

REPUBLIC OF SOUTH AFRICA

JUDICIAL MATTERS AMENDMENT BILL

*(As introduced in the National Assembly (proposed section 75);
explanatory summary of Bill published in Government Gazette No. 31117 of 2 June 2008)
(The English text is the official text of the Bill)*

(MINISTER FOR JUSTICE AND CONSTITUTIONAL DEVELOPMENT)

[B 48—2008]

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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 General Law Amendment Act, 1935, so as to prohibit the unlawful disposal of the body of a newly born baby; to amend the Administration of Estates Act, 1965, so as to regulate the calculation of interest payable in respect of certain moneys paid into the Guardian's Fund and substitute obsolete terminology; to amend the Medicines and Related Substances Act, 1965, so as to effect a technical correction in the Afrikaans text; to amend the Criminal Procedure Act, 1977, so as to substitute obsolete references; to further regulate the payment of admission of guilt fines; to further regulate the release of an accused person on bail; to further regulate the appointment of psychiatrists in cases involving the mental capacity of an accused person; to provide for the prosecution of persons who commit offences while doing diplomatic duty outside of the Republic; to further regulate the imposition of periodical imprisonment; and to further regulate appeals in criminal proceedings from a magistrate's court to a High Court and from a High Court to the Supreme Court of Appeal; to amend the Attorneys Act, 1979, so as to extend the category of persons entitled to engage candidate attorneys; and to increase the penalties that may be imposed on attorneys for improper conduct; to amend the Admiralty Jurisdiction Regulation Act, 1983, so as to further regulate the form of proceedings relating to maritime claims; to amend the Matrimonial Property Act, 1984, so as to remove a discriminatory provision; to amend the Intestate Succession Act, 1987, so as to regulate the position of permanent same-sex life partners; to amend the Criminal Law Amendment Act, 1997, so as to insert certain serious offences in Part I of Schedule 2; to amend the Debt Collectors Act, 1998, so as to further regulate the number of the members of the executive committee of the Council for Debt Collectors; and to further regulate the trust accounts of debt collectors; to amend the Promotion of Access to Information Act, 2000, so as to extend the period within which rules of procedure must be made; and to further regulate the liability of persons exercising powers or performing duties in terms of the Act; to amend the Promotion of Administrative Justice Act, 2000, so as to extend the period within which to make rules of procedure for judicial review; to extend the period within which the code of good administrative conduct must be made; and to effect a technical correction in the IsiXhosa text; to amend the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000, so as to further regulate the remuneration and allowances payable to members of the Equality Review Committee; to amend the Judges' Remuneration and Conditions of Employment Act, 2001, so as to further regulate the service of judges after discharge from active service; to amend the Prevention and Combating of Corrupt Activities Act, 2004, so as to further regulate penalties; and to provide for matters connected therewith.

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

Substitution of section 113 of Act 46 of 1935

1. The following section is hereby substituted for section 113 of the General Law Amendment Act, 1935: 5

“Unlawful disposal of body of child

113. (1) Any person who, without a lawful burial order, disposes of the body of any child with intent to conceal the fact of its birth or not, whether the child died before, during or after birth, shall be guilty of an offence and liable on conviction to a fine [not exceeding one hundred pounds] or to imprisonment for a period not exceeding three years. 10

[(2) Whenever a person disposes of the body of any such child which was recently born, otherwise than under a lawful burial order, he shall be deemed to have disposed of such body with intent to conceal the fact of the child’s birth, unless it is proved that he had no such intent.] 15

[(3)](2) A person may be convicted under subsection (1) although it has not been proved that the child in question died before its body was disposed of.

(3) The institution of a prosecution under this section must be authorised in writing by the Director of Public Prosecutions having jurisdiction.”. 20

Amendment of section 88 of Act 66 of 1965

2. Section 88 of the Administration of Estates Act, 1965, is hereby amended by the substitution for subsection (1) of the following subsection:

“(1) Subject to the provisions of subsections (2) and (3), compounded interest calculated on a monthly basis at the rate per annum determined from time to time by the Minister [of Finance] for Justice and Constitutional Development, in consultation with the Minister of Finance, [and compounded annually at the thirty-first of March,] shall be allowed on each rand of the principal of every sum of money received by the Master for account of any minor, [lunatic] mentally ill person or person with severe or profound intellectual disability, unborn heir or any person having an interest therein of a usufructuary, fiduciary or fideicommissary nature.”. 25 30

Amendment of section 1 of Act 101 of 1965, as substituted by section 1 of Act 65 of 1974 and amended by section 1 of Act 17 of 1979, section 1 of Act 20 of 1981, section 1 of Act 94 of 1991, section 1 of Act 49 of 1996, section 1 of Act 90 of 1997 and section 1 of Act 59 of 2002 35

3. Section 1 of the Medicines and Related Substances Act, 1965, is hereby amended by the substitution, in the Afrikaans text, for the definition of “landdros” of the following definition:

“‘landdros’ ’n landdros soos omskryf in artikel 1 van die Wet op Landdroste, 1993 (Wet No. 90 van 1993), en ook ’n [bykomende] addisionele landdros en ’n assistant-landdros;”.

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Amendment of section 51 of Act 51 of 1977

4. Section 51 of the Criminal Procedure Act, 1977, is hereby amended by the substitution for subsections (1) and (2) of the following subsections: 45

“(1) Any person who escapes or attempts to escape from custody after he or she has been lawfully arrested and before he or she has been lodged in any prison, police-cell or lock-up, shall be guilty of an offence and liable on conviction to the penalties prescribed in section [48 of the Prisons Act, 1959 (Act 8 of 1959)] 117 of the Correctional Services Act, 1998 (Act No. 111 of 1998). 50

(2) Any person who rescues or attempts to rescue from custody any person after he or she has been lawfully arrested and before he or she has been lodged in any prison, police-cell or lock-up, or who aids such person to escape or to attempt to

escape from such custody, or who harbours or conceals or assists in harbouring or concealing any person who escapes from custody after he or she has been lawfully arrested and before he or she has been lodged in any prison, police-cell or lock-up, shall be guilty of an offence and liable on conviction to the penalties prescribed in section **[43 of the said Prisons Act, 1959]** 117 of the said Correctional Services Act, 1998." 5

Amendment of section 55 of Act 51 of 1977, as amended by section 14 of Act 59 of 1983, section 5 of Act 33 of 1986 and section 3 of Act 4 of 1992

5. Section 55 of the Criminal Procedure Act, 1977, is hereby amended by the substitution for paragraph (a) of subsection (2A) of the following paragraph: 10

“(a) If the court issues a warrant of arrest in terms of subsection (2) in respect of a summons which is endorsed in accordance with section 57[(1)](3)(a)—
 (i) an endorsement to the same effect shall be made on the warrant in question;
 (ii) the court may make a further endorsement on the warrant to the effect that the accused may admit his or her guilt in respect of the failure to appear in answer to the summons or to remain in attendance at the criminal proceedings, and that he or she may upon arrest pay to a clerk of the court or at a police station a fine stipulated on the warrant in respect of such failure, which fine shall not exceed the amount to be imposed in terms of subsection (2), without appearing in court.”. 15 20

Amendment of section 56 of Act 51 of 1977, as amended by section 2 of Act 109 of 1984 and section 5 of Act 5 of 1991

6. Section 56 of the Criminal Procedure Act, 1977, is hereby amended by the substitution for subsections (1) and (2) of the following subsections: 25

“(1) If an accused is alleged to have committed an offence contemplated in section 57(2)(a), [and] a peace officer [on reasonable grounds believes that a magistrate’s court, on convicting such accused of that offence, will not impose a fine exceeding the amount determined by the Minister from time to time by notice in the Gazette, such peace officer] may, whether or not the accused is in custody, hand to the accused a written notice which shall— 30
 (a) specify the name, residential address and the occupation or status of the accused;
 (b) call upon the accused to appear at a place and on a date and at a time specified in the written notice to answer a charge of having committed the offence in question; 35
 (c) contain an endorsement in terms of section 57 that the accused may admit his or her guilt in respect of the offence in question and that he or she may pay [a] the stipulated fine as determined by the Minister in terms of section 57(2)(b) in respect thereof without appearing in court; and
 (d) contain a certificate under the hand of the peace officer that he or she has handed the original of such written notice to the accused and that he or she has explained to the accused the import thereof. 40
 (2) If the accused is in custody, the effect of a written notice handed to him or her under subsection (1) shall be that he or she be released forthwith from custody.”. 45

Substitution of section 57 of Act 51 of 1977, as substituted by section 3 of Act 109 of 1984, section 6 of Act 33 of 1986, section 2 of Act 26 of 1987 and section 6 of Act 5 of 1991 45

7. The following section is hereby substituted for section 57 of the Criminal Procedure Act, 1977:

“Admission of guilt and payment of fine without appearance in court 50

57. (1) An admission of guilt fine contemplated in this section may only be imposed and paid in respect of an offence which the Minister determines, as contemplated in subsection (2).

(2) For purposes of this section, the Minister may, from time to time, by notice in the *Gazette*, and after consultation with the Chief Justice, the 55

National Director of Public Prosecutions and the Minister of Safety and Security, determine—

- (a) the offences in respect of which an admission of guilt fine may be imposed and paid; and
- (b) the amount of an admission of guilt fine which can be stipulated in a summons under section 54 (in this section referred to as the summons) or a written notice under section 56 (in this section referred to as the written notice), in respect of each offence.

~~[(1)](3)~~ Where—

- (a) a summons is issued against an accused **[under section 54 (in this section referred to as the summons)]** and the public prosecutor **[or the clerk]** of the court concerned **[on reasonable grounds believes that a magistrate's court, on convicting the accused of the offence in question, will not impose a fine exceeding the amount determined by the Minister from time to time by notice in the Gazette, and such public prosecutor or the clerk of the court], in accordance with the directives issued by the National Director of Public Prosecutions under subsection (11)**, endorses the summons to the effect that the accused may admit his or her guilt in respect of the offence in question and that he or she may pay a fine stipulated on the summons in respect of such offence without appearing in court; or
- (b) a written notice under section 56 **[(in this section referred to as the written notice)]** is handed to the accused and the endorsement in terms of **[paragraph (c) of]** subsection (1)(c) of that section purports to have been made by a peace officer,

the accused may, without appearing in court, admit his or her guilt in respect of the offence in question by paying the fine stipulated (in this section referred to as the admission of guilt fine) either to the clerk of the magistrate's court which has jurisdiction or at any police station within the area of jurisdiction of that court or, if the summons or written notice in question is endorsed to the effect that the fine may be paid at a specified local authority, at such local authority.

~~[(2)](4)~~ (a) The summons or the written notice may stipulate that the admission of guilt fine shall be paid before a date specified in the summons or written notice, as the case may be.

(b) An admission of guilt fine may be accepted by the clerk of the court concerned notwithstanding that the date referred to in paragraph (a) or the date on which the accused should have appeared in court has expired.

~~[(3)](5)~~ (a) (i) Subject to the provisions of subparagraphs (ii) and (iii), an accused who intends to pay an admission of guilt fine in terms of subsection (1), shall surrender the summons or the written notice, as the case may be, at the time of the payment of the fine.

(ii) If the summons or written notice, as the case may be, is lost or is not available and the copy thereof known as the control document—

- (aa) is not available at the place of payment referred to in subsection ~~[(1)](3)~~, the accused shall surrender a copy of the summons or written notice, as the case may be, at the time of the payment of the fine; or
- (bb) is available at the place of payment referred to in subsection ~~[(1)](3)~~, the admission of guilt fine may be accepted without the surrender of a copy of the summons or written notice, as the case may be.

(iii) If an accused in respect of whom a warrant has been endorsed in terms of section 55(2A) intends to pay the relevant admission of guilt fine, the clerk of the court may, after he or she has satisfied himself or herself that the warrant is so endorsed, accept the admission of guilt fine without the surrender of the summons, written notice or copy thereof, as the case may be.

(b) A copy referred to in paragraph (a)(ii) may be obtained by the accused at the magistrate's court, police station or local authority where the copy of the summons or written notice in question known as the control document is filed.

(c) Notwithstanding the provisions of subsection ~~[(1)](3)~~, an accused referred to in paragraph (a)(iii) may pay the admission of guilt fine in question to the clerk of the court where he or she appears in consequence of

such warrant, and if the said clerk of the court is not the clerk of the magistrate's court referred to in subsection [(1)](3), he or she shall transfer such admission of guilt fine to the latter clerk of the magistrate's court.

[(4)](6) No provision of this section shall be construed as preventing a public prosecutor attached to the court concerned from reducing an admission of guilt fine on good cause shown in writing. 5

[(5) (a) An admission of guilt fine stipulated in respect of a summons or a written notice shall be in accordance with a determination which the magistrate of the district or area in question may from time to time make in respect of any offence or, if the magistrate has not made such a determination, in accordance with an amount determined in respect of any particular summons or any particular written notice by either a public prosecutor attached to the court of such magistrate or a police official of or above the rank of non-commissioned officer attached to a police station within the magisterial district or area in question or, in the absence of such a police official at any such police station, by the senior police official then in charge at such police station. 10

(b) An admission of guilt fine determined under paragraph (a) shall not exceed the maximum of the fine prescribed in respect of the offence in question or the amount determined by the Minister from time to time by notice in the *Gazette*, whichever is the lesser. 20

(7) An admission of guilt fine stipulated in respect of a summons or a written notice shall be in accordance with the determination made by the Minister from time to time in respect of the offence in question, as contemplated in subsection (2). 25

[(6)](8) An admission of guilt fine paid at a police station or a local authority in terms of subsection [(1)](3) and the summons or, as the case may be, the written notice surrendered under subsection [(3)](5), shall, as soon as is expedient, be forwarded to the clerk of the magistrate's court which has jurisdiction, and such clerk of the court shall thereafter, as soon as is expedient, enter the essential particulars of such summons or, as the case may be, such written notice and of any summons or written notice surrendered to the clerk of the court under subsection [(3)](5), in the criminal record book for admissions of guilt, whereupon the accused concerned shall, subject to the provisions of subsection [(7)](9), be deemed to have been convicted and sentenced by the court in respect of the offence in question. 30

[(7)](9) The judicial officer presiding at the court in question shall examine the documents and if it appears to him or her that a conviction or sentence under subsection [(6)] (8) is not in accordance with justice or **[that any such sentence]**, except as provided in subsection [(4)](6), is not in accordance with a determination made by the **[magistrate] Minister** under subsection [(5)](2) or, **[where the determination under that subsection has not been made by the magistrate, that the sentence is not adequate]** does not comply with a directive issued by the National Director of Public Prosecutions as contemplated in subsection (11), such judicial officer may set aside the conviction and sentence and direct that the accused be prosecuted in the ordinary course, whereupon the accused may be summoned to answer such charge as the public prosecutor may deem fit to prefer: Provided that where the admission of guilt fine which has been paid exceeds the amount determined by the **[magistrate] Minister** under subsection [(5)](2), the said judicial officer may, in lieu of setting aside the conviction and sentence in question, direct that the amount by which the said admission of guilt fine exceeds the said determination be refunded to the accused concerned. 40 45 50 55

(10) Any determination made by the Minister under this section must be tabled in Parliament 30 days before publication thereof in the *Gazette*.

(11) (a) The National Director of Public Prosecutions must issue directives regarding the cases and circumstances in which a prosecutor may issue a summons contemplated in subsection (3) or a written notice contemplated in section 57A(1) in which an admission of guilt fine may be imposed in respect of the offences which the Minister determines under 60

subsection (2) and any directive so issued must be observed in the application of this section.

(b) The directives contemplated in paragraph (a) must ensure that adequate disciplinary steps will be taken against a prosecutor who fails to comply with any such directive.

(c) The Minister must submit directives issued under this subsection to Parliament before those directives take effect, and the first directives so issued, must be submitted to Parliament within four months of the commencement of this section.

(d) Any directive issued under this subsection may be amended or withdrawn in like manner.”.

Amendment of section 57A of Act 51 of 1977, as inserted by section 1 of Act 86 of 1996

8. Section 57A of the Criminal Procedure Act, 1977, is hereby amended by—

(a) the substitution for subsection (1) of the following subsection:

“(1) If an accused who is alleged to have committed an offence contemplated in section 57(2)(a), has appeared in court and is—

(a) in custody awaiting trial on that charge and not on another more serious charge;

(b) released on bail under section 59 or 60; or

(c) released on warning under section 72,

the public prosecutor may, before the accused has entered a plea and if he or she on reasonable grounds believes that a magistrate’s court, on convicting such accused of that offence, will not impose a fine exceeding the amount determined by the Minister from time to time by notice in the *Gazette*, as contemplated in section 57(2)(b) in respect of that offence,

hand to the accused a written notice, or cause such notice to be delivered to the accused by a peace officer, containing an endorsement in terms of section 57 that the accused may admit his or her guilt in respect of the offence in question and that he or she may pay [a] the stipulated fine in respect thereof without appearing in court again.”; and

(b) the substitution for subsection (4) of the following subsection:

“(4) The provisions of sections 55, 56(2) and (4) and 57[(2)] (1), (2), (4) to [(7)] (9), inclusive, shall apply *mutatis mutandis* to the relevant written notice handed or delivered to an accused under subsection (1) as if, in respect of section 57, such notice were the written notice contemplated in that section and as if the fine stipulated in such written notice were also the admission of guilt fine contemplated in that section.”.

Amendment of section 60 of Act 51 of 1977, as substituted by section 3 of Act 75 of 1995 and amended by section 2 of Act 56 of 1979, section 2 of Act 64 of 1982, section 4 of Act 85 of 1997, section 5 of Act 34 of 1998, section 9 of Act 62 of 2000 and section 4 of Act 55 of 2003

9. Section 60 of the Criminal Procedure Act, 1977, is hereby amended by the insertion after subsection (2A) of the following subsection:

“(2B) (a) If the court is satisfied that the interests of justice permit the release of an accused on bail as contemplated in subsection (1), and if the payment of a sum of money is to be considered as a condition of bail, the court must hold a separate inquiry into the ability of the accused to pay the sum of money being considered or any other appropriate sum.

(b) If, after an inquiry contemplated in paragraph (a), it is found that the accused is—

(i) unable to pay any sum of money, the court must consider setting appropriate conditions that do not include an amount of money for the release of the accused on bail; or

(ii) able to pay a sum of money, the court must consider setting conditions for the release of the accused on bail and a sum of money which is appropriate in the circumstances; or

- (iii) unable to pay the sum of money, the court must consider the release of the accused in terms of a guarantee contemplated in subsection (13)(b).”.

Amendment of section 79 of Act 51 of 1977, as amended by section 4 of Act 4 of 1992, section 17 of Act 116 of 1993, section 44 of Act 129 of 1993, section 28 of Act 105 of 1997, section 6 of Act 68 of 1998, section 8 of Act 42 of 2001 and section 68 of Act 32 of 2007 5

10. Section 79 of the Criminal Procedure Act, 1977, is hereby amended by—

(a) the substitution for subsection (1) of the following subsection:

“(1) Where a court issues a direction under section 77(1) or 78(2), the relevant enquiry shall be conducted and be reported on— 10

(a) where the accused is charged with an offence other than one referred to in paragraph (b), by the medical superintendent of a psychiatric hospital designated by the court, or by a psychiatrist appointed by such medical superintendent at the request of the court; or

(b) where the accused is charged with murder or culpable homicide or rape or compelled rape as contemplated in sections 3 or 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively, or another charge involving serious violence, or if the court considers it to be necessary in the public interest, or where the court in any particular case so directs— 15 20

(i) by the medical superintendent of a psychiatric hospital designated by the court, or by a psychiatrist appointed by such medical superintendent at the request of the court;

(ii) by a psychiatrist appointed by the court and who is not in the full-time service of the State unless the court directs otherwise, upon application by the prosecutor, in accordance with directives issued under subsection (13) by the National Director of Public Prosecutions; 25

(iii) by a psychiatrist appointed for the accused by the court; and

(iv) by a clinical psychologist where the court so directs.”; and 30

(b) the addition after subsection (12) of the following subsection:

“(13) (a) The National Director of Public Prosecutions must, in consultation with the Minister, issue directives regarding the cases and circumstances in which a prosecutor must apply to the court for the appointment of a psychiatrist as contemplated in subsection (1)(b)(ii) and any directive so issued must be observed in the application of this section. 35

(b) The directives contemplated in paragraph (a) must ensure that adequate disciplinary steps will be taken against a prosecutor who fails to comply with any such directive. 40

(c) The Minister must submit directives issued under this subsection to Parliament before those directives take effect, and the first directives so issued, must be submitted to Parliament within four months of the commencement of this subsection.

(d) Any directive issued under this subsection may be amended or withdrawn in like manner.”. 45

Insertion of section 110A in Act 51 of 1977

11. The following section is hereby inserted in the Criminal Procedure Act, 1977, after section 110:

“Jurisdiction in respect of offences committed by certain persons outside Republic 50

110A. (1) Notwithstanding any other law, any South African citizen who commits an offence outside the area of jurisdiction of the courts of the Republic and who cannot be prosecuted by the courts of the country in which the offence was committed, due to the fact that such a person is immune from prosecution as a result of the operation of the provisions of— 55

- (a) the Convention on the Privileges and Immunities of the United Nations, 1946;
- (b) the Convention on the Privileges and Immunities of the Specialised Agencies, 1947;
- (c) the Vienna Convention on Diplomatic Relations, 1961;
- (d) the Vienna Convention on Consular Relations, 1963; or
- (e) any other international convention, treaty or any agreement between the Republic and any other country or international organisation, and such person is found within the area of jurisdiction of any court in the Republic which would have had jurisdiction to try the offence if it had been committed within its area of jurisdiction, that court shall, subject to subsection (2), have jurisdiction to try that offence.
- (2) No prosecution may be instituted against a person under subsection (1), unless—
- (a) the offence is an offence under the laws of the Republic; and
- (b) the National Director of Public Prosecutions instructs that a prosecution be instituted against such a person.
- (3) At the conclusion of the trial against a person under this section, a copy of the proceedings, certified by the clerk of the court or registrar, together with such remarks as the prosecutor may wish to append thereto, must be submitted to the Minister of Foreign Affairs.”.

Amendment of section 285 of Act 51 of 1977, as amended by section 16 of Act 33 of 1986

12. Section 285 of the Criminal Procedure Act, 1977, is hereby amended by—
- (a) the substitution for subsection (5) of the following subsection:
- “(5) If, before the expiration of any sentence of periodical imprisonment imposed upon any person for any offence—
- (a) such person is undergoing a punishment of any other form of detention imposed by any court; or
- (b) such person after having surrendered himself or herself pursuant to the notice issued under subsection (2), without lawful excuse, the proof whereof shall be on such person, thereafter fails to surrender himself or herself for the purpose of undergoing periodical imprisonment, as required,
- any magistrate before whom such person is brought, **[shall] may** set aside the unexpired portion of the sentence of periodical imprisonment and, after considering the evidence recorded in respect of such offence, may impose in lieu of such unexpired portion any punishment within the limits of his or her jurisdiction and of any punishment prescribed by any law as a punishment for such offence.”; and
- (b) the addition of the following subsection:
- “(6) Any magistrate may, if it appears from information on oath that a person who has been sentenced in terms of subsection (1) has failed to surrender himself or herself to undergo imprisonment as contemplated in this section, issue a warrant for the arrest of such person in order to deal with him or her in terms of subsection (5)(b).”.

Amendment of section 309 of Act 51 of 1977, as amended by section 2 of Act 76 of 1977, section 17 of Act 105 of 1982, section 8 of Act 107 of 1990, section 51 of Act 129 of 1993, section 13 of Act 75 of 1995, section 2 of Act 33 of 1997, section 2 of Act 76 of 1997, section 38 of Act 105 of 1997, section 2 of Act 42 of 2003 and section 6 of Act 32 of 2007

13. Section 309 of the Criminal Procedure Act, 1977, is hereby amended by the deletion of subsection (3A).

Amendment of section 309C of Act 51 of 1977, as inserted by section 3 of Act 76 of 1997 and substituted by section 3 of Act 42 of 2003

14. Section 309C of the Criminal Procedure Act, 1977, is hereby amended by the substitution for subsections (4), (5) and (6) of the following subsections:

“(4) When receiving the notice referred to in subsection (3), the clerk of the court must without delay submit to the registrar of the High Court concerned copies of—

- (a) the application that was refused;
- (b) the magistrate’s reasons for refusal of the application; and 5
- (c) the record of the proceedings in the magistrate’s court in respect of which the application was refused[: **Provided that—**
 - (i) **if the accused was tried in a regional court and was legally represented at the trial; or**
 - (ii) **if the accused and the Director of Public Prosecutions agree thereto; 10**
or
 - (iii) **if the prospective appeal is against the sentence only; or**
 - (iv) **if the petition relates solely to an application for condonation, a copy of the judgment, which includes the reasons for conviction and sentence, shall, subject to subsection (6)(a), suffice for the purposes of the 15**
petition].

(5) (a) A petition contemplated in this section must be considered in chambers by [a judge] two judges designated by the Judge President[: **Provided that the Judge President may, in exceptional circumstances, at any stage designate two judges to consider such petition.** 20

(b) If the judges referred to in [the proviso to] paragraph (a) differ in opinion, the petition must also be considered in chambers by the Judge President or by any other judge designated by the Judge President.

(c) For the purposes of paragraph (b) any decision of the majority of the judges considering the petition, shall be deemed to be the decision of all three judges. 25

(6) Judges considering a petition may—

- (a) call for any further information[, **including a copy of the record of any proceedings that was not submitted in terms of the proviso to subsection (4)(c),**] from the magistrate who refused the application in question, or from the magistrate who presided at the trial to which any such application relates, 30
as the case may be; or
- (b) in exceptional circumstances, order that the petition or any part thereof be argued before them at a time and place determined by them.”.

Amendment of section 315 of Act 51 of 1977, as substituted by section 20 of Act 105 of 1982 and amended by section 10 of Act 107 of 1990, section 39 of Act 105 of 1997, section 11 of Act 62 of 2000 and section 4 of Act 42 of 2003 35

15. Section 315 of the Criminal Procedure Act, 1977, is hereby amended by the deletion of paragraphs (b) and (c) of subsection (1).

Amendment of section 316 of Act 51 of 1977, as substituted by section 5 of Act 42 of 2003 and amended by section 21 of Act 105 of 1982, section 15 of Act 26 of 1987 40
and section 12 of Act 62 of 2000

16. Section 316 of the Criminal Procedure Act, 1977, is hereby amended by—

- (a) the substitution for subsection (10) of the following subsection:
 - “(10) When receiving notice of a petition as contemplated in subsection (9), the registrar shall forward to the registrar of the Supreme 45
Court of Appeal copies of the—
 - (a) application or applications that were refused;
 - (b) the reasons for refusing such application or applications; and
 - (c) the record of the proceedings in the High Court in respect of which the application was refused[: **Provided that—** 50
 - (i) **if the accused was legally represented at the trial; or**
 - (ii) **if the accused and the prosecuting authority agree thereto;**
or
 - (iii) **if the prospective appeal is against the sentence only; or**
 - (iv) **if the petition relates solely to an application for condona- 55**
tion,
a copy of the judgment, which includes the reasons for conviction and sentence, shall, subject to subsection (12)(a), suffice for the purposes of the petition].”; and

- (b) the substitution for subsection (12) of the following subsection:
- “(12) The judges considering a petition may—
- (a) call for any further information[, **including a copy of the record of the proceedings that was not submitted in terms of the proviso to subsection (10)(c),**] from the judge who refused the application in question, or from the judge who presided at the trial to which any such application relates, as the case may be; or
- (b) in exceptional circumstances, order that the application or applications in question or any of them be argued before them at a time and place determined by them.”.

Amendment of section 341 of Act 51 of 1977, as amended by section 9 of Act 64 of 1982, section 25 of Act 33 of 1986, section 16 of Act 26 of 1987 and section 4 of Act 18 of 1996

17. Section 341 of the Criminal Procedure Act, 1977, is hereby amended by the substitution for subsection (5) of the following subsection:
- “(5) The amount to be specified in any notification issued under this section as the amount of the fine which a court would probably impose in respect of any offence, shall be determined from time to time [**for any particular area by the magistrate of the district or area in which such area is situated,**] by the Minister by notice in the *Gazette* and may differ from the admission of guilt fine determined under section 57[(5)(a)](2)(b) for the offence in question.”.

Amendment of section 3 of Act 53 of 1979, as substituted by section 2 of Act 87 of 1989 and amended by section 2 of Act 108 of 1984 and section 2 of Act 102 of 1991

18. Section 3 of the Attorneys Act, 1979, is hereby amended by—
- (a) the substitution in subsection (1) for paragraph (f) of the following paragraph:
- “(f) in the full-time employment of a law clinic, and if the council of the province in which that law clinic is operated, certifies that the law clinic concerned complies with the requirements prescribed by such council for the operation of such clinic; **[and]**”;
- (b) the insertion in subsection (1) after paragraph (f) of the following paragraph:
- “(fA) as an employee of the Legal Aid Board at an office of the Legal Aid Board; and”;
- (c) the substitution in subsection (1)(i) for subparagraph (i) of the following subparagraph:
- “(i) if he or she is an attorney so practising on his or her own account or as a partner in a firm of attorneys or as a member of a professional company, or is employed full-time at a law clinic, or is employed full-time at an office of the Legal Aid Board, so practised or been so employed for a period of three years or periods of three years in the aggregate during the preceding four years;”.

Amendment of section 72 of Act 53 of 1979, as amended by section 5 of Act 80 of 1985, section 25 of Act 87 of 1989, section 17 of Act 115 of 1993 and section 13 of Act 204 of 1993

19. Section 72 of the Attorneys Act, 1979, is hereby amended by the substitution for subsection (1) of the following subsection:
- “(1) A council conducting an enquiry in terms of section 71 may find the person concerned guilty of unprofessional or dishonorable or unworthy conduct and may—
- (a) in the case of a practitioner—
- (i) impose upon him or her a fine not exceeding **[R10 000]** R100 000; or
- (ii) reprimand him or her; or
- (iii) for a specified period or until otherwise decided by the council, debar him or her from engaging or continuing to engage a candidate attorney; and
- (iv) recover from him or her the costs incurred by the council in connection with such enquiry;

- (b) in the case of a candidate attorney—
- (i) cancel or suspend his or her articles of clerkship or contract of service;
 - (ii) impose upon him or her a fine not exceeding [R2 000] R20 000; or
 - (iii) reprimand him or her. 5
- (c) in the case of a former candidate attorney referred to in section 8(4)—
- (i) debar him or her from remaining in the employ of the attorney referred to in section 8(4) or 8(5), as the case may be; or
 - (ii) impose upon him or her a fine not exceeding [R2 000] R20 000; or
 - (iv) reprimand him or her.”. 10

Amendment of section 3 of Act 105 of 1983, as amended by section 2 of Act 87 of 1992 and section 21 of Act 139 of 1992

20. Section 3 of the Admiralty Jurisdiction Regulation Act, 1983, is hereby amended by—

- (a) the substitution for subsection (6) of the following subsection: 15
- “(6) [Subject to the provisions of subsection (9), an] An action *in rem*, other than such an action in respect of a maritime claim contemplated in paragraph (d) of the definition of ‘maritime claim’, may be brought by the arrest of an associated ship instead of the ship in respect of which the maritime claim arose.”; and 20
- (b) the deletion of subsection (9).

Substitution of section 18 of Act 88 of 1984

21. Section 18 of the Matrimonial Property Act, 1984, is hereby substituted for the following section:

“Certain damages excluded from community and recoverable from other spouse 25

18. Notwithstanding the fact that a spouse is married in community of property—

- (a) any amount recovered by him or her by way of damages, other than damages for patrimonial loss, by reason of a delict committed against him or her, does not fall into the joint estate but becomes his or her separate property; 30
- (b) he or she may recover from the other spouse damages[, **other than damages for patrimonial loss,**] in respect of bodily injuries suffered by him or her and attributable either wholly or in part to the fault of that spouse and such damages do not fall into the joint estate but become the separate property of the injured spouse.” 35

Amendment of section 1 of Act 81 of 1987, as amended by section 14 of Act 43 of 1992

22. Section 1 of the Intestate Succession Act, 1987, is hereby amended by— 40

- (a) the substitution for subsection (1) of the following subsection:
- “(1) If, after the commencement of this Act a person (hereinafter referred to as the ‘deceased’) dies intestate, either wholly or in part, and—
- (a) is survived by a spouse or a partner in a permanent same-sex life partnership in which the partners have undertaken reciprocal duties of support (hereinafter referred to as a ‘partner’), but not by a descendant, such spouse or partner shall inherit the intestate estate; 45
 - (b) is survived by a descendant, but not by a spouse or partner, such descendant shall inherit the intestate estate; 50
 - (c) is survived by a spouse or partner as well as a descendant—
 - (i) such spouse or partner shall inherit a child’s share of the intestate estate or so much of the intestate estate as does not exceed in value the amount fixed from time to time by the

- Minister [of] for Justice and Constitutional Development by notice in the *Gazette*, whichever is the greater; and
- (ii) such descendant shall inherit the residue (if any) of the intestate estate;
- (d) is not survived by a spouse, partner or descendant, but is survived— 5
- (i) by both his or her parents, his or her parents shall inherit the intestate estate in equal shares; or
- (ii) by one of his or her parents, the surviving parent shall inherit one half of the intestate estate and the descendants of the deceased parent the other half, and if there are no such 10
descendants who have survived the deceased, the surviving parent shall inherit the intestate estate; or
- (e) is not survived by a spouse or partner or descendant or parent, but is survived— 15
- (i) by—
- (aa) descendants of his or her deceased mother who are related to the deceased through her only, as well as by descendants of his or her deceased father who are related to the deceased through him only; or
- (bb) descendants of his or her deceased parents who are 20
related to the deceased through both such parents; or
- (cc) any of the descendants mentioned in subparagraph (aa), as well as by any of the descendants mentioned in subparagraph (bb), the intestate estate shall be divided into two equal shares and the descendants related to the 25
deceased through the deceased mother shall inherit one half of the estate and the descendants related to the deceased through the deceased father shall inherit the other half of the estate; or
- (ii) only by descendants of one of the deceased parents of the 30
deceased who are related to the deceased through such parent alone, such descendants shall inherit the intestate estate;
- (f) is not survived by a spouse, partner, descendant, parent, or a descendant of a parent, the other blood relation or blood relations of the deceased who are related to him or her nearest in degree shall 35
inherit the intestate estate in equal shares.”;
- (b) the substitution for subsection (6) of the following subsection:
- “(6) If a descendant of a deceased, excluding a minor or mentally ill descendant, who, together with the surviving spouse or partner of the deceased, is entitled to a benefit from an intestate estate renounces his or 40
her right to receive such benefit, such benefit shall vest in the surviving spouse or partner.”; and
- (c) the addition of the following subsection:
- “(8) (a) The provisions of this section relating to a partner in a 45
permanent same-sex life partnership in which the partners have undertaken reciprocal duties of support are, subject to paragraph (b), deemed to have come into operation on 27 April 1994 and only apply in respect of such partners if the court is satisfied that the partners in question were not able to formalise their partnership as contemplated in the Civil Union Act, 2006 (Act No. 17 of 2006). 50
- (b) The provisions of paragraph (a) shall not affect any transfer of ownership that has taken place pursuant to the distribution of the residue of any estate, unless it is established that, when such transfer was effected, the transferee was on notice that the property in question was subject to a legal challenge on the grounds of an entitlement to benefit 55
from an intestate estate.”.

Amendment of Part 1 of Schedule 2 to Act 105 of 1997, as amended by section 37 of Act 62 of 2000, section 36 of Act 12 of 2004, section 27 of Act 33 of 2004, section 68 of Act 32 of 2007 and section 5 of Act 38 of 2007

23. Part I of Schedule 2 to the Criminal Law Amendment Act, 1997, is hereby amended by the addition of the following offences: 5

“Any offence referred to in Part 1 or Part 2 of Schedule 1 to the Implementation of the Rome Statute of the International Criminal Court Act, 2002 (Act No. 27 of 2002).”.

Amendment of section 5 of Act 114 of 1998

24. Section 5 of the Debt Collectors Act, 1998, is hereby amended by the substitution for subsection (1) of the following subsection: 10

“(1) The Council may appoint not less than three but not more than five of its members as an executive committee of the Council which shall, subject to the provisions of subsection (2) and the directions of the Council, be competent during the periods between meetings of the Council to perform or exercise all the powers and functions of the Council: Provided that the majority of the members of the executive committee shall be members of the Council other than those appointed in terms of section 3(2)(b)(iii).”.

Amendment of section 20 of Act 114 of 1998, as amended by section 14 of Act 22 of 2005 20

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

(a) the substitution for subsection (8) of the following subsection:

“(8) If any debt collector—

- (a) dies;
- (b) becomes insolvent; 25
- (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, or is on reasonable grounds likely to have his or her registration withdrawn;
- (e) is declared by a competent court to be incapable of managing his or her own affairs; or 30
- (f) abandons his or her practice or ceases to practise, the Council—

(i) must [**where necessary**], take control [and] over, administer [**his or her**] and finalise that trust account [**until**]; or 35

(ii) may, in the circumstances the Council deems fit, make an application to 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] to appoint a curator bonis with such rights, duties and powers [as the Master may deem fit] as prescribed to control, [and] administer and finalise such account.”; and 40

(b) the addition of the following subsection:

“(9) The Master of the High Court—

- (a) may, before an appointment of a *curator bonis* is made as contemplated in subsection (8), require from the person who is to be appointed as *curator bonis*, security to the satisfaction of the Master in an amount determined by the Master for the proper performance of his or her functions; 45
- (b) shall have the powers and duties as prescribed; and 50
- (c) is entitled to the fees as provided for in Schedule 2 to the regulations made in terms of section 103 of the Administration of Estates Act, 1965 (Act No. 66 of 1965).”.

Amendment of section 23 of Act 114 of 1998

26. Section 23 of the Debt Collectors Act, 1998, is hereby amended by the substitution for subsection (2) of the following subsection:

- “(2) Without prejudice to the generality of the provisions of subsection (1), the Minister may, after consultation with the Council, make regulations— 5
- (a) prescribing the fees payable by a debt collector to the Council in terms of section 13 (1), and the periods within which such fees are payable;
 - (b) prescribing the circumstances under which a debt collector shall not be bound to pay an amount referred to in section 13 (1); **[and]**
 - (c) regarding the training of debt collectors[.]; 10
 - (d) regarding the remuneration, rights, duties and powers of a *curator bonis* appointed under section 20(8); and
 - (e) regarding the powers and duties of the Master of the High Court when appointing a *curator bonis* in terms of section 20(8).”.

Amendment of section 79 of Act 2 of 2000, as amended by section 23 of Act 55 of 2003

27. Section 79 of the Promotion of Access to Information Act, 2000, is hereby amended by the substitution for the words preceding paragraph (a) of subsection (1) of the following words:

“The Rules Board for Courts of Law, established by section 2 of the Rules Board for Courts of Law Act, 1985 (Act 107 of 1985), must **[within four years after the commencement of this section]**, before 31 December 2008, subject to the approval of the Minister, make rules of procedure for—” 20

Substitution of section 89 of Act 2 of 2000

28. The following section is hereby substituted for section 89 of the Promotion of Access to Information Act, 2000: 25

“Liability

89. No person is criminally or civilly liable for anything done in good faith in the exercise or performance or purported exercise or performance of any power or duty in terms of this Act or the rules made under section 79.” 30

Amendment of section 7 of Act 3 of 2000, as amended by section 27 of Act 55 of 2003

29. Section 7 of the Promotion of Administrative Justice Act, 2000, is hereby amended by the substitution for subsection (3) of the following subsection:

“(3) The Rules Board for Courts of Law established by section 2 of the Rules Board for Courts of Law Act, 1985 (Act No. 107 of 1985), must **[within three years after the date of commencement of section 10 of this Act]**, before 31 December 2008, subject to the approval of the Minister, make rules of procedure for judicial review.” 35

Amendment of section 10 of Act 3 of 2000, as substituted by section 15 of Act 22 of 2005

30. Section 10 of the Promotion of Administrative Justice Act, 2000, is hereby amended by the substitution for subsection (6) of the following subsection:

“(6) The code of good administrative conduct contemplated in subsection (5A) must, before publication in the *Gazette*, be approved by Cabinet and Parliament and must be made **[within 42 months after the commencement of this section]** before 31 December 2008.” 45

Insertion of section 10A in Act 3 of 2000

31. The following section is hereby inserted in the Promotion of Administrative Justice Act, 2000, after section 10:

“Liability

10A. No person is criminally or civilly liable for anything done in good faith in the exercise or performance or purported exercise or performance of any power or duty in terms of this Act or the rules made under section 7(3).” 5

Amendment of section 11 of Act 3 of 2000

32. Section 11 of the Promotion of Administrative Justice Act, 2000, is hereby substituted, in the IsiXhosa text, for the following section: 10

“Igama elifutshane noqaliso

11. LoMthetho ubizwa ngokuba nguMthetho weNkuthazo wokuPhatha ngobuLungisa, [1999] 2000, yaye uyakuqula ukusebenza ngomhla oyakutyunjwa nguPrezidanti ngokubhengeza isiHlomelo kwiGazethi.”. 15

Amendment of section 33 of Act 4 of 2000

33. Section 33 of the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000, is hereby amended by the substitution for subsection (6) of the following subsection:

“(6) The members of the Equality Review Committee referred to in— 20
 (a) section 32(d) and (e) are entitled to such remuneration, allowances and other benefits; and
 (b) section 32(a), (b), (c), (f) and (g) are entitled to such allowances, as may be determined by the Minister in consultation with the Minister of Finance.”. 25

Amendment of section 7 of Act 47 of 2001

34. Section 7 of the Judges’ Remuneration and Conditions of Employment Act, 2001, is hereby amended by—

- (a) the substitution in subsection (1) for paragraph (b) of the following paragraph: 30
 “(b) Service contemplated in paragraph (a) of the definition of ‘service’ in section 1, in a permanent post on the establishment of a particular court, may, subject to paragraph (bA), only be performed if such service is requested by the Chief Justice, President of the Supreme Court of Appeal or the judge president in whose area of jurisdiction the Constitutional Court judge or judge resides or of the court to which he or she was attached when discharged from active service, or with his or her consent, any other judge president, in consultation with the Chief Justice or the said judge president, as the case may be, and the Minister so approves, after consultation with the Judicial Service Commission.”; 35
 and 40
- (b) the insertion in subsection (1) after paragraph (b) of the following paragraph: 45
 “(bA) Service contemplated in paragraph (a) of the definition of ‘service’ in section 1 which becomes necessary as a result of the creation of an additional temporary post on the establishment of a particular court, to deal with additional workload or backlogs which have developed, may be performed if such service is approved by the Minister after consultation with the head of such court, and for the period decided by the Minister, which period may not exceed three months at a time.”.

Amendment of section 26 of Act 12 of 2004

35. Section 26 of the Prevention and Combating of Corrupt Activities Act, 2004, is hereby amended by the addition of the following subsection:

“(4) Notwithstanding anything to the contrary in any law, a magistrate’s court shall be competent to impose the penalty provided for in subsection (1)(a)(iii), (1)(c), or (3).” 5

Transitional provisions

36. Any admission of guilt fine which, before the commencement of sections 5 to 8 and 17 of this Act—

(a) was imposed in terms of section 57(1) of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), before its amendment by section 7 of this Act; and 10

(b) has not been dealt with in terms of section 57(7) of the Criminal Procedure Act, 1977, before its amendment by section 7 of this Act,

must be dealt with as if section 7 of this Act has not been passed.

Short title and commencement

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37. (1) This Act is called the Judicial Matters Amendment Act, 2008.

(2) Sections 5, 6, 7, 8, 10, 13, 14, 15, 16, 17, 25, 26 and 36 come into operation on a date fixed by the President by proclamation in the *Gazette*.

MEMORANDUM ON THE OBJECTS OF THE JUDICIAL MATTERS AMENDMENT BILL, 2008

1. PURPOSE OF BILL

The purpose of the Judicial Matters Amendment Bill, 2008 (“the Bill”) is to amend numerous provisions in various Acts administered by the Department of Justice and Constitutional Development (“the Department”), which do not require individual amendment Acts. This Memorandum provides the reasons for the amendments, most of which are straight forward and not contentious, as is traditionally the case with amendments in such an omnibus Bill. While some amendments in the Bill are straight forward, there are others which require an explanation, as set out below:

2. OBJECTS OF BILL

2.1 Clause 1: Amendment of section 113 of the General Law Amendment Act, 1935 (Act 46 of 1935):

Section 113 of the General Law Amendment Act, 1935, criminalises the act of disposing a child’s body with the intention of concealing the birth of the child, irrespective of whether the child died before, during or after birth. The Women’s Legal Centre argues that these provisions are overly broad, lacking in definition, archaic and their constitutional validity is questionable, often impinging on the right to human dignity of women charged under it. The amendments contained in clause 1 address the evidentiary burden of proof that is placed on accused persons, bringing it in line with constitutional jurisprudence. As a safety mechanism, the clause also requires a Director of Public Prosecutions to authorise a prosecution in terms of the section.

2.2 Clause 2: Amendment of section 88 of the Administration of Estates Act, 1965 (Act 66 of 1965):

Clause 2 is intended to amend section 88 of the Administration of Estates Act, 1965, which deals with the payment of interest on certain moneys held in the guardians’ fund. In terms of this section interest on moneys held in the guardians’ fund only becomes available at the end of the financial year, which is 31 March of every year. This method of compounding interest annually is prejudicial to beneficiaries who have to wait for a year before they can receive the interest on the money held in trust. The amendment provides that the interest be compounded on a monthly basis. The proposed method of calculating the interest is intended to bring the calculation of interest into line with the methods used by commercial institutions. This section still refers to the term “lunatic”. The amendment brings this unacceptable terminology in line with the terminology used in the Mental Health Care Act, 2002 (Act 17 of 2002). Because the amendment deals with a matter relating to the administration of justice, the amendment also replaces the role of the Minister of Finance with the Minister for Justice and Constitutional Development in determining the rate of interest. The amendment proposes that the Minister for Justice and Constitutional Development does this in consultation with the Minister of Finance.

2.3 Clause 3: Amendment of section 1 of the Medicines and Related Substances Act, 1965 (Act 101 of 1965):

The amendment corrects an incorrect word in the Afrikaans text.

2.4 Clause 4: Amendment of section 51 of the Criminal Procedure Act, 1977 (Act 51 of 1977)

This amendment replaces references to the repealed Prisons Act, 1958, with references to the prevailing provisions of the Correctional Services Act, 1998 (Act 111 of 1998).

2.5 Clauses 5, 6, 7, 8, 17 and 36: Amendment of sections 55, 56, 57, 57A and 341 of the Criminal Procedure Act, 1977 (Act 51 of 1977):

- (i) The provisions in the Criminal Procedure Act, 1977 (the Criminal Procedure Act), which regulate the setting and payment of admission of guilt fines, most notably section 57, allow prosecutors and clerks of courts (by way of a summons as contemplated in section 54 of the Act) and peace officers (by way of a written notice as contemplated in section 56 of the Act), to set admission of guilt fines in certain circumstances. Section 57(5) of the Act, authorises the magistrate of every magisterial district to set specific amounts to be paid as admission of guilt fines in respect of specific offences in the magisterial

district in question, from which prosecutors, clerks of court and peace officers may not deviate.

- (ii) The effect of these provisions is that different amounts for admission of guilt fines for similar offences apply in different parts of the country. This might constitute an infringement of section 9 of the Constitution which guarantees everyone the right to the equal protection and benefit of the law. These provisions might also infringe the principle of the separation of powers, as envisaged in the Constitution, since it entitles members of the judiciary (magistrates) to make law, which, in terms of the Constitution, is a legislative function. Likewise, the question is also raised whether it is appropriate for clerks of court to set admission of guilt fines, as sanctioned by the existing provisions in this regard.
- (iii) Clause 7 amends section 57 of the Criminal Procedure Act and clauses 5, 6, 8, and 17 amend sections 55, 56, 57A, and 341, consequentially. In short, the amendments—
 - (a) empower the Minister for Justice and Constitutional Development to determine, by notice in the *Gazette*, the offences in respect of which admission of guilt fines may be set and the amounts payable in respect of each of the offences so determined;
 - (b) provide that prosecutors may only endorse summonses with admission of guilt fines in respect of the offences determined by the Minister, in accordance with national directives issued by the National Director of Public Prosecutions; and
 - (c) repeal the power of magistrates to determine admission of guilt fines for their magisterial districts, and the power of clerks of court to set admission of guilt fines.

Clause 36 contains transitional arrangements, dealing with admission of guilt fines which are imposed before the commencement of the above amendments and which are not finalised by the time the amendments come into operation.

2.6 Clause 9: Amendment of section 60 of the Criminal Procedure Act, 1977 (Act 51 of 1977):

- (i) Clause 9 is aimed at amending section 60 of the Criminal Procedure Act, 1977, which deals with the bail application of an accused person in court. It is intended to address the problem of prison overcrowding, one of the causes thereof being the huge number of awaiting-trial prisoners. Many of these awaiting-trial persons have been granted bail, but are still in detention because they cannot afford the sum of money set by the court as a condition of being released on bail.
- (ii) It has been argued that if a court has come to the conclusion that an accused person can be released on bail because it is satisfied that the interests of justice so permit, the court should then endeavour to facilitate such release on bail and, to this end, should hold a separate inquiry to determine the ability of the accused person to pay the sum of money that the court intends setting as a condition for release or, in the event of the accused not being able to afford any sum of money, to consider alternative conditions for release on bail. Clause 9 seeks to build in such an inquiry.

2.7 Clause 10: Amendment of section 79 of the Criminal Procedure Act, 1977 (Act 51 of 1977):

- (i) Section 79 of the Criminal Procedure Act, 1977, in the case of serious offences (murder, culpable homicide, rape or another charge involving serious violence), or where the court considers it to be necessary in the public interest, or where the court, in any particular case so directs, requires a panel of three psychiatrists to be appointed for purposes of inquiring into the capacity of an accused person to understand the criminal proceedings pending against him or her or into the criminal capacity of an accused person, where mental capacity is an issue. In the case of lesser offences, only one person is required to undertake the investigation.
- (ii) The section is almost impossible to apply in some parts of the country (mainly Gauteng) due to the non-availability of private psychiatrists willing to do observations. As a result of the problems experienced serious cases have been struck off the roll because proper observations could not be done. The amendments allow the courts to do away with the third psychiatrist, at the request of the prosecutor, who may only so request in accordance with

directives issued by the National Director of Public Prosecutions. The NDPP must, in terms of the proposed amendments, issue such directives, setting out the cases and circumstances in which a prosecutor may make such a request.

2.8 Clause 11: Insertion of a new section 110A in the Criminal Procedure Act, 1977 (Act 51 of 1977):

Clause 11 inserts a new section 110A in the Criminal Procedure Act, 1977, in order to confer jurisdiction on South African courts to try offences committed by South African officials while on diplomatic duty abroad, who cannot be prosecuted in the foreign country due to diplomatic immunity. Clause 11 confers jurisdiction on the South African courts to try these cases if the offence committed abroad is also an offence in South Africa, and the NDPP instructs that a prosecution must be instituted.

2.9 Clause 12: Amendment of section 285 of the Criminal Procedure Act, 1977 (Act 51 of 1977):

In terms of section 285(4)(a), a person commits an offence if he or she fails to report at a prison for the first time to serve a term of periodical imprisonment. However, no mechanism is created to deal with a person who initially reports for periodical imprisonment, but who fails to report at a later stage. Clause 12 empowers any court to re-consider the sentence of periodical imprisonment where a person appears before it, having failed to report for periodical imprisonment. It will be more effective to alter the sentence of periodical imprisonment, rather than to have a new trial where the person is charged for failure to report for periodical imprisonment. This provision is similar to section 276A(4) of the Criminal Procedure Act, 1977, which deals with correctional supervision.

2.10 Clauses 13, 14, 15 and 16: Amendment of sections 309, 309C, 315 and 316 of the Criminal Procedure Act, 1977 (Act 51 of 1977):

- (i) Sections 309, 309B, 309C and 309D of the Criminal Procedure Act, 1977, regulate appeals by persons in criminal proceedings from the lower courts to the High Courts. In terms of these provisions, such an appeal is subject to leave to appeal being granted by the trial court, failing which the appellant may petition the Judge President of the High Court having jurisdiction.
- (ii) In the case of *Shinga vs the State and Others*, the Constitutional Court found the following provisions to be unconstitutional for the reasons given hereunder:
 - (a) Section 309(3A): This subsection provides that an appeal must be disposed of by a High Court in chambers on the written argument of the parties or their legal representatives, unless the Court is of the opinion that the interests of justice require that the parties or their legal representatives submit oral argument to the Court. It, however, also provides that even if the Court is of the opinion that oral argument is necessary, written argument in chambers will suffice if the parties or their legal representatives so request and the Judge President in question so agrees. The Constitutional Court held this provision to be unconstitutional, remarking that “[a] fair appeal must require that every accused and the prosecution be given an opportunity to advance their case in every reasonable way they can. To deny the accused or the prosecution the right to present oral argument in open court is fundamentally unfair bearing in mind the importance of oral argument as a significant tool in the hands of both an accused and the prosecution in the appeal process”. Clause 13 addresses this finding of the Constitutional Court by deleting section 309(3A). Clause 15 does likewise in respect of criminal appeals from the High Court to the Supreme Court of Appeal by deleting section 315(1)(b) and (c) which contains similar provisions to section 309(3A).
 - (b) Section 309C(4): This subsection provides that where leave to appeal has been refused and the appellant petitions the Judge President in question, the clerk of the magistrate’s court must submit, amongst others, the full record of the proceedings in the trial court (subsection (4)(c)). However, the proviso to subsection (4)(c) provides that the full record of the proceedings in the trial court need not be given if the accused was tried in a regional court and, amongst others, was legally represented at the trial. The Constitutional Court was of the view “that the record of the case should as a matter of course be placed before the petition judges on the basis that an adequate reappraisal is not possible without the record”. It went on further to comment that once this is accepted as sound, there

is no basis for the suggestion that an adequate review is possible without the record in relation to each category posed by the exceptions. It held that these exceptions were unconstitutional. Clause 14 consequently deletes these exceptions. Clause 16 does likewise in respect of criminal appeals from the High Court to the Supreme Court of Appeal by amending section 316(10) and (12), which contains similar provisions to section 309C(4) and (6).

- (c) Section 309C(5): This subsection provides that the petition must be considered by a single judge designated by the Judge President who may, in exceptional circumstances, designate two judges. If there is a difference of opinion in the case of two judges, the Judge President, or another judge designated by the Judge President, must also consider the petition. The Constitutional Court concluded that the constitutional requirement for an adequate reappraisal of the record requires two judges to consider the record even for petitions for leave to appeal from the Magistrates' Court. Clause 14 also addresses this in section 309C(5). The amendments to subsection 309C(6) are consequential in nature.

2.11 Clause 18: Amendment of section 3 of the Attorneys Act, 1979 (Act 53 of 1979):

The Attorneys Act, 1979, envisages attorneys employed at offices of the Legal Aid Board engaging candidate attorneys. However, section 3 of the Attorneys Act, 1979, which specifies the persons who may engage candidate attorneys, erroneously did not include attorneys employed at offices of the Legal Aid Board. Clause 18 rectifies this omission by ensuring that attorneys employed by the Board are entitled to engage candidate attorneys.

2.12 Clause 19: Amendment of section 72 of the Attorneys Act, 1979 (Act 53 of 1979):

Clause 19 seeks to amend section 72 of this Act in order to increase fines which may be imposed by the council of a law society which finds an attorney or candidate attorney guilty of unprofessional conduct. It is suggested that the maximum fines be increased from R10 000 to R100 000 in the case of attorneys and from R2 000 to R20 000 in the case of candidate attorneys. These maximum fines were last adjusted in 1993. The increased fines will ensure greater protection to members of the public.

2.13 Clause 20: Amendment of section 3 of the Admiralty Jurisdiction Regulation Act, 1983 (Act 105 of 1983):

- (i) Section 3 of this Act envisages two categories of legal actions, namely actions in personam and actions in rem. An action in rem may only be instituted by the arrest of certain property in respect of which the claim lies, for instance a ship (Section 3(5)). Section 3(6), however, provides that, in the case of an action in rem, the action does not necessarily have to be instituted by the arrest of the ship which gave rise to the claim. It may be instituted by the arrest of an "associated ship". An "associated ship" includes another ship owned by the person or the company who or which was also the owner of the ship that gave rise to the maritime claim. Section 3(9), however, gives the Minister for Justice and Constitutional Development the power to exclude certain ships from these "associated ship arrest provisions" as set out in section 3(6), by way of notice in the *Gazette*. Section 3(9) was enacted in order to protect South African shipowners and was used to circumvent sanctions.
- (ii) These provisions were enacted before the new constitutional dispensation and, more particularly section 9(1) of the Constitution, which entrenches the principle that everyone is equal before the law and has the right to the equal protection and benefit of the law. Clause 20 intends bringing this section into line with Constitutional imperatives and removes the Minister's arbitrary power to elevate certain persons above the law.

2.14 Clause 21: Amendment of section 18 of the Matrimonial Property Act, 1984 (Act 88 of 1984):

In *Van der Merwe v The Road Accident Fund and Others*, the Constitutional Court declared section 18(b) of the Matrimonial Property Act, 1984 (Act 88 of 1984), to be inconsistent with the equality clause of the Constitution and therefore invalid. This section permits a spouse married in community of property to recover damages from the other spouse in respect of bodily injuries caused by that spouse but not damages for patrimonial loss. The Court ordered that patrimonial damages must become the separate property of the injured spouse which he or she is entitled to recover. Clause 21 is intended to give effect to this judgement.

2.15 Clause 22: Amendment of section 1 of the Intestate Succession Act, 1987 (Act 81 of 1987)

- (i) In *Gory v Kolver NO and Others*, the Constitutional Court declared section 1(1) of the Intestate Succession Act, 1987, to be inconsistent with the rights to equality and dignity as enshrined in the Constitution, and therefore invalid. This section, among others, regulates the law of intestate succession in respect of married couples (heterosexual spouses) but not in respect of permanent same-sex life partners. The court declared this omission to be unconstitutional and invalid.
- (ii) Clause 22 gives effect to the judgment of the Constitutional Court. Because permanent same-sex partners now have the opportunity to “marry” in terms of the Civil Union Act, 2006 (Act 17 of 2006), the proposed amendment limits the application of the clause to cases where the court is satisfied that the partners in question were not able to formalise their same-sex partnerships under the Civil Union Act, 2006. The amendment goes further and provides that these provisions cannot be applied in situations where a transfer of ownership of property has taken place pursuant to the distribution of the residue of any estate, unless it is established that, when such transfer was effected, the transferee was on notice that the property in question was subject to a legal challenge on the grounds of an entitlement to benefit from an intestate estate.

2.16 Clause 23: Amendment of Schedule 2 to the Criminal Law Amendment Act, 1997 (Act 105 of 1997):

- (i) Discretionary minimum sentences, as envisaged in terms of section 51 of the Criminal Law Amendment Act, 1997, are only provided for in respect of a small number of serious offences and in each case the presiding judicial officer has a discretion to impose a lesser sentence than the prescribed minimum sentence if he or she is satisfied that substantial and compelling circumstances exist which justify the imposition of such lesser sentence. The offences to which discretionary minimum sentences are applicable are listed in Schedule 2 to this Act. The offences listed in Part I of Schedule 2 are those which carry a minimum sentence of life imprisonment, such as, murder and rape.
- (ii) The Implementation of the Rome Statute of the International Criminal Court Act, 2002 (Act 27 of 2002), to which South Africa is a party, creates the offences of genocide, crimes against humanity and war crimes and provides that a South African court, convicting a person thereof, may impose life imprisonment. Clause 22 proposes that these crimes also be included in Part I of Schedule 2 to the Criminal Law Amendment Act, 1997.

2.17 Clause 24: Amendment of section 5 of the Debt Collectors Act, 1998 (Act 114 of 1998):

Currently, the Debt Collectors Act, 1998, provides that the Executive Committee of the Council for Debt Collectors consists of three members of the Council. The proposed amendment to section 5 of the Act is aimed at increasing the membership of the Executive Committee to a possible five members, that is not less than three but not more than five members. The increased membership would capacitate the Council and ensure that it carries out its mandate more efficiently.

2.18 Clause 25: Amendment of section 20 of the Debt Collectors Act, 1998 (Act 114 of 1998):

- (i) The Judicial Matters Amendment Act, 2005 (Act 22 of 2005), among others, amended section 20 of the Debt Collectors Act, 1998, to make provision for the Council for Debt Collectors to take control and administer the trust account of a debt collector who has his or her registration as a debt collector withdrawn or who abandons practice or ceases to practise as a debt collector. Provision was also made for the Council to administer the trust account of such a person until the Master of the High Court has appointed a *curator bonis* to control and administer such trust account. This section has not been put into operation.
- (ii) The proposed amendments to section 20 of the Act give the Council for Debt Collectors the power to take control over, administer and finalise a debt collector’s trust account in the circumstances already mentioned in section 20, as well as in cases where there is reason to believe that a debt collector is likely to have his or her registration withdrawn. Although the Council retains the right to approach the Master to appoint a *curator bonis*, the right of any

interested party to approach the Master in this regard is removed. It also gives the Master the power to require the payment of security from a *curator bonis* before he or she is appointed and it regulates the remuneration of a *curator bonis*.

2.19 Clause 26: Amendment of section 23 of the Debt Collectors Act, 1998 (Act 114 of 1998):

Section 23 of the Debt Collectors Act, 1998, empowers the Minister to make regulations. The proposed amendments to section 23 will allow the Minister to make regulations regarding the powers and duties of a *curator bonis*, as well as the powers and duties of a Master when appointing a *curator bonis*.

2.20 Clause 27: Amendment of section 79 of the Promotion of Access to Information Act, 2000 (Act 2 of 2000):

In terms of section 79 of the Promotion of Access to Information Act, 2000, the Rules Board for Courts of Law must make certain rules of procedure. These rules have been finalised and submitted to Parliament for consideration. The amendment contained in clause 27 is intended to extend the statutory period within which the rules envisaged in section 79 must be made. It also inserts wording similar to that in the Rules Board for Courts of Law Act, 1985, in terms of which rules of court are made with the approval of the Minister. This will eliminate any uncertainty that currently exists.

2.21 Clause 28: Amendment of section 89 of the Promotion of Access to Information Act, 2000 (Act 2 of 2000):

Section 89 of the Promotion of Access to Information Act, 2000, provides that a person exercising a power or performing a duty in terms of the Act is indemnified from any criminal or civil liability if it is done in good faith, eg court personnel such as clerks of court who assist members of the public with filling in forms. The Act includes the regulations made under the Act but it does not include the rules made under the Act. The amendment proposed in clause 28 extends this indemnity to cases where court personnel assist members of the public to comply with the rules as well.

2.22 Clause 29: Amendment of section 7 of the Promotion of Administrative Justice Act, 2000 (Act 3 of 2000):

Clause 29 of the Bill extends the statutory deadline, setting a time period within which the Rules Board for Courts of Law must make rules relating to judicial review. It also inserts wording similar to that in the Rules Board for Courts of Law Act, 1985, in terms of which rules of court are made with the approval of the Minister. This will eliminate any uncertainty that currently exists.

2.23 Clause 30: Amendment of section 10 of the Promotion of Administrative Justice Act, 2000 (Act 3 of 2000):

Clause 30 of the Bill extends the statutory deadline, by when the code of good administrative conduct must be made and published.

2.24 Clause 31: Insertion of section 10A in the Promotion of Administrative Justice Act, 2000 (Act 3 of 2000):

As indicated in paragraph 2.21 above, section 89 of the Promotion of Access to Information Act, 2000 (PAIA), provides that a person exercising a power or performing a duty in terms of the Act is indemnified from any criminal or civil liability if it is done in good faith. The Promotion of Administrative Justice Act, 2000, does not have a corresponding provision and clause 31 inserts a provision similar to section 89 of PAIA.

2.25 Clause 32: Amendment of section 11 of the isiXhosa text of the Promotion of Access to Information Act, 2000 (Act 2 of 2000):

Clause 32 corrects the short title of the Promotion of Administrative Justice Act, 2000 (Act 3 of 2000) in the isiXhosa text which refers to the Act as a “1999” Act, instead of “2000”.

2.26 Clause 33: Amendment of section 33 of the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (Act 4 of 2000):

Section 32 of the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (PEPUDA), establishes the Equality Review Committee, consisting of a senior judicial officer, the Chairperson of the South African Human Rights Commission, the Chairperson of the Commission on Gender Equality, a representative of civil society, an expert in the field of human rights, a member of the National Assembly and a member of the National Council of Provinces. The Equality Review Committee must advise the Minister about the operation of the PEPUDA, advise the Minister about laws that impact on equality and submit regular reports to the Minister on the operation of the PEPUDA, among others. In terms of section 33(6), the members of this Committee “are entitled to such remuneration, allowances and other benefits as may be determined by the Minister

in consultation with the Minister of Finance”. Other Acts of Parliament which create statutory bodies provide specifically that members of such bodies who already receive a remuneration package from the Fiscus by virtue of the office they hold, eg a judge, a member of Parliament, a public servant, etc, are not entitled to a second remuneration package as a member of the statutory body in question. Section 33 of this Act, as it reads at present, does not specifically exclude the possibility of such members from receiving a second remuneration package. Clause 33 addresses this problem.

2.27 Clause 34: Amendment of section 7 of the Judges’ Remuneration and Conditions of Employment Act, 2001 (Act 47 of 2001):

In terms of section 7 of the Judges’ Remuneration and Conditions of Employment Act, 2001 (Act 47 of 2001), a judge who is discharged from active service and who is not yet 75 years old, must, when required to do so, perform service for three months every year. Such a judge may volunteer to perform service for more than three months if this is requested. Judges older than 75 years may also voluntarily perform such service. Such voluntary service may only be performed after consultation with the Judicial Service Commission, if the head of the court in question has so requested and if the Minister approves. In practice difficulties have been experienced in getting judges quickly to do such service where additional temporary posts are created in specific courts purely to deal with additional workload or backlogs which have developed. In such instances, it is counter-productive to have to approach the Judicial Service Commission which only sits twice a year. The proposed amendment in clause 34 will only require the request by the head of the court requiring the service and the approval by the Minister before the engagement of a judge who has been discharged from active service.

2.28 Clause 35: Amendment of section 26 of the Prevention and Combating of Corrupt Activities Act, 2004 (Act 12 of 2004):

Currently, the Magistrates Courts’ Act, 1944 (Act 32 of 1944), limits lower courts (District Courts) to imposing a sentence of imprisonment for a period not exceeding three (3) years and to a fine not exceeding R60 000. While magistrates’ courts have jurisdiction under the Prevention and Combating of Corrupt Activities Act, 2004 (Act 12 of 2004), the penalties provided for in that Act exceed the punitive jurisdiction of a magistrate’s court. In terms of that Act, the penalties amount to imprisonment for a maximum of five (5) years, a fine of up to R250 000, and a fine equal to five times the value of the gratification involved in the offence. The proposed amendment to section 26 is intended to make it clear that a magistrate’s court has the power to impose penalties in excess of its jurisdiction provided for in the Magistrates’ Courts’ Act, 1944.

3. DEPARTMENTS AND PARTIES CONSULTED

The following were consulted in respect of specific clauses of the Bill: Women’s Legal Centre, Directors of Public Prosecutions and the judiciary in respect of clause 1; the Chief Master’s Office in respect of clause 2; the NPA and Department of Health in respect of clause 10; the NPA and the Department of Foreign Affairs in respect of clause 11; the Director of Public Prosecutions, Cape Town, in respect of clause 12; the Legal Aid Board in respect of clause 18, the Law Society of South Africa in respect of clause 19; the Department of Transport and the Maritime Law Society of South Africa in respect of clause 20; the Council for Debt Collectors and Office of the Chief Master in respect of clauses 24 to 26; the Rules Board for Courts of Law in respect of clause 28. The Bill was also made available to the Chief Justice, the President of the Supreme Court of Appeal, all Judges President, Regional Court Presidents, Chief Magistrates, cluster heads, the National Director of Public Prosecutions, the General Council of the Bar, the Law Society of SA, Black Lawyers’ Association and NADEL. Comments received were incorporated where appropriate.

4. IMPLEMENTATION PLAN

No implementation plan is required.

5. ORGANISATIONAL AND PERSONNEL IMPLICATIONS

None.

6. FINANCIAL IMPLICATIONS

None.

7. COMMUNICATION IMPLICATIONS

None.

8. CONSTITUTIONAL IMPLICATIONS

Some of the provisions in the Bill give effect to Constitutional principles.

9. IMPLICATIONS FOR VULNERABLE GROUPS

Clause 1 is intended to protect the rights of women and clause 22 is intended to protect the rights of same sex-partners.

10. PARLIAMENTARY PROCEDURE

10.1 The State Law Advisers and the Department of Justice and Constitutional Development are of the opinion that this 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.

10.2 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 41 of 2003), since it does not contain provisions pertaining to customary law or customs of traditional communities.

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