**SUMMARY OF SUBMISSIONS TO PORTFOLIO COMMITTEE ON JUSTICE AND CORRECTIONAL SERVICES ON THE JUSTICE ADMINISTERED FUND BILL 26 OF 2015 AND RESPONSE BY DEPARTMENT OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT**

**Table 1 reflects general recommendations and the DOJ&CD’s response**

**Table 2 provides a clause by clause summary of the submissions and the DOJCD’s response**

**TABLE 1**

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| **NAME OF DEPARTMENT/INSTITUTION** | **COMMENTS/RECOMMENDATIONS** | **DOJ&CD RESPONSE**  *Absence of legal and accounting framework for the Third Party Fund (TPF) formerly known as "Deposit Account"* |
| The General Council for the Bar (‘the GCB’) | No general comments/recommendations were made. | **History of "Deposit Account"**  **Exchequer Act, 1975 (Act No. 66 of 75) (old Act)**  **The Department opened the following accounts:**  1. Vote account  2. Guardians Fund  3. *Deposit Account* (later known as Money in Trust Fund, then Third Party Fund and now Justice Administered Fund)   * The Deposit Account was established by the Department of Justice by virtue of the Treasury in terms of section 11A of the repealed Exchequer Act, No. 66 of 1975 (the Act).      * The operating of the Deposit Account was prescribed by the repealed Departmental code “Accounts”, and the following deposits were dealt with **(Instruction 51):**   (a) *General:*   * Moneys received which could not be allocated immediately. * Estate moneys regarding estates administered by magistrates in terms of R.200 of 1987. * Moneys paid as compensation as a condition of a suspended sentence [section 297(4) of the Criminal Procedure Act, No. 51 of 1977 (CPA)].   (b) *Bail:*  Moneys determined by police before first appearance of accused [section 59 of the (CPA)]; Director of Public Prosecutions (section 59A of the CPA), or court (section 60 of the CPA) for the release from custody.  (c) *Fines:*  Moneys paid as fines as admission of guilt (sections 57 and 57A of the CPA) or court fine (section 276(f) of the CPA).  (d) *Maintenance:*  Moneys paid in terms of a maintenance order by a court in terms of section 16 of the Maintenance Act, No. 99 of 1998 to the clerk of the court/maintenance officer (Section 16 determines that the court may direct that payments be made to other persons/organisations/financial instructions, etc.)  **New legislation**  **PMFA, 1999 (Act No. 1 of 1999)(new Act)**  **Sec 13** of the new Act provides that all money received by the national government must be paid into the National Revenue Fund, except money received by-   1. ...... 2. a national public entity; 3. the South African Reserve Bank; 4. the Auditor-General; 5. the national government from donor agencies which in terms of legislation or the agreement with the donor, must be paid to the Reconstruction and Development Programme Fund; 6. a national department- 7. operating a trading entity, if the money is received in the ordinary course of operating the trading entity; 8. in trust for a specific person or category of persons or for a specific purpose; 9. from another department to render an agency service for that department; or 10. if the money is of a kind described in Schedule 4; or 11. a constitutional institution- 12. in trust for a specific person or category of persons or for a specific purpose; or 13. if the money is of a kind described in Schedule 4.   **Schedule 4**  EXCLUSIONS FROM REVENUE FUNDS  SA Schools Act (covering school fees)  Fines and estreated bails paid in respect of offences and alleged offences in terms of—  (a) by-laws enacted by municipalities; or  (b) national or provincial legislation, the administration of which is assigned to municipalities.  **Sec 93** of the new Act provides that anything done in terms of a provision of the Exchequer Act, 1975 (Act No. 66 of 1975), which can be done in terms of a provision of this Act, must be regarded as having been done in terms of this Act and that all treasury regulations and instructions made or issued in terms of the Exchequer Act, 1975, remain in force until repealed in terms of section 76 of this Act.  **The new regulations provide as follows:**  **15.5  Responsibilities of departments [Sections 13 and 22 of the PFMA]**  15.5.3   Money collected by a department, which is not classified as revenue, must be paid into the department’s Paymaster-General account and accounted for in its ledger. This includes money received for agency services provided to another department.  **Legislation prescribing payments to clerk/court**  **Acts rules and regulations providing for the payment of money to the clerk of the court/to the court.**   1. Criminal Procedure Act, 1977 Act No 51 of 1977; 2. Maintenance Act; 3. Magistrates Court Act, 1944 Act 32 of 1944: Rules   Payment into court can be described as the payment of sums of money deposited at a given court in terms of certain Rules of the Court, inter alia:   * Rule 14 * Rule 18 * Rule 19 * Rule 43 * Rule 44 * Rule 51 * Rule 62  1. Prevention of Organised Crime Act, 121 of 1998; 2. Proceeds of Crime Act, 76 of 1996; 3. Drugs and Drug Trafficking Act, 140 of 1992; 4. Extradition Act,67 of 1962; 5. Child Justice Act, 75 of 2008; 6. Prevention and Treatment of Drug Dependency Act, 20 of 1992; 7. Prevention and Treatment of Substance Abuse Act 70 of 2008; and 8. Defence Act, Act 44 of 57.   **COURT FINE**  A court fine is a penalty determined by the presiding officer for an offence and payable to the relevant authority.  **MONTHLY COURT FINE PAY-OVERS**  Payments are made to inter alia, the following Authorities.  - Provincial Authority;  - Local Authority;  - Environmental & Tourism;  - Cross Border Transport; and  - Marine Living Resources. |

**TABLE 2**

| **CLAUSE**  **PROVISIONS** | **NAME OF DEPARTMENT/**  **INSTITUTION** | **COMMENTS/**  **RECOMMENDATIONS** | **DOJ&CD RESPONSE** |
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| **1. Clause 1: Definitions** |  |  |  |
| **2. Clause 2: Establishment of Justice Administered Fund** |  |  |  |
| **3. Clause 3:** **Finances of Fund**  The following monies on behalf of third parties must be administered through the  Fund:   1. Money received in terms of maintenance orders made in terms of the Maintenance Act, 1998 (Act No. 99 of 1998); 2. money received as bail, payable in terms of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), or any other Act of Parliament; 3. money paid to court in terms of any Rule of Court or any other law, of which the intended beneficiary is a third party; 4. money received which cannot immediately be allocated into any of the categories listed in paragraphs (a) to (c); and 5. interest earned, or bank charges raised on money paid into or retained by the Fund. | GCB | 1. As presently formulated clause 3(a) on the face thereof applies to all monies received by any person, on behalf of a third party such as a minor/dependent child, in terms of a maintenance order granted in terms of the Maintenance Act 99 of 1998 (‘the Maintenance Act’). As such, the effect of the section as currently formulated is wide enough to encompass payment of maintenance for a minor/dependent child, by one parent to another parent or maintenance payments received on behalf of a minor child by administrators of deceased estates. 2. It is submitted that the Bill does make it clear as to what amounts are required to be paid into the Fund. 3. It is recommended that clause 3(a) and (d) be amended to make reference to receipt of monies received by particular persons and/or entities, for example the clerk of the maintenance Court.      1. Clause 3(c) would appear to contemplate, inter alia, monies currently paid into the Guardians Fund. | 1. Section 15 of the Maintenance Act provides for orders to be made by the presiding officer. If the court finds the person liable for paying maintenance, it will make an order for the amount of maintenance to be paid. The court will also determine when and how maintenance payments must be made.   The court can order maintenance money to be paid in one of the following ways:   * At the local magistrate's office or any other government office designated for this purpose. * Into the bank account designated by the person concerned. * Directly to the person who is entitled to the money, or * By means of an order that directs the employer of the person who is liable for paying maintenance to deduct the maintenance payment directly from the employee’s salary, in accordance with the 1998 Maintenance Act.   The maintenance referred to in clause 3(a) of the Bill is maintenance money that a court **directs** shall be paid at the local magistrate's court **and not** all maintenance.   1. The amounts are determined by the court and cannot be specified in the Bill. The money in the Justice Administered Fund comprises bail, fines, maintenance, money not immediately identified and interest. This is not a new. It reflects the current situation. The Bill merely incorporates in legislation the current position to give it a legal basis as requested by the Auditor-General. See history of the Deposit Account in Table 1. 2. It will not be advisable to list the persons who must receive money. In the legislation referred to in Table 1, the specific Act already stipulates whether it should be paid to the clerk of the court or the court or the maintenance officer. It should be noted that although a provision in legislation provides that money be paid to the clerk of the court, the maintenance officer, or the court the money is not paid to that person 'in person'. Each court has a cash hall where payments are made/received. It should be borne in mind that it is not only the lower courts that are affected but also the superior courts. The Departmental Financial Instructions deal extensively with how money is received and dealt with. 3. The Rules of Court refers to the Rules made by the Rules Board for Courts of Law. See history in Table 1. The Guardian's Fund is a separate trust fund established and operated in terms of the Administration of Estates Act. As can be seen from Table 1 there is a separate account named the Guardian's Fund and it should not to be confused with the Justice Administered Fund. It should also be noted that the operative words are "paid to court". Money intended for the Guardian's Fund is not paid to court.   The list of national legislation which is applicable is indicated in Table 1. This list represents some examples of national legislation. However, provincial and municipal legislation may also have provisions which require the payment of money to the courts. These payments are then paid to the relevant authority from the Justice Administered Fund. |
| **4. Clause 4: Management, control and administration of Fund** |  |  |  |
| **5. Clause 5: Bank accounts and reserve account**  (1) The accounting officer must, within the Fund, open and maintain bank accounts as he or she deems fit and assign to each such bank account a name that clearly identifies the account, one of which must be a separate account to be known as the reserve account.  (4)(a) Any—  (i) unclaimed money; and  (ii) money which cannot immediately be allocated into any of the categories listed in section 3(a) to (c),  due to beneficiaries, must within 30 days, after receipt thereof, be paid into the reserve account.  (b) If—   1. a beneficiary claims an amount of money that has been paid into the reserve account in terms of paragraph (a)(i); or 2. the allocation of money that has been paid into the reserve account in terms of paragraph (a)(ii) becomes known,   within 10 years after it has been paid into the reserve account, the reserve account will be debited and the money will be paid to the beneficiary or be allocated correctly. |  | In contrast to clause 5(1), section 86(2) of the Administration of Estates Act provides that whenever any monies are accepted or received by the Master under that Act or any other law or in pursuance of an order of Court, the Master “shall open in the books of the guardian’s fund an account in the name of the person to whom that money belongs or the estate of which that money forms part: Provided that if it is not known to whom any such money belongs, or if it is more convenient, the account may be opened in the name of the person from whom that money has been received, or of the estate from which that money is derived, as the case may be”. Clause 5(1) of the Bill grants a wide discretion to the Accounting Officer to open and maintain bank accounts as she or he sees fit. In regard to monies held in the Fund for and on behalf of third parties there does not appear to be any legally sustainable basis for the Accounting Officer to have a wide discretion as opposed to a narrowly prescribed discretion, in regard to the opening and maintenance of bank accounts within the Fund in respect of Fund held on behalf of third parties.  Clause 5(4) of the Bill appears to contemplate that unclaimed monies held in the Fund become forfeit (presumably to the State, although the Bill does not expressly so provide), ten years after such monies have been paid into the reserve account in terms of clause 5(4)(i) of the Bill. On the other hand section 93 of the Administration of Estates Act provides expressly for the forfeiture to the State of unclaimed monies in the Guardians Fund after a period of thirty years as from the date upon which a person became entitled to claim the said money from the Guardians Fund.  There does not appear to be any rational basis for such a drastic reduction in the period within which monies may be claimed from the Fund in particular given that experience has shown that persons are often unaware of their rights to claim monies from the Guardians Fund and even where persons are aware of such rights, are unable to access monies in the Guardians Fund due to logistical challenges and resources constraints. | It should be noted that The Guardians Fund is one trust account opened at a banking institution. There is not a separate bank account opened for each person. This is done administratively within the financial system of the Department. The same principle applies to the Justice Administered Fund. Within the system a separate account for each person/matter is opened and maintained. The Department does not agree that the Accounting Officer has too a wide discretion in the opening of bank accounts.  The Guardian's Fund does not fall within the ambit of the Bill.  Clause 4(b) deals expressly with unclaimed money and money which cannot be allocated into the categories listed in clause 3(a) – (c). Unclaimed money will be:   1. maintenance paid to the court; 2. bail; and 3. money paid to the court in terms of any Rule of Court made by the Rules Board for Courts of Law.   An earlier version of the Bill provided as follows:  (b) If—  (i) a beneficiary claims an amount of money that has been paid into the reserve account in terms of paragraph (a)(i); or  (ii) the allocation of money that has been paid into the reserve account in terms of paragraph (a)(ii) becomes known,  within thirty years after it has been paid into the reserve account, the reserve account must be debited and the money must be paid to the beneficiary or be allocated correctly.  National Treasury indicated that, considering the risk of running a huge fund, Treasury is amenable to the idea of setting the maximum limit on the reserve account rather than keeping funds in the reserve account for a period of 30 years. The clause was amended accordingly and a term of 10 years was agreed upon.  It should also be noted that in the absence of any prescription periods in legislation, the provisions of the Prescription Act, 1969 (Act 68 of 1969) is applicable. Section 1 provides as follows:  **Acquisition of ownership by prescription**.—Subject to the provisions of this Chapter and of Chapter IV, a person shall by prescription become the owner of a thing which he has possessed openly and as if he were the owner thereof for an uninterrupted period of thirty years or for a period which, together with any periods for which such thing was so possessed by his predecessors in title, constitutes an uninterrupted period of thirty years.  In clause 6(4) of the Bill it is however stated as follows:  (4) The accounting officer must ensure that any amount in excess of the amount in the reserve account contemplated in section 5(3) is paid over to the National Revenue Fund.  This has the effect that the **excess** as determined by the Minister in consultation with the Minister of Finance is paid into the National Revenue Account and not the money not in excess. There is not a prescription period set for the money not in excess and that result in section 1 of the Prescription Act being applied, namely 30 years. The maximum limit of the Reserve Account is to be set by the Minister in consultation with the Minister of Finance. It is envisaged that the limit set will not result in any excess of money. |
| **6. Clause 6: Utilisation of money in Fund**  (1) The money in the Fund referred to in section 3(a) to (d)—   1. may only be used for the purposes for which it has been paid into the Fund; and 2. must be paid directly from the Fund to the party entitled to the payment in question.   (2)(a) The bank costs relating to bank accounts opened and maintained in respect of the Fund must be defrayed against the interest earned in respect of those accounts, and any net balance of interest earned on those accounts must be paid into the reserve account.  (b) If the bank costs referred to in paragraph (a) exceed the amount of interest earned, the net balance of the bank costs must be defrayed from the reserve account. |  | 1. In regard to the payment of monies from the Fund, clause 6(1)(b) of the Bill merely provides that money held in the Fund in terms of sections 3(a) to (d) “must be paid directly from the Fund to the party entitled to the payment in question”. In contrast, sections 90 and 90A of the Administration of Estates Act make detailed provision for the circumstances in which payments may be made to natural guardians, tutors and curators, or for and on behalf of minors and persons under curatorship as well as to usufructuaries, fiduciaries or to their tutors or curators. 2. Clause 6(2)(a) and (b) of the Bill provides that any interest which may accrue to amounts held in the Fund in terms of clause 3(a) to (d) of the Bill is to be applied to defray bank charges and any surplus interest is to be paid into the reserve account. It does not appear that the Bill contemplates that such surplus interest amounts are to accrue to the benefit of third parties on whose behalf monies are held in the Fund.   The effect hereof is that monies, held in the Fund on behalf of minors or persons suffering under any legal disability for any extended length of time would not be protected from the effects for example of inflation, over time. | 1. The Bill does not apply to the Guardian's Fund. The persons/institutions to whom or which payments are made in terms of the Administration of Estates Act differ considerably from the persons/institutions in the Justice Administered Fund. The Justice Administered Fund contains money from a wide variety of sources from private persons to national departments, provincial departments, and municipalities. The money itself is also not limited as money contemplated in the Administration of Estates Act, but includes, maintenance paid to the court in terms of a court order, bail, fines etc as set out in clause 3. It would therefore not be advisable to attempt to list persons/institutions to whom money is to be paid because such a list may not provide for each and every instance that may arise, leaving a gap in the legislation. 2. It should be noted that money paid into the Justice Administered Fund is paid out within 30 days of receipt to the beneficiaries so no interest is earned on those amounts. The interest earned is on money in the reserve account, which is unclaimed money and money received which cannot immediately be allocated into any of the categories listed in clause 3(a) to (c) of the Bill. It is not possible to calculate individual interest on the amounts in the reserve account, taking into consideration all the money in the reserve account.   The Guardians Fund does not form part of the Justice Administered Fund so the effect the GCB is concerned about does not apply here. It should also be noted that unclaimed maintenance rarely if ever forms part of the reserve account. There are moreover internal processes in place regarding unclaimed maintenance. At the end of each month a static cases maintenance report must be drawn by the delegated person. Money remaining unclaimed, for reasons unknown, must be refunded to the respondent after diligent enquiry, by order of the magistrate and after the expiry of 12 months.  Regarding unclaimed bail the following procedures are followed: Bail Money may only be refunded at the finalisation of the case. At the end of each month a static cases bail report must be drawn by the delegated person. Unclaimed bail money is treated in a similar way as unclaimed maintenance. After the expiry of 12 months after the finalisation of the case a diligent enquiry, must be held to locate the whereabouts of the person who posted bail.  Failure will result in the money being paid to the reserve account.  It should also be noted that even if money is paid to the National Revenue Fund, the money could still be paid out to a person having a claim. |
| **7. Clause 7: Investment of money not immediately required** |  |  |  |
| **8. Clause 8: Regulations** |  |  |  |
| **9. Clause 9: Financial instructions** |  |  |  |
| **10. Clause 10: Short title and commencement** |  |  |  |