 25

3. (1) Where a court of law has granted an interdict under section 2 against a party to a marriage, or intends to grant such an interdict, and evidence is laid before the court that a real danger exists that such party will probably disregard the interdict, or a provision thereof, the court may, to ensure proper compliance with the interdict, issue a conditional warrant of arrest against such other party. 30

(2) A conditional warrant of arrest issued under subsection (1), may be summarily executed by any peace officer if the said party commits an act which reasonably

justifies an inference that such party has disregarded, or is about to disregard, the interdict, or a provision thereof.

(3) Notwithstanding anything to the contrary contained in any law a person arrested in terms of a warrant under subsection (1), shall not be released before the expiration of 24 hours after the arrest unless a court of law, or a judge or magistrate in chambers, orders otherwise. 5

Jurisdiction of magistrates' courts

4. A magistrate's court shall have jurisdiction to grant an interdict or to issue a warrant which this Act provides for.

Assault of wife by her husband which constitutes rape 10

5. (1) Whenever a man has been convicted of assault in any form on his lawful wife and could, but for the existence of the marriage between them at the time of the commission of the crime, have been convicted of rape, the fact that he could have been convicted of rape had he not been married to his wife, shall be regarded by the court as an aggravating circumstance at the passing of sentence. 15

(2) Subsection (1) shall not apply in the case where a man is convicted of rape of his lawful wife in terms of section 6.

Rape of wife by her husband where they are not living together as husband and wife

6. The rule that a man cannot be convicted of rape of his lawful wife, shall not apply where the man and his wife because of the break-down of the marriage relationship between them no longer lived together in the same home when the act was committed. 20

Offences and penalties

7. A person who disregards an order granted by a court of law under section 2 shall be guilty of an offence and upon conviction be liable to a penalty not exceeding R2 000 or to imprisonment for a period not exceeding six months or both such penalty and such imprisonment. 25

Regulations

8. Notwithstanding anything to the contrary contained in any law the Minister of Justice may make regulations in order to— 30

- (a) prescribe a speedy and simple procedure whereby an application in terms of this Act may be heard;
- (b) generally, for the purpose of attaining the object of this Act prescribe any other matter.

Repeal of Act 39 of 1989 35

9. The Criminal Law and the Criminal Procedure Act Amendment Act, 1989, is hereby repealed.

Short title and commencement

10. This Act shall be called the Prevention of Domestic Violence Act, 1993, and shall come into operation on a date fixed by the State President by proclamation in the *Gazette*. 40

NOTICE 160 OF 1993
DEPARTMENT OF JUSTICE
EXPLANATORY MEMORANDUM
DRAFT BILL ON THE PROMOTION OF EQUAL
OPPORTUNITIES, 1993

INTRODUCTION

1. South Africa is on the threshold of a new dispensation in which there will be equality between persons and respect for the human dignity of all its citizens. Equality can be given effect to in various ways, for example, by implementing a charter of fundamental rights, subscribing to international conventions and introducing specific legislation. Equality guarantees persons the right that they will not be discriminated against on the ground of race, colour, language, sex, religion, ethnic origin, social class, birth, political or other convictions, or disabilities or other natural characteristics. This principle is the corner stone of the Government's proposed Charter of Fundamental Rights which was published for information on 2 February 1993. Equality between men and women is thus about to be guaranteed as a fundamental right.
2. The mere removal of inequalities between men and women without taking into consideration the differences between them may, however, lead to further discrimination. The fact that women differ from men biologically call for special measures which take into account the distinctive qualities of women. It requires that a woman be accommodated in order to enable her to fulfil her dualistic role as economic productive member in society and as mother, without being discriminated against. It is important that equality does not remain hollow words, but that in time real and effective equality between the sexes will materialize.
3. Although much has been done in recent years to promote equality between men and women, historical discrimination caused backlogs which will have to be addressed. The Government realize the need to protect women against discrimination and to promote equal opportunities between men and women. For this reason the Government has subscribed to four major international conventions regarding women. For the same reason the Government is now publishing this proposed draft bill for comment.
4. The purpose of the proposed draft bill is to prohibit discrimination on the ground of sex, marital status and pregnancy and to promote equality and equal opportunities between men and women. The essence of the draft bill is the establishment of an Equal Opportunities Commission to promote equality and equal opportunities between men and women. The draft bill is divided into three chapters in which provision is made for the prohibition of discrimination, the promotion of equal opportunities and provisions dealing with related miscellaneous matters. The proposed bill will be administered by the Minister of Justice because it deals primarily with legal reform and is not limited to the labour field. The principles on which the proposed legislation is based have already been implemented in some western countries.
5. Why is special legislation regarded necessary to give expression to the equality clause in a charter of fundamental rights? A charter of fundamental rights, firstly, contains only the basic rights which are guaranteed to individuals. The substantive regulation of rights is effected by legislation. Secondly, a charter primarily regulates relations between the State and the individual. The State is prohibited to infringe on the fundamental rights as contained in the charter. An equality clause therefore prohibits the State to discriminate against a person on the ground of sex or to make laws which permits discrimination. Sex discrimination, however, also occurs extensively in the private sector. It is therefore necessary that the prohibition of sex discrimination not only applies to the legal relations between the State and the individual, but also to the legal relations among individuals *inter se*. The proposed legislation provides for this.
6. The prohibition of discrimination in the work place and in the other circumstances specified in the draft bill, will have far reaching effects. For this

reason the legislation will not be implemented over night. The legislation contemplates to be phased in gradually in order that the provisions thereof will not apply to all persons, employers and organisations with immediate effect. Exclusions and exemptions will initially have to be granted on a fairly wide scale, which will in time be systematically withdrawn as and when the parties concerned are ready.

7. The purpose of the publication of this draft bill is to provide interested parties the opportunity to contribute to the project to promote women's rights. Any constructive proposals will be welcomed. The closing date for comments is 31 March 1993. Comments may be forwarded to the Director-general, Department of Justice, Private Bag X81, Pretoria, 0001.

DISCRIMINATION ON THE GROUND OF SEX, MARITAL STATUS AND PREGNANCY

1. Clauses 2, 3 and 4 define discrimination on the ground of sex, marital status and pregnancy. The definitions entail that a person discriminates against a man or a woman if a man or woman is prejudiced in the prescribed circumstances solely on the ground of his or her sex, or solely on the ground of his or her marital status or solely on the ground, in the case of a woman, of her pregnancy.

2. The marital status of a person is defined as follows in clause 1: "marital status" means the status of—

- (a) being single;
- (b) being married;
- (c) being married but not living together with the other spouse as husband and wife;
- (d) being divorced; or
- (e) living together with a person of the opposite sex as husband and wife as if married.

PROHIBITION OF DISCRIMINATION

1. Clauses 5, 7, 8, 10, 11, 12 and 13 prohibit particular persons and institutions to discriminate against other persons on the ground of sex, marital status or pregnancy. The prohibition applies to employers, employment agencies, partnerships, registered societies, occupational controlling bodies and educational institutions and in respect of executive acts. All these terms are defined in clause 1 of the bill. The acts in respect of which discrimination is prohibited are also specified. For example an employer may not discriminate with regard to work offered by him.

2. The prohibition to discriminate against a person on the ground of marital status will have the effect that an employer may not follow a policy of, for example, only appointing single persons or of not appointing divorced persons.

3. The prohibition to discriminate against a woman on the ground of pregnancy aims at protecting pregnant women against discrimination especially in the work situation. An employer who dismisses a pregnant woman or pays her less solely because of her pregnancy will contravene the prohibition.

4. The prohibition of sex discrimination, however, does not apply in cases where the gender of a person is a genuine occupational requirement. It is stipulated in clause 9 that the Minister of Justice may by notice in the Gazette determine circumstances where gender is an occupational requirement.

5. Discrimination in contravention of the proposed legislation will not be a criminal offence. A person prejudiced by such discrimination will, however, have certain legal remedies at his or her disposal, for example, by laying charges with the Equal Opportunities Commission and the Ombudsman. Discrimination will further be deemed to be an unfair labour practice for purposes of the Industrial Court.

6. It must be stressed that the prohibition in the bill against discrimination on the ground of gender, marital status and pregnancy has been formulated in wide

terms. The proposed legislation will no doubt affect areas where it cannot be implemented immediately. The *modus operandi* is to initially grant exemptions to the prohibition rather extensively and then, in time, to systematically withdraw the exemptions until the prohibition is generally in force. The idea is to phase out discrimination in an orderly fashion.

EQUAL PAY FOR EQUAL WORK

1. Provision is made in clause 6 that employees of different gender employed by the same employer should receive equal pay for the performance of the same work or work of the same value. Where an employee thus performs the same work or work of the same value than another employee and the first-mentioned employee's contract of employment is less favourable than that of the last-mentioned employee, the less favourable contract of employment will in terms of the bill be deemed to be adjusted so that it is not less favourable.

2. This provision, by virtue of the drastic nature thereof, will for a period of two years after the bill becomes law, not apply to contracts of employment that existed at the time the bill becomes law. The purpose is to give employers the opportunity to adapt to the proposed legislation.

SEXUAL HARASSMENT

1. Clause 14 of the Bill deals with sexual harassment in the workplace and in educational institutions. The proposed clause prohibits in the first instance the sexual harassment of an employee or prospective employee by an employer or by an employee employed by the same employer. In the second instance the clause prohibits sexual harassment of a pupil or student or prospective pupil or student by a member of the staff of an educational institution.

2. Sexual harassment is defined as follows:

"any conduct where a person makes an unwelcome sexual suggestion to another person, or makes an unwelcome request for a sexual favour to another person, or engages in any other unwelcome conduct of a sexual nature in relation to another person, in circumstances where such other person has reasonable grounds to believe that the rejection of such conduct may prejudice him or her—

(a) in any application for employment or a position with an employer or for admission to an educational institution; or

(b) in the continuation or the circumstances of his or her employment with an employer or of his or her studies at an educational institution."

3. A contravention of the provisions against sexual harassment will be deemed an unfair labour practice justiciable by the Industrial Court. Such behaviour may, however, as a result of it being declared unlawful, also lend to civil claims.

EQUAL OPPORTUNITIES COMMISSION

1. An Equal Opportunities Commission is proposed in terms of clause 17 of the Bill. This Commission will be similar to commissions for equal opportunities which already function in countries such as Britain and Australia. The object of the Commission is the elimination of discrimination on the ground of gender, marital status and pregnancy and the advancement of equal opportunities between men and women.

2. The activities, composition and functioning of the Commission are set out in clauses 19 to 30. The Commission will consist of five members appointed by the State President. The State President may consult specific organisations when appointing members. The chairperson of the Commission will be designated by the State President. Members occupy their offices for a maximum of 5 years, but may be reappointed after the expiration of their term.

3. The Commission will be competent to investigate any discriminatory legal provision, including provisions of the common law. If the Commission finds that

a specific provision constitutes an unreasonable distinction between males and females, the Commission may make proposals regarding the amendment or repeal thereof. The Commission may further also investigate general discriminatory practices, especially in the labour field, and submit proposals for the elimination thereof to the Minister.

4. In terms of clause 27 the Commission may draft a code of conduct regarding the identification and elimination of discriminatory practices, the creation of measures aimed at gender equality, care centres for children and special treatment of pregnant women. The code would not be binding, but the Minister may declare specific provisions thereof to be binding.

5. Finally, the Commission may in terms of clause 28 assist prejudiced persons regarding the remedies available to them. The Commission may order any person responsible for such prejudice to submit a report in connection therewith to the Commission. An omission by a person to comply with such an order will constitute an offence and will be punishable with a fine not exceeding R5 000 or imprisonment not exceeding six months.

EXEMPTIONS

Provision is made in clause 31 for the responsible Minister to grant exemptions. The exemptions may be amended or revoked. The reason for this is, as already mentioned, that the proposed bill will have a very wide application and may have drastic implications. The provisions of the bill will therefore not at once, but gradually, be phased in. The exemption clause makes a phased introduction possible.

PERMISSIBLE DISCRIMINATION IN FAVOUR OF WOMEN AND WITHIN RELIGIOUS ASSOCIATIONS

1. Because of the biological composition of women it is sometimes necessary to introduce special measures aimed at the protection of women. It is further necessary that opportunities be granted to enable women to overcome historical backlogs which resulted from discrimination in the past. In order to give effect to this, clause 32 provides that discrimination in favour of women will be permissible in the following cases:

- (i) the protection of women as a result of their physical nature;
- (ii) the performance of military service;
- (iii) special treatment regarding pregnancy; and
- (iv) special measures aimed at the development and advancement of women.

2. Clause 33 allows discrimination within a religious association on the basis of their religious beliefs provided it is applied *bona fide*. The reason for this is to allow persons freedom of choice and not to be prescriptive when it comes to the religion of persons.

PROHIBITION OF VICTIMIZATION

1. In order to prevent that an employer prejudices an employee who in terms of this draft bill seeks to enforce his or her rights, victimization of the employee is prohibited.

2. An employer who contravenes this provision, will be guilty of an offence and liable on conviction to a penalty not exceeding R5 000 or to imprisonment for a period not exceeding six months.

ASSISTANT-OMBUDSMAN

Clause 36 provides for the appointment of an Assistant-ombudsman with the insertion of section 2A in the Ombudsman Act, 1979 (Act No. 118 of 1979). The Assistant-ombudsman will specifically be tasked with matters where the State discriminates unlawfully against a person on the ground of sex, marital status or pregnancy.