

JUDICIAL MATTERS AMENDMENT BILL

*(As amended by the Portfolio Committee on Justice and Constitutional Development
(National Assembly))
(The English text is the official text of the Bill)*

(MINISTER FOR JUSTICE AND CONSTITUTIONAL DEVELOPMENT)

[B 2B-2005]

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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 Magistrates' Courts Act, 1944, so as to provide for the disposal of part heard cases by permanently appointed magistrates who vacate the office of magistrate;
 - 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;
 - 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 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 Maintenance Act, 1998, so as to further regulate the appointment or designation of officers in the Department as maintenance investigators;
 - 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 further regulate the provisions relating to trust accounts of debt collectors;
 - 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*; and to extend the period of time within which the code of good administrative conduct must be made;
 - 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 within the definition of sex;
 - 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 9 of Act 32 of 1944, as substituted by section 2 of Act 8 or 1967 and amended by section 4 of Act 53 of 1970, section 8 of Act 102 of 1972, section 11 of Act 29 of 1974, section 24 of Act 94 of 1974, section 1 of Act 28 of 1981, section 2 of Act 34 of 1986, section 17 of Act 90 of 1993, section 3 of Act 104 of 1996, section 3 of Act 66 of 1998, section 1 of Act 62 of 2000 and section 1 of Act 28 of 2003

1. Section 9 of the Magistrates' Courts Act, 1944, is hereby amended by the addition of the following subsection after subsection (6):

"(7) (a) A magistrate appointed in terms of subsection (1) who presided in criminal proceedings in which a plea was recorded in accordance with section 106 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), shall, notwithstanding his or her subsequent vacation of the office of magistrate at any stage, dispose of those proceedings and, for such purpose, shall continue to hold such office in respect of any period during which he or she is necessarily engaged in connection with the disposal of those proceedings-

- (i) in which he or she participated, including an application for leave to appeal in respect of such proceedings; and
- (ii) which were not disposed of when he or she vacated the office of magistrate.

(b) The proceedings contemplated in paragraph (a) shall be disposed of at the court where the proceedings were commenced, unless all parties to the proceedings agree unconditionally in writing to the proceedings being resumed in another court mentioned in the agreement.

(c) If the magistrate contemplated in paragraph (a) has subsequently been appointed as a Constitutional Court judge or judge as defined in section 1 of the Judges' Remuneration and Conditions of Employment Act, 2001 (Act No. 47 of 2001)-

- (i) he or she shall only, be entitled to the benefits to which such a Constitutional Court judge or judge is entitled as contemplated in the Judges' Remuneration and Conditions of Employment Act, 2001, in respect of any period taken to dispose of the proceedings as contemplated in paragraph (a); and
- (ii) the period taken to dispose of the proceedings as contemplated in paragraph (a) is deemed to be active service for purposes of the Judges' Remuneration and Conditions of Employment Act, 2001.

(d) If the magistrate contemplated in paragraph (a) has subsequently not been appointed as a Constitutional Court judge or judge as contemplated in paragraph (c), he or she is entitled to such benefits as determined by the Minister from time to time by notice in the *Gazette* at an hourly rate.

(e) A magistrate contemplated in paragraph (a) who is, in the opinion of the Minister-

- (i) unfit to continue holding the office of magistrate for purposes of disposing of the proceedings in question; or
- (ii) incapacitated and is not able to dispose of the proceedings in question due to such incapacity,

may be exempted by the Minister from the provisions of this subsection, after consultation with the Chief Justice."

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

2. 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;"

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

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

- "(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;**]
 - [(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.
- ~~— (b) The Chief Master-~~
- ~~-- (i) is subject to the control, direction and supervision of the Minister;~~
 - ~~— (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

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

~~"(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."~~

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

5. 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:

" ~~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."~~

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

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 shall be entitled to appear in any court throughout the Republic."

Insertion of section SA 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 5 of Act 99 of 1998

9. Section 5 of the Maintenance Act, 1998, is hereby amended by the substitution for subsection (1) of the following subsection:

- "(1) The Minister, or any officer of the Department of Justice **and Constitutional Development** authorised thereto in writing by the Minister, may -
- (a) subject to the laws governing the public service, appoint or designate one or more officers in the Department; or
 - (b) appoint in the prescribed manner and on the prescribed conditions one or more persons,
- as maintenance investigators of a maintenance court to exercise or perform any power, duty or function conferred upon or assigned to maintenance investigators by or under this Act."

Amendment of section 1 of Act 114 of 1998

10. 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, as an agent or employee of a person referred to in paragraph (a) or (b) or as an agent of an attorney, collects the debts on behalf of such person or attorney, 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

11. 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

12. 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], who is in possession of a valid certificate of registration contemplated in section 11; 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.

(5) The Council shall, when it submits the register to Parliament as contemplated in subsection (2)(d), publish a notice in the *Gazette* and in a national newspaper, setting out the prescribed places and particulars where the register is available for inspection by the public."

Insertion of section 16A in Act 114 of 1998

13. 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 cancel the registration of a debt collector upon the written request of the debt collector; and
- (b) record the name of such debt collector in the register contemplated in section 12(1)(b)."

14. 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.**

(3) All interest, if any, on money deposited in terms of subsection (1) shall be paid, [as] at the prescribed time and in the prescribed manner, to the [person on whose behalf the money was deposited] Council.";

- (b) by the insertion after subsection (3) of the following subsection:

"(3A) The Council may, in accordance with a tariff and procedure determined by the Council reimburse the debt collector concerned for any bank charges or any portion thereof incurred by the debt collector in connection with the keeping of his or her trust account."; and

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

"(6) A debt collector must in the prescribed manner and period -

- (a) cause his or her accounting records to be audited annually by a public accountant or auditor contemplated in the Public Accountants' and Auditors' Act, 1991 (Act No. 80 of 1991); and
(b) report to the Council thereon.

(7) 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.

(8) If any debt collector-

- (a) dies;
(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
(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."

Substitution of section 10 of Act 3 of 2000

15. 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—

- (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
(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].**

(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 –
- (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;
 - (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;
 - (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;
 - (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;
 - (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
 - (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;
- (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
- (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).

(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 –

- (a) made under subsections (1)(a), (b), (c) 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.

(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.

(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 years] 42 months after the commencement of this [Act] section."

Amendment of section 1 of Act 4 of 2000

16. Section 1 of the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000, is hereby amended—

- (a) by the insertion in subsection (1) after the definition of "HIV/AIDS status" of the following definition:
- "'intersex' means a congenital sexual differentiation which is atypical, to whatever degree;"; and
- (b) by the insertion in subsection (1) after the definition of "sector" of the following definition:
- " 'sex' includes intersex;"

Amendment of section 10 of Act 27 of 2002

17. 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:

"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

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

Short title and commencement

19. (1) This Act is called the Judicial Matters Amendment Act, 2005.
- (2) Sections 1 and 10 to 14 come into operation on a date fixed by the President by proclamation in the *Gazette*.
- (3) Section 6 comes into operation on the date of commencement of section 8 of the Judicial Matters Second Amendment Act, 2003 (Act No. 55 of 2003).
- (4) Section 9 comes into operation on the date of commencement of section 5 of the Maintenance Act, 1998 (Act No. 99 of 1998).

**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 Clause 1 seeks to amend the Magistrates Courts Act, 1944, (Act No. 32 of 1944), in order to address the situation where a magistrate vacates the office of magistrate but still has part heard cases to be finalised in the Magistrates Court. It also deals specifically with instances where a magistrate vacates the office of magistrate and is appointed as a judge.

2.2 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 2 and 3 seek to eliminate any uncertainty in this regard.

2.3 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 4 of the Bill corrects this omission.

2.4 Clause 5 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.

2.5 Clause 6 seeks 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 the attendance requirement, for instance where a person has worked in a management capacity in a law firm for years or has an MBA.

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 a High Court, to appear in any court in the Republic and not only in the Court in the province 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 Section 5 of the Maintenance Act, 1998 (Act No. 99 of 1998), provides that the Minister or any officer of the Department authorised thereto in writing by the Minister, may appoint, in the prescribed manner and on the prescribed conditions, one or more persons as maintenance investigators of a maintenance court to exercise or perform any power, duty or function conferred on or assigned to maintenance investigators by or under the Maintenance Act. Clause 9 has been inserted to allow public servants to be appointed as maintenance investigators as well.

2.9 Clauses 10, 11, 12, 13 and 14 seek to amend the Debt Collectors Act, 1998 (Act No. 114 of 1998).

2.9.1 Clause 10 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.

2.9.2 Clause 11 merely seeks to rectify an incorrect reference in section 10 of the Debt Collectors Act, 1998.

2.9.3 Clause 12 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. This clause also requires the Debt Collectors Council to publish a notice in the *Gazette*

and in a national newspaper once a year, setting out the prescribed places and particulars where the register is available for inspection by the public.

2.9.4 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 13 seeks to address this problem.

2.9.5 Clause 14 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, for instance by requiring interest earned on money deposited in a trust account, to be paid to the Debt Collectors Council and by empowering the said Council to reimburse debt collectors for any bank charges or any portion thereof incurred by them in connection with the keeping of their trust accounts. Clause 14 also seeks to insert in section 20 provisions relating to the auditing of a debt collector's accounting records.

2.10 Clause 15 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. In addition, clause 15 seeks to extend the period of time within which the code of good administrative conduct must be made.

2.11 Clause 16 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.

2.12 Clause 17 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 but 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 17 therefore proposes an amendment to section 10 in order to create legal certainty in this regard.

2.13 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 (Act No. 3 of 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 18 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 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 10, 11, 12, 13 and 14, the South African Human Rights Commission, the Commission on Gender Equality, the South African Law Reform Commission, the Equality Review Committee and an intersexual person in respect of clause 16.

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.