**SUMMARY OF WRITTEN AND ORAL SUBMISSIONS: JUDICIAL MATTERS AMENDMENT BILL**

**[B 2 - 2015]**

The Portfolio Committee on Justice and Correctional Services invited stakeholders and interested persons to make written and oral submissions on the Judicial Matters AmendmentBill [B 2 - 2015].

* Table 1 provides a clause by clause summary of the submissions.
* Table 2 reflects general recommendations.

**TABLE 1**

**Submissions/Recommendations by clause**

| **Clause** | **Name** | **Submission / Recommendation** | **DOJ&CD Response** |
| --- | --- | --- | --- |
| 1 | Commission for Gender Equality (CGE) | The clause is supported. | Noted |
| 3 | Law Society of South Africa | 1. Not opposed to the proposed amendment but believes that the amendment will pose practical difficulties in determining the applicable interest rate.  2. Suggests that whenever the repurchase rate is determined by the South African Reserve Bank, and having regard to the fact that the Minister concerned is in any event obliged to publish the interest rate in the Government Gazette, the relevant Minister rather publish the exact rate, as well as the date when the amended rate will be effective. | 1. Noted.  2. We interpret the proposed new section 1(2)(b) as doing exactly what the Law Society of South Africa is suggesting, namely to publish the exact rate. The proposed new section 1(2)(c), in our view, gives certainty on when the new rate becomes effective, namely on the “first day of the second month following the month in which the repurchase rate is determined by the South African Reserve Bank”. |
| 3 | James Galloway: Deal Advisory Liquidations, Asset Forfeiture and Restructuring | Suggests that sections ***50 (Arrear interest. Debt due after sequestration)*** and ***103 (Non-preferent claims)*** of the Insolvency Act, 1936 (Act 24 of 1936), which are applicable to companies as per section 339 of Act 61 of 1973 (the old Companies Act), read with item 9 of Schedule 5 to Act 71 of 2008 (the Companies Act), be linked to the Prescribed Rate of Interest Act, 1975, so as to further regulate the calculation of interest on certain debts.  Also, the Minister will not have to issue a “Special” regulation to regulate these two sections of the Insolvency Act. | The Department is of the view that this needs to be dealt with separately. Such a proposal needs to be subjected to a proper consultation process with the Masters of the High Court, among others. The Department is busy with a project, the aim of which is to review the 1936 Insolvency Act in its entirety. It might be more appropriate to deal with this proposal during the course of this project. |
| 3 | Commission for Gender Equality | This clause is commendable but is undermined by the inclusion of a provision which allows interest to be calculated in terms of an agreement or any other matter. It would serve no purpose to include such broad provisions.  Proposes the deletion of the words in section 1(1) as follows:  ...or by an agreement or a trade custom or in any other manner.  The deletion of the above is permissible because the proposed clause allows for a court of law to vary the interest rate. | By way of background the following: The Prescribed Rate of Interest Act, 1975 prescribes the maximum rate of interest that may be claimed by a creditor in respect of interest-bearing debts, including judgment debts. The Act is applicable where the parties have not agreed on a rate of interest, either expressly or by implication, and where the interest rate is not governed by any other law or by an agreement or by a trade custom or by any other manner. Since parties can, in theory and by way of example, agree that a debt will not bear any interest or can agree on an interest rate that is lower than the applicable rate, the deletion of the words as proposed by the CGE could take away the freedom of parties to contract, possibly to the detriment of the debtor. The words which the GCE suggests be deleted have been on the Statute Book since the Act was enacted in 1975 and have not given rise to any challenges as far as we are aware. Moreover, the deletion of these words would require further consultation with stakeholders. |
| 6 | Special Investigating Unit (SIU) | The following amendments are proposed to clause 6, which aims to insert a new section 4A in the Special Investigating Units and Special Tribunals Act, 1996 (Act 74 of 1996) (the SIU Act):  **(a)** The proposed section 4A should be renumbered, the current provisions becoming section 4A(1).  **Reason:** This change is required to provide for a newly proposed subsection 4A(2).  **(b)** Paragraph (*b)* of section 4A, must be amended by -  (i) amending the introductory sentence of paragraph (*b*), by inserting the underlined words:  “may at any time when he or she deems it necessary or whenever reasonably requested by—”  **Reason: Proposed insertion of the words “at any time when he or she deems it necessary”:**  According to the SIU, the current paragraph (*b*) of section 4A, only provides for reporting on the progress of an investigation on request and does not address the practical needs to share information. Section 4A(*b*) should be amended to provide the Head of the SIU with a discretion to share information, even in circumstances where no request was received for a report from any of the persons or entities mentioned.  **Reasons: Proposed insertion of the word “reasonably”:** According to the SIU, the insertion of this word will ensure that the SIU is not inundated with unreasonable requests for reports on progress on investigations.  (ii) amending subparagraph (ii) of section 4A(*b*), by the insertion of the references to the “Council, as envisaged in section 18 of the Local Government: Municipal Structures Act, 1998 (Act No. 117 of 1998)” in that subparagraph  **Reason:** According to the SIU, the proposed amendment is necessary due to the fact that a SIU may also be authorised to investigate entities within the local sphere of Government (e.g. Municipalities), in which case a Special Investigating Unit may potentially also be required to report to the Council of such a Municipality.  (iii) amending subparagraph (iii) of section 4A(*b*), by the insertion of the references to the “Local Government: Municipal Finance Management Act, 2003 (Act No. 56 of 2003” in that subparagraph  **Reason:** According to the SIU, the amendment is required due to the fact that a SIU may also be authorised to investigate entities within the local sphere of Government (e.g. a Municipality), in which case a SIU may be required to report to the Accounting Officer or the Municipal Manager of such a Municipality.  (iv) insertion of subparagraph (vi) in section 4A(*b*):  (v) any Portfolio or other Committee of Parliament;  **Reason:** According to the SIU, there is a numbering error in section 4A(b), which needs to be corrected. Also, the proposed subparagraph needs to be included to address the fact that the Head of a SIU is frequently called upon to provide information before Parliamentary Committees, *inter alia*, regarding the state of affairs of investigations undertaken by the SIU. It is therefore necessary to provide for this eventuality in paragraph (b) of the proposed section 4A.  (vi) the correction of the following textual inaccuracy in section 4A(*b*)(viii):  “Auditor-**[g]**General of South Africa”  (vii) the deletion of the references to “person” and “who” in subparagraph (xi) of section 4A(*b*)  **Reason:**  According to the SIU:  \* Although section 4A(1)(b) of the Bill by means of the use of the word "*may*", grants the Head of the SIU a degree of discretion when deciding to grant or refuse such a request for a report on the progress of an investigation, this clause opens the SIU to litigation - the decision of the SIU Head may be subject to legal review under the principles of the *Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000)*.  \* The wide ambit of the current wording of section 4A(*b*)(ix) will result in a SIU being inundated with demands for reports from civil society, including civic organizations and political parties as well as persons under investigation or involved in investigation by a SIU by reason of the fact that the abovementioned entities or persons will fall under the definition of "*person*" as contemplated in section 4A(*b*)(xi). These entities or persons may potentially have an interest in the investigation of a SIU, which will be sufficient for purposes of the proposed section.  \*. The wide ambit of the current draft clause could jeopardise:  - the effective administration of justice and the successful outcome of investigations that are conducted by a SIU;  - joint operations that are conducted with other law enforcement agencies;  - criminal prosecutions and/or civil proceedings that may arise from SIU investigations;  - the effectiveness of the investigation methodology that is utilised by a SIU;  - the safety of witnesses and whistle blowers;  - the operations of a SIU; and  - the *fiscus* financially (e.g. wasted legal costs).  \* The SIU proposes the deletion of the reference to “*person*” due to the fact that such a “person” would still be able to rely on the provisions of the *Promotion of Access to Information Act, 2000 (Act No. 2 of 2000)* in order to gain access to information held by a Special Investigating Unit.  **(c)** The SIU proposes the addition of the following subsection to section 4A, in order to regulate the information that is to be provided :  (i) Option 1:  “4A(2) For purposes of sections 4(1)(h) and 4A(1), the Head of a Special Investigating Unit will have a discretion concerning the level of detail that will be included in a report on the progress of an investigation and matters brought before the Special Tribunal concerned or any court of law. Without limiting the generality of the aforementioned discretion, the Head of a Special Investigating Unit will only be required to provide the following level of detail:  (*a*) the mandate as set out in the relevant Proclamation;  (*b*) any legal proceedings that have already been instituted arising from the investigation. This would be:  (i) any civil proceedings instituted (this will be in the public domain);  (ii) the number of criminal referrals made to the National Prosecuting Authority (NPA) (without mentioning the names  until actual criminal proceedings are instituted by the NPA);  (iii) the number of referrals made to the Asset Forfeiture Unit (AFU) (without mentioning particulars until the AFU has instituted proceedings); and  (iv) the number of disciplinary matters referred to employers (without mentioning the names of affected parties until such disciplinary proceedings have been instituted by the employers); and  (*c*) the target date for completion of the investigation.”  (ii) Option 2  “4A(2) For purposes of sections 4(1)(h) and 4A(1), the Head of a Special Investigating Unit will have a discretion concerning the level of detail that will be included in a report on the progress of an investigation and matters brought before the Special Tribunal concerned or any court of law. Without limiting the generality of the aforementioned discretion, the Head of a Special Investigating Unit will not be required to provide detail:  (a) that discloses the names, personal or commercial information or any other identifying characteristics of any person or entity under investigation or involved in an investigation by a Special Investigating Unit;  (b) of information that was supplied in confidence by a person or entity to a Special Investigating Unit;  (c) if the disclosure of such detail could reasonably be expected to:  (i) constitute an action for breach of a duty of confidence owed to a person or entity in terms of an agreement;  (ii) endanger the life or physical safety of a person;  (iii) reveal, or enable a person to ascertain the identity of a confidential source of information;  (iv) result in the intimidation or coercion of a witness or a person who might be or has been called as a witness;  (v) prejudice or impair the security of a building, structure or system, including, but not limited to, a computer or communication system;  (vi) prejudice the effectiveness of the methods, techniques, procedures or guidelines for the prevention, detection, curtailment or investigation of a contravention or possible contravention of the law;  (vii) prejudice an investigation by a Special Investigating Unit or any other law enforcement agency;  (viii) facilitate the commission of a contravention of the law;  (ix) impede the prosecution of an alleged offender;  (x) prejudice or impair the fairness of a trial or the impartiality of an adjudication;  (xi) result in a miscarriage of justice;  (xii) materially jeopardise the economic interests or financial welfare of the Republic or the ability of the government to manage the economy of the Republic effectively in the best interests of the Republic;  (xiii) frustrate the deliberative process in a State institution or between State institutions by inhibiting the candid communication of an opinion, advice, report or recommendation or conduct of a consultation, discussion or deliberation; or  (xiv) frustrate the success of a policy through the premature disclosure of a policy or contemplated policy.  (d) in respect of information that is privileged from production in legal proceedings;  (e) in respect of information that contains an opinion, advice, report or recommendation obtained or prepared or an account of a consultation, discussion or deliberation that has occurred, including, but not limited to, minutes of a meeting, for the purpose of assisting to formulate a policy or take a decision in the exercise of a power or performance of a duty conferred or imposed by law; or  (f) referring to preliminary, working or draft documents.**”**  **Reasons:**  The rationale for the proposed further amendment is, according to the SIU, as follows:  Option 1 provides that information provided regarding on-going investigations should be limited to:  \* the mandate as set out in the relevant Proclamation;  \* any legal proceedings that have already resulted from the investigation, such as civil proceedings instituted; the number of criminal referrals made to the NPA (without mentioning the names until actual criminal proceedings are instituted by the NPA), referrals made to the Asset Forfeiture Unit (without mentioning particulars until proceedings are instituted), disciplinary matters referred to employers (without mentioning the names of affected parties until such disciplinary proceedings have been instituted by the employers); and the target date for completion of the investigation.  The second option affords the SIU with similar protection as public bodies when faced with requests for access to information that are made in terms of the Promotion of Access to Information Act, 2000, when deciding on the level of detail that must be contained in the reports contemplated in section 4A. | The Department, the SIU and the Presidency have been in discussions on the proposed amendment pursuant to the comments made by the SIU at the public hearings on 5 August 2015. Further deliberations would seem necessary. In the interests of finalising the Bill, the Department requests the Portfolio Committee to consider the possibility of deleting this clause from the Bill at this stage, for it to be dealt with later in another Bill. |
| 15 and 19 | Commission for Gender Equality (CGE) | The CGE has the following concerns relating to this proposed amendment :  1. The Minister is the Head of the Department and must always remain accountable to the National Assembly and not the DG.  2. The reporting obligations in terms of section 65 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (the SOA) requires the Minister of DOJCD to consult with the Ministers of Police, Health and the National Director of Public Prosecutions prior to submitting reports to the National Assembly. This is being revised where the relevant Directors-General will simply annex a report in their Annual Reports, outlining each department’s role and activities.  3. The abovementioned changes will undermine accountability of the various Departments.  4. The CGE **proposes** an increased reporting obligation by the Minister to the National Assembly where quarterly reports are provided to Parliament by the Minister, alternatively the existing reporting obligations should be retained. | The Department acknowledges that the proposed amendments have the implications referred to and refers to its response below. |
| 15 and 19 | Centre for Child Law, Community Law Centre, RAPCAN, Women’s Legal Centre and the 14 other organisations which have endorsed the positions taken in this submission, namely:  Centre for Justice and Crime Prevention;  Chaeli Campaign;  Connect Network;  C Bower – LINALI Consulting;  National Institute for Crime Prevention and the Reintegration of Offenders (NICRO);  Ndifuna Ukwazi;  Oasis Foundation;  People Opposing Women Abuse (POWA);  Sexual Assault Clinic;  Sonke Gender Justice;  Thoyoyandou Victim Empowerment Programme (TVEP);  Triangle Project;  Tshwaranang Legal Advocacy Centre;  Western Cape Forum for Intellectual Disability. | 1. The amendments that are proposed are problematic as they lower and water down the current reporting standards.  2. These proposed amendments undermine the obligation on Departments to prioritise the implementation of these Acts; to do so in collaboration with one another and to report in a consolidated manner.  3. The Legislature’s intention in drafting the reporting provisions in both the SOA and CJA was to ensure high level accountability from the Executive on the implementation of both pieces of legislation and it is for this reason that it specifically identified ministerial and parliamentary roles in this regard.  4. The proposed amendments will also result in piecemeal reporting on progress on the implementation of these laws as it will be dispersed across a wide range of Annual Reports. Removal of the requirement for dedicated reports will also in all likelihood reduce what should be high level, detailed, integrated reports to a few paragraphs in various departmental Annual Reports.  5. The motivation for the amendments is not stated in the Bill.  **General recommendations with regard to both the CJA and the SOA:**  • Parliament’s oversight duty could be more  strongly articulated in the law.  • Joint committee meetings for oversight  should be required.  • The Portfolio Committee of Justice and Correctional Services is best positioned to lead the process.  • All relevant departments should be present in parliamentary committee meetings to examine implementation issues, not only the Department that reports directly to a particular committee.  • Public and stakeholder participation should be embedded in the reporting processes. Both at the National intersectoral committee level (currently not the case for the SOA) and at the parliamentary phase of the process.  • The minimum standards for reporting as described in the National Policy Framework to the SOA and as required by the United Nations Guidelines for Action on Children in the Criminal Justice System for the CIA must be implemented by the respective intersectoral committees when reporting to Parliament.  **Comments specific to the SOA:**  • The “watering down” of the reporting requirements, in addition to limiting Parliament’s ability to demand high-level executive accountability, would undermine South Africa’s accountability in terms of its international law obligations relating to violence against women.  • The Ministers’ annual reports have been useful in gaining some insight into progress and challenges with implementation of the SOA. Unfortunately, the reports have not been consistently, publically available.  • Parliament is entitled to be more robust in enforcing the mandated reporting requirements in the SOA. Relevant committees, in addition to the Portfolio Committee on Justice, should embrace the opportunity to exercise oversight, by making it a standing item in their annual programs and calling for public comment in relation to the Minister’s annual report on the implementation of the SOA. Public participation can enhance the capacity of individual committees, and assist committees in awareness of trends, the implementation challenges on the ground, and the lived experiences of South Africans coming into contact with the SOA.  • Makes recommendations on the ideal report on the implementation of the SOA which should be focused on the quality of services and performance, and directly informed by the victims’ experience of the implementation of the SOA.  • Indicates what the content of such a report should entail. | While the Department acknowledges that the proposed amendments have the implications referred to, it must be borne in mind that the amendments are intended to address –  (a) firstly, the practical challenges experienced in getting the reports of the roleplaying Departments to a state or readiness for submission to Parliament by the Justice Minister; and  (b) secondly the different interpretations when exactly these annual reports must be submitted to Parliament.  Bearing in mind what the commentators, in our view, have argued convincingly, the Department proposes the following redrafts for clauses 15 and 19, respectively:  **Amendment of section 65 of Act 32 of 2007**  **15.** Section 65 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, is hereby amended –  *(a)* by the substitution for subsection (3) of the following subsection:  “(3) The Minister **[must, after consultation with]** and the cabinet members responsible for safety and security, correctional services, social development and health **[and the National Director of Public Prosecutions]** must, not later than 30 September of every year –  *(a)* **[within one year]** after the **[implementation]** commencement of section 15 of **[this]** the Judicial Matters Amendment Act, 2015, each submit reports, as prescribed, to Parliament by each Department or institution contemplated in section 63(2) on the implementation of this Act; and  *(b)* **[every year thereafter submit such reports to Parliament]** report thereon to a committee or committees of parliament, sitting jointly or separately, as determined by Parliament.”; and  *(b)* by the addition of the following subsection:  “(4) The Cabinet members referred to in subsection (3) must, in their individual reports that are referred to in subsection (3), report on the implementation of the training courses contemplated in section 66.”.  **Amendment of section 96 of Act 75 of 2008**  **19.** Section 96 of the Child Justice Act, 2008, is hereby amended by the substitution for subsection (3) of the following subsection:  “(3) The Cabinet **[member]** members responsible for the administration of justice, **[must, after consultation with the Cabinet members responsible for]** safety and security, correctional services, social development, education and health must, not later than 30 September of every year –  *(a)* **[within one year]** after the commencement of **[this]** section 19 of the Judicial Matters Amendment Act, 2015, each submit reports, *as prescribed,* to Parliament by each Department or institution referred to in section 94(2) on the implementation of this Act; and  *(b)* **[every year thereafter submit those reports to Parliament]** report thereon to a committee or committees of parliament, sitting jointly or separately, as determined by Parliament.”.  For the Portfolio Committee’s consideration.  The commentators also suggested that minimum reporting requirements should be put in place in order to ensure an emphasis on qualitative indicators and on impact. With this in mind, the Department has inserted the words “as prescribed” in the redrafts set out above for the Portfolio Committee’s consideration. This would mean that regulations, having the force of law, would determine –  (a) the format of the reports in order to facilitate uniformity; and  (b) the contents of the reports, which could differ from Department to Department, as required by the circumstances.  Regulations are quicker and easier to amend than primary legislation, which would lend itself to change the focus of the reports as required from time to time. |
| 20 | The Banking Association of South Africa | 1. The Banking Association recognizes Government’s objectives for the removal of a  criminal record of a child and acknowledges that having a criminal record may have  negative consequences.  2. However, due to the nature of the business of a bank, society generally demands the vetting of  suitably qualified employees at a high standard of care and honesty. The duty of care is assessed on the nature and prior behaviour of prospective employees (job applicants) which can be assessed from a criminal record, including the criminal record being that of a child.  3. There are specific criminal offences, including but not limited to theft, fraud and malicious damage to property, which could well be deterring factors in choosing employees, as they may not meet the standard of integrity required of and by the banking sector.  4. Banks lose approximately R150 million each year due to internal fraud.  5. The Banking Association is opposed to the expungement of records as it is a critical  check prior to the appointment of an individual due to the nature of the sector.  Therefore, this clause of the Bill should be deleted. | The Department does not agree. The expungement of criminal records of persons who were children when they committed certain offences is already entrenched in the principal Act, the Child Justice Act, 2008. The amendment merely seeks to ensure that the provisions relating to expungement can apply retrospectively. |
| 20 | Centre for Child Law, Community Law Centre, RAPCAN, Women’s Legal Centre and the 14 other organisations which have endorsed the positions taken in this submission, namely:  Centre for Justice and Crime Prevention;  Chaeli Campaign;  Connect Network;  C Bower – LINALI Consulting;  National Institute for Crime Prevention and the Reintegration of Offenders (NICRO);  Ndifuna Ukwazi;  Oasis Foundation;  People Opposing Women Abuse (POWA);  Sexual Assault Clinic;  Sonke Gender Justice;  Thoyoyandou Victim Empowerment Programme (TVEP);  Triangle Project;  Tshwaranang Legal Advocacy Centre;  Western Cape Forum for Intellectual Disability. | Welcomes the amendment. | Noted. |

**TABLE 2**

**General recommendations and comments**

| **Name** | **Submission / Recommendation** | **DOJCD Response** |
| --- | --- | --- |
| The Civil Society Prison Reform Initiative [CSPRI] | 1. Requests an amendment to the Criminal Procedure Act, 1977, following the enactment of the Prevention and Combatting of Torture of Persons Act (13 of 2013). Section 18 of the Criminal Procedure Act, 1977, provides that the right to institute a prosecution for any offence, other than those listed in section 18, lapses after a period of 20 years from the time when the offence was committed, also referred to as a statute of limitations for criminal offences. The offences listed in section 18 are all serious, for instance murder, treason and rape, among others. It is argued that torture should also be listed in section 18. | While the Department does not have any objection to this proposal, it does not pertain to this Bill and will be considered for inclusion in the next Judicial Matters Amendment Bill which is currently being prepared. |
| Department of Justice and Constitutional Development | Clauses 17 and 18 of the Bill deal with amendments to sections 1 and 13 of the South African Judicial Education Institute Act, 2008, transferring responsibilities from the Department to the Office of the Chief Justice and from the Director-General: Justice and Constitutional Development to the Secretary-General of the Office of the Chief Justice. The Department requests the Committee to consider the insertion of further clauses in the Bill which deal with the same issue, that is consequential amendments to the South African Judicial Education Institute Act, 2008. | Should the Committee approve, the existing clause 17 in the Bill would be adapted, as indicated in yellow, to read as follows:  **Amendment of section 1 of Act 14 of 2008**  **17.** Section of the South African Judicial Education Institution Act, 2008, is hereby amended –  *(a)* by the deletion of the definition of “Director-General”;  *(b)* by the substitution for the definition of “Department” of the following definition:  **“ ‘Department’** means the **[Department of Justice and Constitutional Development]** Office of the Chief Justice;”;  *(c)* by the insertion after the definition of “Minister” of the following definitions:  “(viii) **‘Office of the Chief Justice’** means the Office of the Chief Justice, proclaimed as a national department in terms of Proclamation No. 44 of 2010 of 23 August 2010;  (ix) **‘Secretary-General’** means the Secretary-General of the Office of the Chief Justice;”; and  *(d)* by the substitution for the definition of “this Act” of the following definition:  “**[(viiii)]** (x) ‘this Act’ includes any guidelines issued under section 16.”.  Should the Committee approve, the following new clause 18 in the Bill would read as follows:    **Amendment of section 12 of Act 14 of 2008**  **18.** Section 12 of the South African Judicial Education Institute Act, 2008, is hereby amended by the substitution for paragraph *(c)* in subsection (3) of the following paragraph:  “*(c)* provide quarterly management reports to the **[Director-General]** Secretary-General.”.  Should the Committee approve, the existing clause 18 in the Bill, which would become clause 19, would be adapted, as indicated in yellow, to read as follows:  **Amendment of section 13 of Act 14 of 2008**  **19.** Section 13 of the South African Judicial Education Institute Act, 2008, is hereby amended by the substitution in subsection (4) for the words preceding paragraph *(a)* of the following words:  “Subject to the Public Finance Management Act, 1999 (ACT No. 1 of 1999), the **[Director-General]** Secretary-General ~~of the Office of the Chief Justice~~ –“. |