

**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.

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## **BILL**

To amend the Insolvency Act, 1936, so as to insert a definition of Minister; to enable the Cabinet member responsible for the administration of justice to determine policy for, and further regulate, the appointment of *curatores bonis*, trustees, provisional trustees and co-trustees by the Masters of the High Courts; to amend the Administration of Estates Act, 1965, so as to provide for the appointment of a Chief Master of the High Courts; to amend the Companies Act, 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; to amend the Close Corporations Act, 1984, so as to enable the Cabinet member responsible for the administration of justice to determine policy for, and further regulate, the appointment of liquidators by the Masters of the High Courts; and to provide for matters connected therewith.

**B**E IT ENACTED by the Parliament of the Republic of South Africa, as follows:—

**Amendment of section 2 of Act 24 of 1936, as amended by section 2 of Act 16 of 1943, section 1 of Act 6 of 1972, section 1 of Act 27 of 1987, section 4 of Act 57 of 1993, section 1 of Act 157 of 1993 and section 1 of Act 49 of 1996** 5

1. Section 2 of the Insolvency Act, 1936 (hereinafter referred to as the Insolvency Act), is amended by the insertion after the definition of “messenger” of the following definition:

“ ‘Minister’ means the Cabinet member responsible for the administration of justice;” 10

**Amendment of section 5 of Act 24 of 1936, as amended by section 4 of Act 16 of 1943, section 1 of Act 99 of 1965 and section 1 of Act 101 of 1983**

2. Section 5 of the Insolvency Act is amended by the substitution for subsection (2) of the following subsection:

“(2) After the publication of a notice of surrender as aforesaid in the *Gazette* the Master may, in accordance with policy determined by the Minister, appoint a *curator bonis* to the debtor’s estate, who shall forthwith take the estate into his or her custody and take over the control of any business or undertaking of the debtor, 15

as if he or she were the debtor, as the Master may direct, including any business the debtor is licensed to carry on in terms of the Liquor Act, [1928] 1989 (Act No. 27 of 1989), but subject in every case, *mutatis mutandis*, to the provisions of section [seventy] 70.”

**Amendment of section 18 of Act 24 of 1936, as amended by section 11 of Act 16 of 1943** 5

3. Section 18 of the Insolvency Act is amended by the substitution for subsection (1) of the following subsection:

“(1) As soon as an estate has been sequestrated (whether provisionally or finally) or when a person appointed as trustee ceases to be trustee or to function as such, the Master may, in accordance with policy determined by the Minister, appoint a provisional trustee to the estate in question who shall give security to the satisfaction of the Master for the proper performance of his or her duties as provisional trustee and shall hold office until the appointment of a trustee.” 10

**Amendment of section 19 of Act 24 of 1936, as amended by section 11 of Act 50 of 1956, section 5 of Act 99 of 1965, sections 46 and 47 of Act 97 of 1986 and section 5 of Act 122 of 1993** 15

4. Section 19 of the Insolvency Act is amended by the substitution for subsection (6) of the following subsection:

“The Minister [of Justice] may by notice in the *Gazette* amend the said tariff A and rules.” 20

**Amendment of section 54 of Act 24 of 1936**

5. Section 54 of the Insolvency Act is amended by the substitution for subsection (5) of the following subsection:

“(5) If at any meeting of creditors convened for the purpose of electing a trustee, no trustee is elected and the estate is not vested at the time of that meeting in a provisional trustee, the Master may, in accordance with policy determined by the Minister, appoint a trustee and if he or she does not so appoint a trustee, the Master or the insolvent with the Master’s consent, may apply, at the cost of the estate, to the court by petition to set aside the sequestration and the court may make such order thereon as it thinks fit.” 25 30

**Amendment of section 57 of Act 24 of 1936, as amended by section 17 of Act 99 of 1965**

6. Section 57 of the Insolvency Act is amended by—

(a) the substitution for subsection (4) of the following subsection: 35

“(4) If the Master declines, for any reason mentioned in subsection (1), to confirm the election of a person who was elected as trustee at a meeting mentioned in subsection (2), or to appoint a person so elected, he or she shall act in accordance with the provisions of subsection (1) and thereupon, if the person whose election the Master declined to confirm or whom the Master declined to appoint, was elected as sole trustee, or if two trustees were elected and the Master did not appoint both or one of them, the Master shall, in accordance with policy determined by the Minister, appoint as trustee of the estate in question any other person who is not disqualified from being a trustee of that estate.”; 40 45

(b) the substitution for subsection (5) of the following subsection:

“(5) Whenever the Master considers it desirable, he or she may, in accordance with policy determined by the Minister, appoint a person not disqualified from holding the office of trustee who has given the security mentioned in [sub-section (2) of section fifty-six] section 56(2) as a co-trustee with the trustee or trustees of an insolvent estate.”; and 50

(c) the substitution for subsection (7) of the following subsection:

“(7) Any person aggrieved by the appointment of a trustee or the refusal of the Master to confirm the election of a trustee or to appoint a person elected as a trustee, may within a period of seven days from the date of such appointment or refusal request the Master in writing to submit his or her reasons for such appointment or refusal to the Minister [of Justice].”.

**Amendment of section 62 of Act 24 of 1936, as amended by section 19 of Act 99 of 1965**

7. Section 62 of the Insolvency Act is amended by the substitution for subsection (2) of the following subsection: 10

“(2) When a sole trustee has vacated his or her office or has been removed from office, has resigned or died, the Master shall convene a meeting of the creditors of the estate in question for the purpose of electing a new trustee, and in the meantime the Master may, in accordance with policy determined by the Minister, appoint a provisional trustee for the preservation of the estate.”. 15

**Amendment of section 63 of Act 24 of 1936, as amended by section 12 of Act 50 of 1956 and sections 46 and 47 of Act 97 of 1986**

8. Section 63 of the Insolvency Act is amended by the substitution for subsection (1)*bis* of the following subsection: 20

“(1)*bis* The Minister [of Justice] may by notice in the *Gazette* amend the said tariff B.”.

**Amendment of section 95 of Act 24 of 1936**

9. Section 95 of the Insolvency Act is amended by the substitution for subsection (4) of the following subsection: 25

“(4) Any creditor claiming to be entitled to share in the said distribution shall make written application to the Master for payment of his or her share, and the Master may pay out to such creditor or may hand the money to the trustee, if any, for distribution among the creditors entitled thereto, or, if there is no trustee, may, in accordance with policy determined by the Minister, appoint a trustee on such conditions as he or she may think fit to impose for the purpose of making such distribution.”. 30

**Amendment of section 98A of Act 24 of 1936, as inserted by section 2 of Act 122 of 1998**

10. Section 98A of the Insolvency Act is amended by— 35

(a) the substitution for paragraphs (a), (b), (c) and (d) of subsection (2) of the following paragraphs:

“(2) (a) In order to ensure that the balance of the free residue is applied in an equitable manner, the Minister [of Justice] may by notice in the *Gazette* determine maximum amounts which shall be paid out in terms of subsection (1) in respect of— 40

(i) paragraph (a), any or all the subparagraphs thereof or any single employee; and

(ii) paragraph (b) or any single scheme or fund, and different maximum amounts may be so determined in respect of different schemes or funds. 45

(b) In order to take into account subsequent fluctuations in the value of money, the Minister [of Justice] may from time to time supplement, amend or withdraw the relevant maximum amounts by like notice in the *Gazette*. 50

(c) The Minister [of Justice] may at any time replace a notice referred to in paragraph (a) with a new notice issued under the said paragraph (a).

- (d) The Minister [of Justice] shall not exercise the powers conferred upon him or her by paragraph (a) or (c), unless he or she—
- (i) has caused to be published in the *Gazette* a draft of the proposed notice, together with a notice inviting all interested parties to lodge with the Director-General: Justice and Constitutional Development in writing within a period of 60 days from the date of the publication of the notice any representations that they may wish to make in connection with the proposed notice; and
  - (ii) has caused to be forwarded to the National Economic, Development and Labour Council established by section 2(1) of the National Economic, Development and Labour Council Act, 1994 (Act No. 35 of 1994), a copy of such draft.”; and
- (b) the substitution for the words preceding paragraph (a) of subsection (6) of the following words:
- “(6) The Minister [of Justice] may, after consultation with the National Economic, Development and Labour Council established by section 2(1) of the National Economic, Development and Labour Council Act, 1994, by notice in the *Gazette* exclude from the operation of the provisions of this section a category of employees, schemes or funds specified in the notice—”.

**Amendment of section 153 of Act 24 of 1936, as amended by section 21 of Act 62 of 1955 and sections 46 and 47 of Act 97 of 1986**

11. Section 153 of the Insolvency Act is amended by the substitution for subsection (1)*bis* of the following subsection:
- “(1)*bis* The Minister [of Justice] may from time to time by notice in the *Gazette* amend the said Third Schedule.”.

**Substitution of section 158 of Act 24 of 1936, as amended by section 46 of Act 97 of 1986**

12. The following section is substituted for section 158 of the Insolvency Act:

**“Regulations and policy**

158. (1) The Minister [of Justice] may from time to time make regulations not inconsistent with the provisions of this Act, prescribing—
- (a) the procedure to be observed in any Master’s office in connection with insolvent estates;
  - (b) the form of, and manner of conducting proceedings under this Act;
  - (c) the manner in which fees payable under this Act shall be paid and brought to account.
- (2) The Minister may determine policy for the appointment of a *curator bonis*, trustee, provisional trustee or co-trustee by the Master in order to promote consistency, fairness, transparency and the achievement of equality for persons previously disadvantaged by unfair discrimination.
- (3) Any policy determined in accordance with the provisions of subsection (2) must be published in the *Gazette* and tabled in Parliament.”.

**Substitution of section 158*bis* of Act 24 of 1936, as inserted by section 13 of Act 50 of 1956 and amended by sections 46 and 47 of Act 97 of 1986**

13. The following section is substituted for section 158*bis* of the Insolvency Act:

**“Minister [of Justice] may amend First Schedule**

**158.bis.** The Minister [of Justice] may by notice in the *Gazette* amend the First Schedule.”.

**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 and section 2 of Act 20 of 2001**

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

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

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

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(c) 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.”.

**Substitution of section 15 of 61 of 1973, as amended by section 1 of Act 111 of 1976, section 2 of Act 59 of 1978 and section 4 of Act 35 of 2001**

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15. The following section is substituted for section 15 of the Companies Act, 1973 (hereinafter referred to as the Companies Act):

**“Regulations and policy**

15. (1) The Minister may make regulations—

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(a) providing for the conduct and administration of the Companies Registration Office and prescribing the practice and procedure to be observed therein;

(b) prescribing the practice and procedure to be observed in the office of the Master in connection with the winding-up and judicial management of companies;

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(bA) providing for the reproduction of any records in the Companies Registration office or the office of the Master by microfilm, microcard, miniature photographic process, the conversion into electronic format in such a way as to allow such records to be reconverted without changing their original contents or any other process deemed suitable by the Minister;

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(bB) providing for the use for official purposes and the admissibility in evidence in any proceedings, whether in a court of law or otherwise, of any reproduction contemplated in paragraph (bA); [and]

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(c) providing for the keeping and preservation of any records, or any reproduction thereof contemplated in paragraph (bA), in the Companies Registration office or the office of the Master, the removal from such offices and preservation in any other place of such records or reproductions and prescribing the circumstances under which any such records or reproductions may be destroyed;

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(cA) prescribing how records required under this Act to be kept by a company may be kept, and prescribing the circumstances under which any such records may be destroyed;

(d) prescribing the procedure to be followed with respect to any matter in connection with the winding-up and judicial management of companies;

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(e) prescribing the form and the contents of any return, notice or form provided for by this Act;

- (f) prescribing when an additional copy or copies of documents to be lodged under the Act shall require to be lodged and whether such additional copy or copies shall be in the form of a copy or copies certified in the manner prescribed or shall be in duplicate original form; 5
- (g) in consultation with the Minister of Finance, prescribing the matters in respect of which fees shall be payable and the tariff of such fees;
- (h) providing for a table of fees, subject to taxation by the Master, which shall be payable to a liquidator as remuneration;
- (i) prescribing a tariff of remuneration payable to any person performing on behalf of a liquidator any act relating to the winding-up of a company, and prohibiting the charging or recovery of remuneration at a higher tariff than the tariff so prescribed; 10
- (j) in consultation with the Minister of Finance, prescribing the remuneration and allowances of members of the standing advisory committee and its standing sub-committees and the conditions upon which such members are appointed; 15
- (k) as to any matter required or permitted by this Act to be prescribed by regulation; and
- (l) generally, as to any matter which he or she considers it necessary or expedient to prescribe in order that the purposes of this Act may be achieved. 20

(1A) (a) The Minister may determine policy for the appointment of a provisional liquidator, co-liquidator, liquidator or provisional judicial manager by the Master in order to promote consistency, fairness, transparency and the achievement of equality for persons previously disadvantaged by unfair discrimination. 25

(b) Any policy determined in accordance with the provisions of paragraph (a) must be published in the *Gazette* and tabled in Parliament.

(2) Any regulations made under subsection (1) may prescribe penalties for any contravention thereof or failure to comply therewith not exceeding a fine [of one hundred rand] or imprisonment for a period of six months or both [such] a fine and such imprisonment.”. 30

**Substitution of section 368 of Act 61 of 1973, as substituted by section 28 of Act 83 of 1981** 35

16. The following section is substituted for section 368 of the Companies Act:

**“Appointment of provisional liquidator**

368. As soon as a winding-up order has been made in relation to a company, or a special resolution for a voluntary winding-up of a company has been registered in terms of section 200, the Master may, in accordance with policy determined by the Minister, appoint any suitable person as provisional liquidator of the company concerned, who shall give security to the satisfaction of the Master for the proper performance of his or her duties as provisional liquidator and who shall hold office until the appointment of a liquidator.”. 40 45

**Substitution of section 374 of Act 61 of 1973**

17. The following section is substituted for section 374 of the Companies Act:

**“Master may appoint co-liquidator at any time**

374. Whenever the Master considers it desirable he or she may, in accordance with policy determined by the Minister, appoint any person not disqualified from holding the office of liquidator and who has given security to his or her satisfaction, as a co-liquidator with the liquidator or liquidators of the company concerned.”. 50

**Amendment of section 377 of Act 61 of 1973**

18. Section 377 of the Companies Act is amended by the substitution for subsection (3) of the following subsection:

“(3) Subject to the proviso to subsection (1), if for any reason a vacancy is not filled as provided in this section, the Master may, in accordance with policy determined by the Minister, appoint any person as provisional liquidator or as liquidator to fill such vacancy.” 5

**Amendment of section 429 of Act 61 of 1973**

19. Section 429 of the Companies Act is amended by the substitution for subparagraph (i) of paragraph (b) of the following subparagraph: 10

“(i) appoint, in accordance with policy determined by the Minister, a provisional judicial manager (who shall not be the auditor of the company or any person disqualified under this Act from being appointed as liquidator in a winding-up) who shall give such security for the proper performance of his or her duties in his or her capacity as such, as the Master may direct, and who shall hold office until discharged by the Court as provided in section 432(3)(a);” 15

**Substitution of section 10 of Act 69 of 1984, as amended by section 2 of Act 38 of 1986 and section 4 of Act 22 of 2001**

20. The following section is substituted for section 10 of the Close Corporations Act, 1984 (hereinafter referred to as the Close Corporations Act): 20

**“Regulations and policy**

10. (1) The Minister may make regulations—
- (a) providing for the conduct and administration of the Registration Office, and prescribing the practice and procedure to be observed therein; 25
  - (b) prescribing the practice and procedure to be observed in the office of the Master in connection with the winding-up of corporations;
  - (c) providing for the reproduction of any records relating to corporations in the Registration Office or the office of the Master by means of microfilm, microcard, miniature photographic process, the conversion into electronic format in such a way as to allow such records to be reconverted to their original form without changing their original contents or form or any other process deemed suitable by the Minister; 30
  - (d) providing for the use for official purposes and the admissibility in evidence in any proceedings, whether in a court of law or otherwise, of any reproduction contemplated in paragraph (c); 35
  - (e) providing for the keeping and preservation of any records, or any reproductions thereof contemplated in paragraph (c), in the Registration Office or the office of the Master, the removal from such offices of such records or reproductions and the preservation thereof in any other place, and prescribing the circumstances under which such records or reproductions may be destroyed; 40
  - (f) prescribing how records required under this Act to be kept by a corporation may be kept, and prescribing the circumstances under which such records may be destroyed; 45
  - (g) prescribing the procedure to be followed with respect to any matter in connection with the winding-up of corporations;
  - (h) prescribing the form and the contents of any return, notice or document provided for by this Act; 50
  - (i) prescribing when an additional copy or copies of documents to be lodged under this Act shall require to be lodged, and whether such

- additional copy or copies shall be in the form of a copy or copies certified in a defined manner or shall be in duplicate original form;
- (j) with the concurrence of the Minister of Finance, prescribing the matters in respect of which fees shall be payable, the persons by whom and to whom the fees shall be payable and the tariff of such fees; 5
  - (k) providing for a table of fees, subject to taxation by the Master, which shall be payable to a liquidator as remuneration;
  - (l) prescribing a tariff of remuneration payable to any person performing on behalf of a liquidator any act relating to the winding-up of a corporation which the liquidator is not required to perform personally, and prohibiting the charging or recovery of remuneration at a higher tariff than the tariff so prescribed; 10
  - (m) providing for the appointment by the Registrar in specified circumstances of an inspector to investigate the affairs of a corporation, for the powers of an inspector in conducting any such investigation, for the duty of any member, officer, employee or accounting officer of a corporation to make available books and documents in his or her custody or under his or her control and to afford such assistance as an inspector may require in connection with any such investigation; for reporting by an inspector to the Registrar; for the making available by the Registrar of any such report to other persons; for the admissibility of any such report as evidence in legal proceedings; and for defraying the expenses of, and in connection with, any such investigation; 15
  - (n) as to any other matter required or permitted by this Act to be prescribed; and 20
  - (o) generally, as to any matter which he or she considers it necessary or expedient to prescribe in order that the purposes of this Act may be achieved. 25

(1A) (a) The Minister may determine policy for the appointment of a liquidator by the Master in order to promote consistency, fairness, transparency and the achievement of equality for persons previously disadvantaged by unfair discrimination. 30

(b) Any policy determined in accordance with the provisions of paragraph (a) must be published in the *Gazette* and tabled in Parliament.

(2) Regulations made under subsection (1) may prescribe penalties for any contravention thereof or failure to comply therewith, not exceeding a fine [of R300] or imprisonment for a period of six months or both [such] a fine and such imprisonment.”. 35

#### **Amendment of section 74 of Act 69 of 1984**

21. Section 74 of the Close Corporations Act is amended by the substitution for subsection (1) of the following subsection: 40

“(1) For the purposes of conducting the proceedings in a winding-up of a corporation, the Master shall, in accordance with policy determined by the Minister, appoint a suitable natural person as liquidator.”.

#### **Amendment of section 76 of Act 69 of 1984, as amended by section 14 of Act 38 of 1986**

22. Section 76 of the Close Corporations Act is amended by the substitution for paragraph (b) of subsection (3) of the following paragraph: 45

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



**Short title and commencement**

23. This Act is called the Judicial Matters Amendment Act, 2003, and comes into operation on a date fixed by the President by proclamation in the *Gazette*.

## **MEMORANDUM ON THE OBJECTS OF THE JUDICIAL MATTERS AMENDMENT BILL, 2003**

### **1. PURPOSE OF BILL**

The main object of the Bill is to encompass in a single Bill a variety of amendments which do not require individual amendment Bills.

### **2. OBJECTS OF BILL**

The objects of the clauses of the Bill are explained below:

2.1 There are ten offices of the Master of the High Courts in the Republic. The Cabinet member responsible for the administration of justice may appoint a Master, Deputy Masters and Assistant Masters for each Master's office. The Deputy Masters and Assistant Masters may, in terms of section 2(1) of the Administration of Estates Act, 1965, do anything which lawfully may be done by the Master, subject to the control, direction and supervision of the Master. Although the Master, Pretoria, has been described as the "Chief Master", there is no statutory authority for such an office and the Masters, as creatures of statute, are obliged to exercise their powers and carry out their duties in terms of the Administration of Estates Act, 1965, the Insolvency Act, 1936, and other legislation. It is necessary to provide for uniformity within the different Masters' offices and it is undesirable that each Master has different practices or approaches in respect of important matters, such as the appointment of trustees in insolvent estates. The proposed amendment to section 2(1) of the Administration of Estates Act, 1965, makes provision for the appointment of a Chief Master of the High Courts, who will, as executive officer of the Masters' offices, exercise such supervision over all the Masters' offices as may be necessary in order to bring about the required uniformity.

2.2 In order to address the imbalances that exist with the appointment of trustees, liquidators and similar functionaries in insolvency-related matters, in line with Government policy, the Department of Justice and Constitutional Development has developed a policy in this regard. One of the objectives of this policy is to create uniform procedures in all the Masters' offices for the appointment of such functionaries and to promote the image of insolvency practitioners and the Masters' Division. The Masters currently have a discretion to appoint these functionaries. The proposed amendments to sections 5(2), 18(1), 54(5), 57(4), 57(5), 62(2) and 95(4) of the Insolvency Act, 1936, sections 368, 374, 377(3) and 429(b)(i) of the Companies Act, 1973, and sections 74(1) and 76(3)(b) of the Close Corporations Act, 1984, make it clear that the Master should act in accordance with policy determined by the Cabinet member responsible for the administration of justice when making these appointments. The aim of the policy is to promote consistency, fairness, transparency and the achievement of equality in the appointment process. Provision is also specifically made in the amendment to section 158 of the Insolvency Act, 1936, for the Cabinet member responsible for the administration of justice to determine policy in this regard. Similar amendments are proposed to section 15 of the Companies Act, 1973, and section 10 of the Close Corporations Act, 1984.

2.3 A definition of "Minister" is inserted in the Insolvency Act, 1936, which gave rise to numerous consequential amendments in that Act.

### **3. DEPARTMENTS/BODIES/PERSONS CONSULTED**

- Representatives of the Masters' Division within the Department of Justice and Constitutional Development.
- Department of Trade and Industry
- Registrar of Companies

### **4. IMPLICATIONS FOR PROVINCES**

None.

**5. FINANCIAL IMPLICATIONS FOR STATE**

None.

**6. PARLIAMENTARY PROCEDURE**

The Department of Justice and Constitutional Development and the State Law Advisers are of the opinion that this Bill should be dealt with in terms of 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.