

REPUBLIC OF SOUTH AFRICA

JUDICIAL MATTERS AMENDMENT BILL

*(As introduced in the National Assembly as a section 75 Bill; explanatory summary of Bill
published in Government Gazette No. 27001 of 18 November 2004)
(The English text is the official text of the Bill)*

(MINISTER FOR JUSTICE AND CONSTITUTIONAL DEVELOPMENT)

[B 2—2005]

REPUBLIEK VAN SUID-AFRIKA

WYSIGINGSWETSONTWERP OP GEREGETELIKE AANGELEENTHEDE

*(Soos by die Nasionale Vergadering ingedien as 'n artikel 75-wetsontwerp; verduidelikende
opsomming van Wetsontwerp gepubliseer in Staatskoerant No. 27001 van 18 November 2004)
(Die Afrikaanse teks is die amptelike vertaling van die Wetsontwerp)*

(MINISTER VIR JUSTISIE EN STAATKUNDIGE ONTWIKKELING)

[W 2—2005]

ISBN 0 621 35673 5

No. of copies printed 1 800

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.

BILL

To amend—

- the Administration of Estates Act, 1965, so as to amend the definition of “Master”; and to provide that the Chief Master is subject to the control, direction and supervision of the Minister;
 - the Companies Act, 1973, so as to effect a technical correction;
 - the Criminal Procedure Act, 1977, so as to effect a technical correction; and to extend the Commissioner’s power to issue directives relating to the right of a complainant to make representations in certain matters with regard to the placement of a prisoner on parole, on day parole or under correctional supervision;
 - the Attorneys Act, 1979, so as to allow a council to exempt an attorney from the attendance of a legal practice management course in certain circumstances;
 - the Right of Appearance in Courts Act, 1995, so as to provide that an attorney that has been granted the right to appear in a High Court may do so in any High Court in the Republic;
 - the Special Investigating Units and Special Tribunals Act, 1996, so as to provide for the delegation by the head of a Special Investigating Unit of his or her powers and functions in certain circumstances;
 - the Debt Collectors Act, 1998, so as to amend the definition of “debt collector”; to correct an erroneous reference; to provide anew for the keeping of registers by the Debt Collectors Council; to provide for the cancellation of the registration of a debt collector; and to provide for the manner in which interest on money paid into trust accounts of debt collectors must be dealt with;
 - the Promotion of Administrative Justice Act, 2000, so as to make provision for the publishing of a code of good administrative conduct by notice in the *Gazette*;
 - the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000, so as to extend the application of the Act expressly to include intersexed persons;
 - the Implementation of the Rome Statute of the International Criminal Court Act, 2002, so as to clarify the provision regarding the surrender of a person to the International Criminal Court; and
 - the Judicial Matters Second Amendment Act, 2003, so as to repeal a redundant provision;
- and to provide for matters connected therewith.

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

Amendment of section 1 of Act 66 of 1965, as amended by section 1 of Act 54 of 1970, section 1 of Act 79 of 1971, section 1 of Act 49 of 1996, section 26 of Act 57 of 1988 and section 1 of Act 20 of 2001

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1. Section 1 of the Administration of Estates Act, 1965, is hereby amended by the substitution for the definition of “Master” of the following definition:

“**Master**”, in relation to any matter, property or estate, means the Master, Deputy Master or Assistant Master of a High Court appointed under section 2, who has jurisdiction in respect of that matter, property or estate and who is subject to the control, direction and supervision of the Chief Master;”.

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Amendment of section 2 of Act 66 of 1965, as amended by section 2 of Act 79 of 1971, section 35 of Act 47 of 1997, section 2 of Act 20 of 2001 and section 14 of Act 16 of 2003

2. Section 2 of the Administration of Estates Act, 1965, is hereby amended by the substitution for subsection (1) of the following subsection:

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“(1) (a) Subject to subsection (2) and the laws governing the public service, the Minister—

[(a)](i) shall appoint a Chief Master of the High Courts[, **who shall, as such, be the executive officer of the Master’s offices and exercise such supervision over all the Masters as may be necessary in order to bring about uniformity in their practice and procedure**];

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[(b)](ii) shall, in respect of the area of jurisdiction of each High Court, appoint a Master of the High Court; and

[(c)](iii) may, in respect of each such area, appoint one or more Deputy Masters of the High Court and one or more Assistant Masters of the High Court, who may, subject to the control, direction and supervision of the Master, do anything which may lawfully be done by the Master.

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(b) The Chief Master—

(i) is subject to the control, direction and supervision of the Minister;

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(ii) is the executive officer of the Masters’ offices; and

(iii) shall exercise control, direction and supervision over all the Masters.”.

Amendment of section 370 of Act 61 of 1973

3. Section 370 of the Companies Act, 1973, is hereby amended by the substitution in subsection (3) for paragraph (b) of the following paragraph:

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“(b) if the person so nominated was nominated as sole liquidator or if all the persons so nominated have not been appointed by him or her, appoint, in accordance with the policy determined by the Minister, as liquidator or liquidators of the company concerned any other person or persons not disqualified from being liquidator of that company.”.

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Amendment of section 276 of Act 51 of 1977, as amended by section 3 of Act 107 of 1990, section 41 of Act 122 of 1991, section 18 of Act 139 of 1992, section 20 of Act 116 of 1993, section 2 of Act 33 of 1997, section 34 of Act 105 of 1997 and section 5 of Act 55 of 2003

4. Section 276 of the Criminal Procedure Act, 1977, is hereby amended by the substitution in subsection (3) for the proviso to paragraph (b) of the following proviso:

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“: Provided that any punishment contemplated in this paragraph may not be imposed in any case where the court [**intends imposing**] is obliged to impose a sentence contemplated in section 51(1) or (2), read with section 52, of the Criminal Law Amendment Act, 1997.”.

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Amendment of section 299A of Act 51 of 1977, as inserted by section 6 of Act 55 of 2003

5. Section 299A of the Criminal Procedure Act, 1977, is hereby amended by the addition to subsection (4) of the following paragraph:

- “(e) The directives contemplated in this subsection—
- (i) must provide for prescripts to ensure that the identity and whereabouts of any complainant or relative, as the case may be, are kept confidential; and
 - (ii) may provide for prescripts on how a complainant or relative who was not in court when the court sentenced the person in question may be informed of his or her right as contemplated in this section.”.

Substitution of section 13B of Act 53 of 1979, as inserted by section 8 of Act 55 of 2003

6. The following section is hereby substituted for section 13B of the Attorneys Act, 1979:

“Certain attorneys to complete training in legal practice management

13B. (1) After the commencement of section 6 of the Judicial Matters [Second] Amendment Act, [2003] 2005, and subject to subsection (2), every attorney who, for the first time, **[practises as a partner in a firm of attorneys or who practises for his or her own account]** is required to apply for a fidelity fund certificate in terms of section 42 must—

- (a) within the period contemplated in section 74(1)(dA); and
- (b) after payment of the fee prescribed in terms of section 80[(1)](i), complete a legal practice management course approved by and to the satisfaction of the council of the province in which he or she **[practises]** intends to practise.

(2) The relevant council may—

- (a) exempt an attorney, fully or partially and on such conditions as may be appropriate, from completing a legal practice management course to the extent that the attorney—

- (i) has a qualification that is similar to or of a higher standard than that attainable on completion of the course in question; or
 - (ii) has a level of experience that would render the completion of the course in question or any part of such a course unnecessary;
- or

(b) extend the period contemplated in subsection (1)(a).”.

Amendment of section 4 of Act 62 of 1995

7. Section 4 of the Right of Appearance in Courts Act, 1995, is hereby amended by the addition of the following subsection:

- “(4) An attorney who has been granted the right of appearance in terms of this section may appear in any High Court in the Republic.”.

Insertion of section 5A in Act 74 of 1996

8. The following section is hereby inserted in the Special Investigating Units and Special Tribunals Act, 1996, after section 5:

“Delegation of powers and functions by Head of Special Investigating Unit

- 5A. (1)** The Head of a Special Investigating Unit may, in writing—
- (a) delegate any power vested in and any function entrusted to him or her in terms of this Act to any member of that Special Investigating Unit; and

- (b) at any time revoke the delegation contemplated in paragraph (a).
- (2) A delegation to a member in terms of subsection (1)(a)—
- (a) is subject to any limitations and conditions prescribed in terms of this Act;
- (b) is subject to any limitations and conditions that the Head of the Special Investigating Unit may impose;
- (c) may be either in respect of a specific person or in respect of the holder of a specific post in the Special Investigating Unit; and
- (d) does not divest the Head of the Special Investigating Unit of any responsibility concerning the exercise of the delegated power or the performance of the delegated function.
- (3) The Head of a Special Investigating Unit may vary or revoke any decision taken by a member as a result of a delegation in terms of subsection (1)(a), subject to any rights that may have become vested as a consequence of such decision.”.

Amendment of section 1 of Act 114 of 1998

9. Section 1 of the Debt Collectors Act, 1998, is hereby amended by the substitution in the definition of “debt collector” for paragraph (c) of the following paragraph:

- “(c) a person who—
- (i) as an agent or employee of a person referred to in paragraph (a) or (b); or
 - (ii) in terms of any contract, relationship or arrangement with the person referred to in paragraph (a) or (b) other than a factoring arrangement,
- collects the debts on behalf of such person, excluding an employee whose duties are purely administrative, clerical or otherwise subservient to the actual occupation of debt collector;”.

Amendment of section 10 of Act 114 of 1998

10. Section 10 of the Debt Collectors Act, 1998, is hereby amended by the substitution in subsection (1)(a) for subparagraph (ii) of the following subparagraph:

- “(ii) he or she has been found guilty in terms of section [18] 15 of improper conduct;”.

Substitution of section 12 of Act 114 of 1998

11. The following section is hereby substituted for section 12 of the Debt Collectors Act, 1998:

- “[Register] Registers**
12. (1) The Council shall keep—
- (a) a register of the names and prescribed particulars of every debt collector whose application for registration under section 9(3) has been approved[, **or whose registration has been withdrawn or disapproved**] and whose registration has not been cancelled or withdrawn; and
 - (b) a register of the names and prescribed particulars of every debt collector whose registration has been cancelled at the debt collector’s request or whose registration has been withdrawn or disapproved by the Council, and the reasons therefor.
- (2) The register contemplated in subsection (1)(a) shall—
- (a) be published [**in the Gazette annually**] on the website of the Council;
 - (b) be updated every [second] month by the Council;
 - [(c) **be available for inspection by the public at the prescribed places and times;**] and
 - (d) be submitted to Parliament within 14 days after the [publication thereof in the Gazette] end of each financial year.

(3) The register contemplated in subsection (1)(b) shall be updated every month by the Council.

(4) The registers contemplated in subsection (1)(a) and (b) shall be available for inspection by the public at the prescribed places and times.”.

Insertion of section 16A in Act 114 of 1998

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12. The following section is hereby inserted in the Debt Collectors Act, 1998, after section 16:

“Cancellation of registration as debt collector

16A. The Council shall—

- (a) in the prescribed manner and on such conditions as it may deem fit, cancel the registration of a debt collector upon the written request of the debt collector; and 10
- (b) record the name of such debt collector in the register contemplated in section 12(1)(b).”.

Amendment of section 20 of Act 114 of 1998

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13. Section 20 of the Debt Collectors Act, 1998, is hereby amended—

- (a) by the substitution for subsections (2) and (3) of the following subsections, respectively:

“(2) The money deposited in terms of subsection (1) shall[, **together with the interest as determined under subsection (3),**] be paid within a reasonable or agreed time to the person on whose behalf the money is received or held: Provided that a settlement account, containing a complete exposition of all credits and debits reflected in the said account shall be delivered to that person at least once a month. 20

(3) All interest, if any, on money deposited in terms of subsection (1) shall be paid, as prescribed, to the [**person on whose behalf the money was deposited**] Council: Provided that before such payment is made the debt collector concerned may deduct any reasonable expenses incurred in respect of his or her trust account from the interest accrued in accordance with a tariff and procedure prescribed by the Council.”; and 25 30

- (b) by the addition of the following subsections:

“(6) No amount standing to the credit of a trust account contemplated in subsection (1) shall form part of the assets of a debt collector or may be attached on behalf of any creditor of such debt collector: Provided that any excess, including interest accrued, remaining after payment of all claims of persons whose money has, or should have been, deposited in such trust account shall be deemed to form part of the assets of such debt collector. 35

(7) If any debt collector—

- (a) dies; 40
- (b) becomes insolvent;
- (c) in the case of a company or close corporation, is liquidated or placed under judicial management, whether provisionally or finally;
- (d) has his or her registration withdrawn;
- (e) is declared by a competent court to be incapable of managing his or her own affairs; or 45
- (f) abandons his or her practice or ceases to practise, the Council must, where necessary, control and administer his or her trust account until the Master of the High Court having jurisdiction has, on application made by the Council or by a person having an interest in the trust account of that debt collector, appointed a *curator bonis* with such rights, duties and powers as the Master may deem fit to control and administer such account.”. 50

Substitution of section 10 of Act 3 of 2000

14. The following section is hereby substituted for section 10 of the Promotion of Administrative Justice Act, 2000:

“Regulations and code of good administrative conduct

- 10.** (1) The Minister must make regulations relating to— 5
- (a) the procedures to be followed by designated administrators or in relation to classes of administrative action in order to promote the right to procedural fairness;
 - (b) the procedures to be followed in connection with public inquiries;
 - (c) the procedures to be followed in connection with notice and comment procedures; and 10
 - (d) the procedures to be followed in connection with requests for reasons[; **and**
 - (e) **a code of good administrative conduct in order to provide administrators with practical guidelines and information aimed at the promotion of an efficient administration and the achievement of the objects of this Act].** 15
- (2) The Minister may make regulations relating to—
- (a) the establishment, duties and powers of an advisory council to monitor the application of this Act and to advise the Minister on— 20
 - (i) the appropriateness of publishing uniform rules and standards which must be complied with in the taking of administrative actions, including the compilation and maintenance of registers containing the text of rules and standards used by organs of state; 25
 - (ii) any improvements that might be made in respect of internal complaints procedures, internal administrative appeals and the judicial review by courts or tribunals of administrative action;
 - (iii) the appropriateness of establishing independent and impartial tribunals, in addition to the courts, to review administrative action and of specialised administrative tribunals, including a tribunal with general jurisdiction over all organs of state or a number of organs of state, to hear and determine appeals against administrative action; 30
 - (iv) the appropriateness of requiring administrators, from time to time, to consider the continuance of standards administered by them and of prescribing measures for the automatic lapsing of rules and standards; 35
 - (v) programmes for educating the public and the members and employees of administrators regarding the contents of this Act and the provisions of the Constitution relating to administrative action; 40
 - (vi) any other improvements aimed at ensuring that administrative action conforms with the right to administrative justice;
 - (vii) any steps which may lead to the achievement of the objects of this Act; and 45
 - (viii) any other matter in respect of which the Minister requests advice;
 - (b) the compilation and publication of protocols for the drafting of rules and standards; 50

- (c) the initiation, conducting and co-ordination of programmes for educating the public and the members and employees of administrators regarding the contents of this Act and the provisions of the Constitution relating to administrative action;
- (d) matters required or permitted by this Act to be prescribed; and 5
- (e) matters necessary or convenient to be prescribed in order to—
- (i) achieve the objects of this Act; or
 - (ii) subject to subsection (3), give effect to any advice or recommendations by the advisory council referred to in paragraph (a). 10
- (3) This section may not be construed as empowering the Minister to make regulations, without prior consultation with the Public Service Commission, regarding any matter which may be regulated by the Public Service Commission under the Constitution or any other law.
- (4) Any regulation— 15
- (a) made under subsections (1)(a), (b), (c) and (d) and (2)(c), (d) and (e) must, before publication in the *Gazette*, be submitted to Parliament; and
- (b) made under subsection [(1)(e) and] (2)(a) and (b) must, before publication in the *Gazette*, be approved by Parliament. 20
- (5) Any regulation made under subsections (1) and (2) or any provision of the code of good administrative conduct made under subsection (5A) which may result in financial expenditure for the State must be made in consultation with the Minister of Finance.
- (5A) The Minister must, by notice in the *Gazette*, publish a code of good administrative conduct in order to provide administrators with practical guidelines and information aimed at the promotion of an efficient administration and the achievement of the objects of this Act. 25
- (6) The [regulations] code of good administrative conduct contemplated in subsection [(1)(e)] 5A must, before publication in the *Gazette*, be approved by Cabinet and Parliament and must be made within [two] three years after the commencement of this Act.” 30

Amendment of section 1 of Act 4 of 2000

15. Section 1 of the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000, is hereby amended— 35
- (a) by the insertion in subsection (1) after the definition of “HIV/AIDS status” of the following definition:
- “**‘intersex’** means an atypical congenital physical sexual differentiation;”; and
- (b) by the insertion in subsection (1) after the definition of “sector” of the following definition: 40
- “**‘sex’** includes intersex;”.

Amendment of section 10 of Act 27 of 2002

16. Section 10 of the Implementation of the Rome Statute of the International Criminal Court Act, 2002, is hereby amended by the substitution in subsection (5) for the words following paragraph (c) of the following words: 45
- “the magistrate must [issue an] order [committing] that such person [to prison pending his or her surrender] be surrendered to the Court and that he or she be committed to prison pending such surrender.”.

Repeal of section 22 of Act 55 of 2003

17. Section 22 of the Judicial Matters Second Amendment Act, 2003, is hereby repealed.

Short title and commencement

18. This Act is called the Judicial Matters Amendment Act, 2005, and comes into operation on a date fixed by the President by proclamation in the *Gazette*. 5

MEMORANDUM ON THE OBJECTS OF THE JUDICIAL MATTERS AMENDMENT BILL, 2005

1. PURPOSE OF BILL

The main purpose of the Bill is to encompass in a single Bill a variety of amendments to laws administered by the Department of Justice and Constitutional Development. These amendments do not require individual Amendment Acts. Some of these self-explanatory amendments have been proposed in order to address practical issues that have arisen in practice. Others are intended to improve provisions in statutes that, if left as they are, may give rise to legal uncertainty.

2. OBJECTS OF BILL

The objects of the respective clauses of the Bill are explained below.

- 2.1 The Judicial Matters Amendment Act, 2003 (Act No. 16 of 2003), amended section 2 of the Administration of Estates Act, 1965 (Act No. 66 of 1965), to provide for the appointment of a Chief Master. In terms of the amendment, the Chief Master is the executive officer of all the Masters' offices in order to promote uniformity in respect of practice and procedure of the various offices. The question has been raised whether the amendment goes far enough in ensuring that the Chief Master has effective control over the various Masters and their activities and whether the Minister has effective control over the Chief Master. The amendments proposed in clauses 1 and 2 seek to eliminate any uncertainty in this regard.
- 2.2 The Judicial Matters Amendment Act, 2003, also amended certain sections of the Companies Act, 1973 (Act No. 61 of 1973), so as to enable the Cabinet member responsible for the administration of justice to determine policy for, and further regulate, the appointment of liquidators, provisional liquidators, co-liquidators and provisional judicial managers by the Masters of the High Courts. Section 370 of the Companies Act, 1973, should also have been amended consequentially but was inadvertently omitted from the Judicial Matters Amendment Act, 2003. Clause 3 of the Bill corrects this omission.
- 2.3 Clause 4 seeks to amend section 276 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), that deals with the nature of punishments which may be imposed by our courts. In terms of section 51 of the Criminal Law Amendment Act, 1997 (Act No. 105 of 1997), a court is obliged to impose a minimum sentence under certain circumstances. The current wording in the proviso to section 276(3) of the Criminal Procedure Act, 1977, could be interpreted to indicate that the court has a discretion in this regard by the use of the wording, "where a court intends imposing a sentence contemplated" in section 51 of the Criminal Law Amendment Act, 1997. The proposed change of wording is intended to reflect the legal position more clearly.
- 2.4 Section 299A of the Criminal Procedure Act, 1977, entitles a victim of crime or, where a victim has died as a result of the crime, his or her immediate relative to have a say when an accused is considered for parole or correctional supervision. In terms of the said section, a victim or relative ("complainant") who wants to be informed of the accused's possible release on parole or correctional supervision must inform the Commissioner of Correctional Services accordingly and keep the Commissioner informed of his or her whereabouts. This section also requires the Commissioner to issue directives regarding the manner and circumstances in which a complainant may exercise this right. At present section 299A does not provide for the identity and whereabouts of a complainant to be kept confidential nor is there a mechanism

in place for informing a complainant of the right contained in section 299A. Clause 5 seeks to amend section 299A so as to enable the Commissioner to provide for those situations in the directives.

- 2.5 Clause 6 seek to amend section 13B of the Attorneys Act, 1979 (Act No. 53 of 1979), which was inserted in that Act at the request of the legal profession. Section 13B requires all attorneys who, for the first time, intend to practise on their own account or as a partner, to complete a mandatory legal practice management course approved by the council of the law society in their area of jurisdiction. When consulting the profession on the implementation of this provision the profession requested a further amendment to allow for some flexibility in respect of—
- (i) the attendance requirement, for instance where a person has worked in a management capacity in a law firm for years or has an MBA; and
 - (ii) the period in which the course must be completed, for instance in the case of illness or pregnancy.
- 2.6 Clause 7 seeks to amend section 4 of the Right of Appearance in Courts Act, 1995 (Act No. 62 of 1995), by allowing any attorney who has been granted the right of appearance in terms of that Act to appear in any High Court in the Republic and not only to appear in the Court in which he or she was granted the right of appearance.
- 2.7 Clause 8 seeks to insert a new section in the Special Investigating Units and Special Tribunals Act, 1996 (Act No. 74 of 1996), which will allow the Head of a Special Investigating Unit to delegate certain of his or her powers and functions to a member of a Special Investigating Unit. This will facilitate the smooth functioning of Special Investigating Units.
- 2.8 Clauses 9, 10, 11, 12 and 13 seek to amend the Debt Collectors Act, 1998 (Act No. 114 of 1998).
- 2.8.1 Clause 9 seeks to amend the definition of “debt collector”. At present a debt collector is defined as follows:
- “ **‘debt collector’** means —
- (a) a person, other than an attorney or his or her employee or a party to a factoring arrangement, who for reward collects debts owed to another on the latter’s behalf;
 - (b) a person who, other than a party to a factoring arrangement, in the course of his or her regular business, for reward takes over debts referred to in paragraph (a) in order to collect them for his or her own benefit;
 - (c) a person who, as an agent or employee of a person referred to in paragraph (a) or (b) collects the debts on behalf of such person, excluding an employee whose duties are purely administrative, clerical or otherwise subservient to the actual occupation of debt collector;”.

The Debt Collectors Council has established that some debt collectors refuse to register with the Council. They argue that they provide administrative functions for an attorney and that the attorney will then deal with the processing of the documents and the courts. In this manner neither the attorney nor the debt collector is registered in terms of the Debt Collectors Act, 1998, and the Council has no control over

the activities of such a person who performs exactly the same functions as the agent or employee of a debt collector registered in terms of the Act. Such an agent will be able to do as he or she likes and the Council will not be able to act against him or her. The proposed amendment of the definition in question seeks to address this possible gap that has been identified.

- 2.8.2 Clause 10 merely seeks to rectify an incorrect reference in section 10 of the Debt Collectors Act, 1998.
- 2.8.3 Clause 11 proposes the substitution of section 12 of the Debt Collectors Act, 1998, which deals with the register of debt collectors kept by the Debt Collectors Council. In terms of this section the Council must keep a register of the names and prescribed particulars of every debt collector whose application for registration has been approved or whose registration has been withdrawn or disapproved. The Council must also publish the register of debt collectors in the *Gazette* annually. The register must be updated every second month, it must be made available for inspection by the public at prescribed places and times and must be submitted to Parliament within 14 days after the publication thereof in the *Gazette*. The register, in its present format, contains particulars of “active” debt collectors, that is the particulars of persons whose application for registration as a debt collector has been approved, as well as particulars of “non-active” debt collectors, in other words the particulars of those persons whose applications or registrations have either been withdrawn or disapproved. It is proposed in clause 12 that the Council should keep two registers, namely one containing the particulars of “active” debt collectors and the other the particulars of “non-active” debt collectors. The other amendments proposed arise from a request of the Debt Collectors Council indicating that it will be very expensive to publish the registers in the *Gazette*, as is currently required. It is therefore suggested that the requirement to publish in the *Gazette* be deleted and replaced with the requirement that the register of “active” debt collectors be published on the Council’s website, a much less expensive option. However, in order to make the registers accessible to the person in the street, it is proposed that the registers should be available for public inspection at prescribed places.
- 2.8.4 The Debt Collectors Act, 1998, at present only makes provision for the withdrawal of the registration of a person as debt collector, for instance if a debt collector is convicted of a “dishonesty” offence, improper conduct, becomes insolvent, becomes of unsound mind or if a debt collector does not pay his or her prescribed fees. If a debt collector no longer wishes to practise as a debt collector there is no mechanism in the Act in terms of which he or she can request that his or her registration be cancelled. The Debt Collectors Council can merely withdraw the registration of the person concerned if he or she fails to pay the prescribed fees, after the person has given notice that he or she no longer wishes to practise as a debt collector. Clause 12 seeks to address this problem.
- 2.8.5 Clause 13 seeks to amend section 20 of the Debt Collectors Act, 1998, which regulates the trust accounts of debt collectors. In terms of this section every debt collector who practises for his or her own account must open and maintain a separate trust account at a bank and must deposit therein all money received or held by him or her on behalf of any person as soon as possible after receipt thereof. The money so

deposited must, together with the interest, be paid within a reasonable or agreed time to the person on whose behalf the money was received or held. Any interest must be paid in accordance with the prescribed regulations. The Debt Collectors Council has received numerous requests from debt collectors and auditors alike to amend these provisions to bring them more into line with the trust account provisions of attorneys, estate agents and sheriffs, which require attorneys, estate agents and sheriffs to pay interest earned in their trust accounts to their respective Fidelity Funds, unless the person on whose behalf the money is held or received requests otherwise. The legislation regulating these three “professions” also, in some way or other, makes provision for the “professionals” in question to be re-imbursed from the interest accrued on the trust account for expenses incurred in respect of that trust account. The debt collectors and many of their auditors point out that it is very difficult and in many cases virtually impossible to work out the interest involved in every case unless the debt collectors have special and very expensive IT programmes which are capable of doing such calculations. The interest earned in many instances often amounts to a few cents and the costs involved in returning the interest exceeds the amount of interest owed. The amendments proposed are intended to bring the relevant provisions more in line with similar provisions relating to trust accounts in other legislation.

- 2.9 Clause 14 seeks to amend section 10 of the Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000). This section deals with regulations which the Minister may make to give meaningful effect to the Act. The Minister must, by regulation, prepare a code of good administrative conduct in order to provide administrators with practical guidelines and information aimed at the promotion of an efficient administration and the achievement of the objects of the Act. The Portfolio Committee on Justice and Constitutional Development deliberately intended this Code not to have the binding force of law, but to be used as a practical guide. The State Law Advisers have expressed the opinion that a practical code, which is nothing more than a practical guide, should not have the force of law which subordinate legislation (*regulations*) has. In terms of the proposed amendment the code of good administrative conduct will be published by notice in the *Gazette* and not be made by regulation in order to give effect to Parliament’s intention.
- 2.10 Clause 15 seeks to amend section 1 of the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (Act No. 4 of 2000). A concern has been raised that a person who is intersexed might be vulnerable as a result of the conventional or ordinary understanding of the words “sex” and “gender” (two of the prohibited grounds of unfair discrimination contained in section 9 of the Constitution), being filtered through into the law, leaving these persons unprotected. While it may be argued that the said Act will protect a person who is intersexed from unfair discrimination on the strength of the definition of “prohibited grounds” in section 1 thereof, which includes “sex” and “gender”, as well as any other ground where the discrimination in question “causes or perpetuates systemic disadvantage, undermines human dignity or adversely affects the equal enjoyment of a person’s rights and freedoms in a serious manner”, the opinion is held that the amendments proposed in this clause will eliminate any uncertainty in this regard and focus the minds of those who apply this legislation in practice in the event of a person who is intersexed seeking relief.
- 2.11 Clause 16 seeks to amend section 10 of the Implementation of the Rome Statute of the International Criminal Court Act, 2002 (Act No. 27 of 2002). Section 10 sets out the procedure to be followed after the arrest of a person in

South Africa who is wanted by the International Criminal Court for a crime contemplated in the Act for purposes of surrendering that person to the International Criminal Court. Such a person must be brought before a magistrate who must hold an inquiry in order to establish whether the warrant of arrest applies to the arrested person, whether the person has been arrested in accordance with the procedures laid down by domestic law and whether the rights of the person as contemplated in Chapter 2 of the Constitution have been respected. In terms of section 10(5), if the magistrate is satisfied that these requirements have been met and that the person may be surrendered to the International Criminal Court for prosecution in the Court, for the imposition of a sentence by the Court for a crime in respect of which the person has already been convicted or to serve a sentence already imposed by the Court, “the magistrate must issue an order committing that person to prison pending his or her surrender to the Court.” It has been pointed out that this provision may be flawed to the extent that it makes no explicit provision for an order for the surrender of a person to the Court but merely envisages an order committing a person to prison pending his or her surrender to the Court. Clause 16 therefore proposes an amendment to section 10 in order to create legal certainty in this regard.

4.12 Section 22 of the Judicial Matters Second Amendment Act, 2003, amended section 44(4) of the Promotion of Access to Information Act, 2000 (Act No. 2 of 2000). In terms of the amended section 44(4) a record may not be refused insofar as it consists of an account or a statement of reasons required to be given in accordance with section 5 of the Promotion of Administrative Justice Act, 2000, except if the record relates to a decision referred to in paragraph (gg) of the definition of “administrative action” in section 1 of the Promotion of Administrative Justice Act, 2000, regarding the nomination, selection or appointment of a judicial officer or any other person by the Judicial Service Commission in terms of any law. Section 5 of the Promotion of Administrative Justice Act, 2000, provides that any person whose rights have been materially and adversely affected by an administrative action and who has not been given reasons for the action may, within 90 days after the date on which that person became aware of the action, request written reasons for the action. However, paragraph (gg) of the definition of “administrative action” already provides that “a decision relating to any aspect regarding the nomination, selection or appointment of a judicial officer or any other person by the Judicial Service Commission in terms of any law” is not an administrative action. The amendment to section 44(4) of the Promotion of Access to Information Act, 2000, was therefore unnecessary in the first place and clause 17 seeks to repeal section 22 of the Judicial Matters Second Amendment Act, 2003, since it has not been put into operation yet.

3. CONSULTATION

The following persons were consulted: The Department of Correctional Services in respect of clause 5, the legal profession in respect of clause 6, the legal profession and judiciary in respect of clause 7, the Special Investigating Unit in respect of clause 8, the Council for Debt Collectors in respect of clauses 9, 10, 11, 12 and 13, the South African Human Rights Commission, the Commission on Gender Equality, the South African Law Reform Commission, the Equality Review Committee and an intersexed person in respect of clause 15.

4. IMPLICATIONS FOR PROVINCES

None.

5. FINANCIAL IMPLICATIONS FOR STATE

None.

6. PARLIAMENTARY PROCEDURE

- 6.1 The State Law Advisers and the Department of Justice and Constitutional Development are of the opinion that the Bill must be dealt with in accordance with the procedure established by section 75 of the Constitution since it contains no provision to which the procedure set out in section 74 or 76 of the Constitution applies.
- 6.2 The State Law Advisers are of the opinion that it is not necessary to refer this Bill to the National House of Traditional Leaders in terms of section 18(1)(a) of the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003), since it does not contain provisions pertaining to customary law or customs of traditional communities.

