

REPUBLIC OF SOUTH AFRICA

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# JUDICIAL MATTERS AMENDMENT BILL

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

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(MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT)

[B 7B—2013]

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[ ] Words in bold type in square brackets indicate omissions from existing enactments.

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**To amend—**

- the Magistrates' Courts Act, 1944, so as to bring the Afrikaans text relating to causes of action over which magistrates' courts have jurisdiction in line with that of the English text; and to further regulate the jurisdiction of magistrates' courts in line with a decision of the Constitutional Court;
- the Criminal Procedure Act, 1977, so as to effect certain textual corrections; and to further regulate the provisions relating to the expungement of certain criminal records;
- the Attorneys Act, 1979, so as to further regulate the constitution and the powers of the board of control of the Attorneys Fidelity Fund;
- the Small Claims Courts Act, 1984, so as to further regulate the appointment of commissioners;
- the Judicial Service Commission Act, 1994, so as to allow the Chairperson of the Judicial Conduct Committee to delegate certain powers or functions to an acting Chairperson; to further regulate the election of an acting Chairperson of the Judicial Conduct Committee; to provide for the referral of a complaint to the Deputy Chief Justice; to provide that the Minister may make regulations regarding witness fees; and to effect certain textual corrections;
- the Criminal Law Amendment Act, 1997, so as to exclude persons under the age of 18 years from the operation of that Act;
- the Promotion of Access to Information Act, 2000, so as to extend the time periods within which to bring court applications;
- the Children's Act, 2005, so as to allow for information in the National Child Protection Register to be made available in the case of applications for the expungement of certain criminal records;
- the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, so as to effect certain textual corrections; to allow for information in the National Register for Sex Offenders to be made available in the case of applications for the expungement of certain criminal records; and to further regulate the issuing of directives by the National Director of Public Prosecutions;
- the Child Justice Act, 2008, so as to further regulate the evaluation of the criminal capacity of a child; to further regulate the reporting of any injury sustained or severe psychological trauma suffered by a child while in police custody; to further regulate the holding of preliminary inquiries; to provide for the delegation of certain powers and assignment of certain duties by the Cabinet member responsible for social development in respect of the accreditation of diversion programmes and diversion service providers; to effect certain textual corrections; to repeal provisions that make the Criminal Law Amendment Act,

- 1997, applicable to persons under the age of 18 years; to further regulate the automatic review of children in certain cases; and to further regulate the expungement of records of certain convictions of children; and
- the Reform of Customary Law of Succession and Regulation of Related Matters Act, 2009, so as to effect certain textual corrections; and to provide for matters connected therewith.

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

**Amendment of section 29 of Act 32 of 1944, as substituted by section 7 of Act 31 of 2008**

1. Section 29 of the Magistrates' Courts Act, 1944, is hereby amended— 5
  - (a) by the substitution in subsection (1) for paragraph (e) of the Afrikaans text of the following paragraph:
 

“(e) aksies gebaseer op of wat ontstaan uit ‘n kredietooreenkoms soos omskryf in artikel 1 van die ‘National Credit Act, 2005’ (Wet No. 34 van 2005)[, **waar die vordering of die waarde van die goed in geskil nie die bedrag wat die Minister van tyd tot tyd by kennisgewing in die Staatskoerant bepaal, te bowe gaan nie**];”;

and
  - (b) by the substitution for subsection (1A) of the following subsection: 15
 

“(1A) The Minister may determine different amounts contemplated in subsection (1)(a), (b), (d), [(e),] (f) and (g) in respect of courts for districts and courts for regional divisions.”.

**Amendment of section 30 of Act 32 of 1944, as amended by section 4 of Act 19 of 1963 and section 11 of Act 53 of 1970**

2. Section 30 of the Magistrates' Courts Act, 1944, is hereby amended— 20
  - (a) by the substitution for subsection (1) of the following subsection:
 

“(1) Subject to the limits of jurisdiction prescribed by this Act, the court may grant against persons and things orders for [**arrest *tanquam suspectus de fuga***,] attachments, interdicts and *mandamenten van spolie*.”; and
  - (b) by the deletion of subsection (3). 25

**Substitution of section 30bis of Act 32 of 1944, as inserted by section 8 of Act 80 of 1964**

3. The following section is hereby substituted for section 30bis of the Magistrates' Courts Act, 1944: 30

**“Attachment to found or confirm jurisdiction**

**30bis.** The court may order attachment of [**person or**] property to found or confirm jurisdiction against any person who does not reside in the Republic, in respect of an action within its jurisdiction, where the claim or the value of the matter in dispute amounts to at least [**forty rand**] R2 500, 35 exclusive of any costs in respect of the recovery thereof, and may grant an order allowing service of any process in such action to be effected in such manner as may be stated in such order.”.

**Amendment of section 38 of Act 51 of 1977, as substituted by section 99 of Act 75 of 2008** 40

4. Section 38 of the Criminal Procedure Act, 1977, is hereby amended by the substitution for subsection (1) of the following subsection:

“(1) Subject to section 4(2) of the Child Justice Act, 2008 (Act No. 75 of 2008), the methods of securing the attendance of an accused who is eighteen years or older in court for the purposes of his or her trial shall be arrest, summons, written notice and indictment in accordance with the relevant provisions of this Act.”.

**Amendment of section 73 of Act 51 of 1977, as amended by section 2 of Act 86 of 1996 and section 99 of Act 75 of 2008** 5

5. Section 73 of the Criminal Procedure Act, 1977, is hereby amended by the substitution for subsection (3) of the following subsection:

“(3) In addition to the provisions of sections 3(g), 38(2), 44(1)(b) and 65 of the Child Justice Act, 2008 (Act No. 75 of 2008), relating to the assistance of an accused who is under the age of eighteen years by his or her parent [or] an appropriate adult or a guardian at criminal proceedings, any accused who, in the opinion of the court, requires the assistance of another person at criminal proceedings, may, with the permission of the court, be so assisted at such proceedings.”. 15

**Amendment of section 271B of Act 51 of 1977, as inserted by section 3 of Act 65 of 2008**

6. Section 271B of the Criminal Procedure Act, 1977, is hereby amended—

(a) by the substitution in subsection (1)(a) for the words preceding subparagraph (i) of the following words: 20

“Where a court has imposed any of the following sentences on, or has made any of the following orders in respect of a person convicted of an offence, the criminal record of that person, containing the conviction and sentence or order in question, must, subject to paragraph (b) and subsection (2) and section 271D, on the person’s written application, be expunged after a period of 10 years has elapsed after the date of conviction for that offence, unless during that period the person in question has been convicted of an offence and has been sentenced to a period of imprisonment without the option of a fine.”; 25

(b) by the insertion in subsection (1)(a) after subparagraph (vi) of the following subparagraph: 30

“(viA) an order in terms of section 290(1)(a) or (b) as that section was before it was repealed by section 99 of the Child Justice Act, 2008 (Act No. 75 of 2008);” and

(c) by the substitution in subsection (1)(a) for subparagraph (vii) of the following subparagraph: 35

“(vii) a sentence of correctional supervision, referred to in section 276(1)(h) or a sentence referred to in section 276(1)(i); or”.

**Amendment of section 271C of Act 51 of 1977, as inserted by section 3 of Act 65 of 2008** 40

7. Section 271C of the Criminal Procedure Act, 1977, is hereby amended—

(a) by the substitution in subsection (1) for paragraph (c) of the following paragraph:

“(c) a contravention of section 5(1), read with section 5(2), [or] section 6(1), read with section 6(2), section 9(3), section 9(3)bis(a), read with section 9(3)(c), section 10(1), read with section 10(4), section 11(1), read with section 11(2)(a), section 12(1), read with section 12(2), section 12(3), section 15(1), read with section 15(3), section 29(1), read with section 29(9) and section 29(12), section 31(1), read with section 31(2), section 35(1), read with section 35(4), section 35(5), section 35(6), section 40(3), section 43bis or section 44, of the Blacks (Urban Areas) Consolidation Act, 1945 (Act No. 25 of 1945);” and 45 50

- (b) by the insertion in subsection (1) after paragraph (k) of the following paragraph:

“(kA)a contravention of section 14, section 20(2), section 20A(4) or section 26(2) of the Black Labour Act, 1964 (Act No. 67 of 1964);”.

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#### **Insertion of sections 271DA and 271DB in Act 51 of 1977**

8. The following sections are hereby inserted in the Criminal Procedure Act, 1977, after section 271D:

##### **“Revoking of certificate of expungement erroneously issued**

**271DA.** (1) Where the Director-General: Justice and Constitutional Development, in terms of section 271B(2) or 271C(3), or the Minister, in terms of section 271C(5)(b), has issued a certificate of expungement and it subsequently appears that the applicant did not qualify for the expungement of his or her record, the Director-General must—

- (a) inform the applicant in writing of the information that has come to his or her attention and that he or she or the Minister intends to revoke the certificate of expungement;
- (b) afford the applicant an opportunity to furnish compelling written reasons to him or her or the Minister, within 90 working days after the applicant has been informed of the intention to revoke, why his or her record should remain expunged;
- (c) inform the applicant in writing within 30 working days after a decision is made of—
  - (i) his or her or the Minister’s decision; and
  - (ii) the reasons for revoking the certificate of expungement; and
- (d) inform the head of the Criminal Record Centre of the South African Police Service, in writing within 14 working days after the decision was made, to revoke the certificate of expungement and to reinstate the convictions and sentences in question.

(2) If the applicant fails to furnish compelling written reasons contemplated in subsection (1)(b), the Director-General or the Minister, as the case may be, may, subject to the Promotion of Administrative Justice Act, 2000 (Act No. 2 of 2000), revoke the certificate of expungement.

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##### **Delegation of powers and assignment of duties by Director-General**

**271DB.** (1) The Director-General: Justice and Constitutional Development may delegate any power or assign any duty conferred on or assigned to him or her in terms of section 271B(2) or (3) or 271C(3) or (4) to an appropriately qualified official in the employ of the Department of Justice and Constitutional Development at the rank of Deputy Director-General.

(2) A delegation or assignment in terms of subsection (1)—

- (a) is subject to any limitation, condition and direction which the Director-General may impose;
- (b) must be in writing; and
- (c) does not divest the Director-General of the responsibility concerning the exercise of the power or the performance of the duty.

(3) The Director-General may—

- (a) confirm, vary or revoke any decision taken in consequence of a delegation or assignment in terms of this section, subject to any rights that may have accrued to a person as a result of the decision; and
- (b) at any time, in writing, withdraw a delegation or assignment.”.

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**Amendment of section 276A of Act 51 of 1977, as inserted by section 42 of Act 122 of 1991 and amended by section 46 of Act 129 of 1993, section 21 of Act 87 of 1997, section 68 of Act 32 of 2007 and section 99 of Act 75 of 2008**

9. Section 276A of the Criminal Procedure Act, 1977, is hereby amended—
- (a) by the substitution in subsection (1) for paragraph (b) of the following paragraph: 5  
 “(b) for a fixed period not exceeding three years, or in the case of a conviction for any offence referred to in the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (Act No. 32 of 2007), for a fixed period not exceeding five years.”; and 10
  - (b) by the substitution in subsection (2) for the words preceding paragraph (a) of the following words:  
 “Punishment shall, subject to the provisions of section [75] 77 of the Child Justice Act, 2008, only be imposed under section 276(1)(i)—”.

**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, section 6 of Act 38 of 2007, section 13 of Act 66 of 2008 and section 99 of Act 75 of 2008** 15

10. Section 309 of the Criminal Procedure Act, 1977, is hereby amended by the substitution in subsection (1) for paragraph (a) of the following paragraph: 20  
 “(a) Subject to section 84 of the Child Justice Act, 2008 (Act No. 75 of 2008), any person convicted of any offence by any lower court (including a person discharged after conviction) may, subject to leave to appeal being granted in terms of section 309B or 309C, appeal against such conviction and against any resultant sentence or order to the High Court having jurisdiction: Provided that if that person was sentenced to imprisonment for life by a regional court under section 51(1) of the Criminal Law Amendment Act, 1997 (Act No. 105 of 1997), he or she may note such an appeal without having to apply for leave in terms of section 309B: Provided further that the provisions of section 302(1)(b) shall apply in respect of a person who duly notes an appeal against a conviction, sentence or order as contemplated in section 302(1)(a).” 25 30

**Amendment of section 309B of Act 51 of 1977, as inserted by section 3 of Act 76 of 1997, substituted by section 3 of Act 42 of 2003 and amended by section 99 of Act 75 of 2008** 35

11. Section 309B of the Criminal Procedure Act, 1977, is hereby amended by the substitution in subsection (1) for paragraph (a) of the following paragraph:  
 “(a) Subject to section 84 of the Child Justice Act, 2008 (Act No. 75 of 2008), any accused, other than a person referred to in the first proviso to section 309(1)(a), who wishes to note an appeal against any conviction or against any resultant sentence or order of a lower court, must apply to that court for leave to appeal against that conviction, sentence or order.” 40

**Amendment of section 309D of Act 51 of 1977, as inserted by section 3 of Act 76 of 1997, substituted by section 3 of Act 42 of 2003 and amended by section 99 of Act 75 of 2008** 45

12. Section 309D of the Criminal Procedure Act, 1977, is hereby amended by the substitution in subsection (1) for paragraph (a) of the following paragraph:  
 “(a) [An accused, other] Other than a child contemplated in the Child Justice Act, 2008 (Act No. 75 of 2008), an accused—  
 (i) referred to in the first proviso to section 309(1)(a); or 50  
 (ii) who is unrepresented at the time he or she is convicted and sentenced, must be informed by the presiding officer of his or her rights in respect of appeal and legal representation and of the correct procedures to give effect to these rights.”.

**Amendment of section 28 of Act 53 of 1979, as amended by section 18 of Act 62 of 2000**

13. Section 28 of the Attorneys Act, 1979, is hereby amended by the substitution for subsection (1) of the following subsection:

“(1) The board of control consists of four members of each society, elected by the council of that society.”. 5

**Substitution of section 29 of Act 53 of 1979**

14. The following section is hereby substituted for section 29 of the Attorneys Act, 1979:

**“Period of office of members of board of control”** 10

29. A member of the board of control holds office for a term of three years and, at the end of his or her term of office, is eligible for re-election for one additional term of office only.”.

**Insertion of section 46A in Act 53 of 1979**

15. The following section is hereby inserted in the Attorneys Act, 1979, after section 46: 15

**“Board of control may institute private prosecution**

46A. Notwithstanding the provisions of section 76, the board of control may, by any person authorized thereto in writing by the chairperson, and upon written notice to the society of the province concerned, institute a private prosecution for the misappropriation or theft of property or trust money, and the provisions of section 8 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), and any other law relating to private prosecutions shall apply to such prosecution as if the board of control is a public body.”. 20

**Amendment of section 48 of Act 53 of 1979** 25

16. Section 48 of the Attorneys Act, 1979, is hereby amended by the addition of the following subsection:

“(3) The board of control may delegate to any of its employees the duty to consider any claim against the fund, subject to any conditions that may be imposed by the board of control.”. 30

**Amendment of section 78 of Act 53 of 1979, as substituted by section 28 of Act 87 of 1989**

17. Section 78 of the Attorneys Act, 1979, is hereby amended by the substitution for subsection (8) of the following subsection:

“(8) The court may on application made by the society of the province concerned or by the board of control, in consultation with the society of the province concerned, and on good cause shown, prohibit any practitioner from operating in any way on his or her trust account, and may appoint a *curator bonis* to control and administer such trust account, with such rights, duties and powers in relation thereto as the court may deem fit.”. 35 40

**Substitution of certain words in Act 53 of 1979**

18. The Attorneys Act, 1979, is hereby amended—

- (a) by the substitution for the words “chairman”, “vice-chairman” and “chairman’s”, wherever they occur, of the words “chairperson”, “vice-chairperson” and “chairperson’s”, respectively; and 45
- (b) by the substitution for the words “he”, “him”, “his”, “himself” and “he or his” wherever they occur, of the words “he or she”, “him or her”, “his or her”, “himself or herself” and “he or his or she or her”, respectively, except

where “he or she”, “him or her”, “his or her”, “himself or herself” and “he or his or she or her” occur.

**Amendment of section 9 of Act 61 of 1984, as amended by section 5 of Act 92 of 1986, section 1 of Act 63 of 1989, section 4 of Act 18 of 1996 and section 4 of Act 26 of 1999**

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19. Section 9 of the Small Claims Courts Act, 1984, is hereby amended by the insertion in subsection (1) after paragraph (b) of the following paragraph:

“(c) A commissioner appointed in terms of paragraph (a) in respect of a specific court shall be deemed to be appointed for any court established under section 2 in that province.”.

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**Amendment of section 8 of Act 9 of 1994, as inserted by section 9 of Act 20 of 2008**

20. Section 8 of the Judicial Service Commission Act, 1994, is hereby amended by the substitution for subsection (3) of the following subsection:

“(3) The Chairperson may, either generally or in a specific case, delegate any of his or her powers or functions as Chairperson of the Committee to [the Deputy Chief Justice] an acting Chairperson as provided for in section 9(4).”.

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**Amendment of section 9 of Act 9 of 1994, as inserted by section 9 of Act 20 of 2008**

21. Section 9 of the Judicial Service Commission Act, 1994, is hereby amended by the addition of the following subsection:

“(4) The Deputy Chief Justice must act as Chairperson in the absence of the Chief Justice: Provided that in the absence of both the Chief Justice and the Deputy Chief Justice, the Chief Justice must nominate one of the members of the Committee as acting Chairperson: Provided further that if the Chief Justice does not nominate an acting Chairperson and the Deputy Chief Justice is also absent from the meeting, the members must elect a Chairperson from their number.”.

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**Amendment of section 14 of Act 9 of 1994, as inserted by section 9 of Act 20 of 2008**

22. Section 14 of the Judicial Service Commission Act, 1994, is hereby amended by the substitution for subsection (1) of the following subsection:

“(1) Any person may lodge a complaint about a judge with the Chairperson of the Committee: Provided that the Chairperson may refer the complaint to the Deputy Chief Justice to deal with in terms of the provisions of the Act, and the Deputy Chief Justice assumes the role of the chairperson in respect of that complaint.”.

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**Amendment of section 18 of Act 9 of 1994, as inserted by section 9 of Act 20 of 2008**

23. Section 18 of the Judicial Service Commission Act, 1994, is hereby amended by the deletion in subsection (2) of paragraph (b).

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**Amendment of section 19 of Act 9 of 1994, as inserted by section 9 of Act 20 of 2008**

24. Section 19 of the Judicial Service Commission Act, 1994, is hereby amended by the substitution for subsection (3) of the following subsection:

“(3) The Commission must, unless it is acting on a recommendation referred to in section [16(4)(c)] 16(4)(b) or 18(4)(a)(iii), (b)(iii) or (c)(iii), before it requests the appointment of a Tribunal, inform the respondent, and, if applicable, the complainant, that it is considering to make that request and invite the respondent, and, if applicable, the complainant, to comment in writing on the fact that the Commission is considering to so request.”.

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**Amendment of section 34 of Act 9 of 1994, as inserted by section 9 of Act 20 of 2008**

**25.** Section 34 of the Judicial Service Commission Act, 1994, is hereby amended by the substitution in subsection (1)(a) for the words preceding subparagraph (i) of the following words:

“having been subpoenaed in terms of section [29] 30 to appear before a Tribunal, 5  
fails without reasonable excuse to—”.

**Amendment of section 35 of Act 9 of 1994, as inserted by section 9 of Act 20 of 2008**

**26.** Section 35 of the Judicial Service Commission Act, 1994, is hereby amended by the substitution for subsection (1) of the following subsection:

- “(1) The Minister— 10
- (a) must make the regulations required to be made in terms [sections] of section 13 of this Act; [and]
  - (b) may make regulations regarding any matter that may be necessary or expedient to prescribe regarding— 15
    - (i) the finances and financial management and accountability of the Commission and Office of the Registrar of Judges Registrable Interests;
    - (ii) the manner in which a judge may apply for written consent of the Minister as contemplated in section 11(1) and (2); and
    - (iii) the administration and functioning of the Commission or Conduct 20  
Committee, the Secretariat of the Commission, or any other aspect of this Act; and
  - (c) may, in consultation with the Cabinet member responsible for finance, make regulations regarding travelling, subsistence and other expenses and allow- 25  
ances payable to a person who was subpoenaed as a witness and attends a hearing of the Conduct Committee or a Tribunal.”.

**Amendment of section 51 of Act 105 of 1997, as substituted by section 1 of Act 38 of 2007**

**27.** Section 51 of the Criminal Law Amendment Act, 1997, is hereby amended by the substitution for subsections (5) and (6) of the following subsections, respectively: 30

“(5) [(a) Subject to paragraph (b), the] The operation of a minimum sentence imposed in terms of this section shall not be suspended as contemplated in section 297(4) of the Criminal Procedure Act, 1977 (Act No. 51 of 1977).

[(b) Not more than half of a minimum sentence imposed in terms of subsection (2) may be suspended as contemplated in section 297(4) of the 35  
Criminal Procedure Act, 1977, if the accused person was 16 years of age or older, but under the age of 18 years, at the time of the commission of the offence in question.]

(6) This section does not apply in respect of an accused person who was under the age of [16] 18 years at the time of the commission of an offence contemplated 40  
in subsection (1) or (2).”.

**Amendment of section 77 of Act 2 of 2000**

**28.** Section 77 of the Promotion of Access to Information Act, 2000, is hereby amended by the substitution in subsection (5)(c) for subparagraphs (i) and (ii) of the following subparagraphs, respectively: 45

- “(i) within [60] 180 days; or
- (ii) if notice to a third party is required by subsection (4)(a)(ii), within [30] 180 days.”.

### Amendment of section 78 of Act 2 of 2000

29. Section 78 of the Promotion of Access to Information Act, 2000, is hereby amended—

- (a) by the substitution in subsection (2) for the words following paragraph (d) of the following words: 5  
     “may, by way of an application, within [30] 180 days apply to a court for appropriate relief in terms of section 82.”; and
- (b) by the substitution in subsection (3) for the words following paragraph (c) of the following words: 10  
     “may, by way of an application, within [30] 180 days apply to a court for appropriate relief in terms of section 82.”.

### Amendment of section 82 of Act 2 of 2000

30. Section 82 of the Promotion of Access to Information Act, 2000, is hereby amended by the deletion of the word “or” at the end of paragraph (c), the insertion of the expression “; or” after the word “costs” in paragraph (d) and the addition of the 15  
 following paragraph:

- “(e) condoning non-compliance with the 180 day period within which to bring an application, where the interests of justice so require.”.

### Insertion of section 128A in Act 38 of 2005

31. The following section is hereby inserted in the Children’s Act, 2005, after section 128: 20

#### **“Enquiries for purposes of expungement applications in terms of Criminal Procedure Act**

**128A.** (1) For the purposes of section 271B of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), the Director-General: Justice and Constitutional Development may enquire from the Director-General whether or not the particulars of a person have been included or recorded in the Register or whether or not that person’s particulars and any information relating to that person have been removed from the Register in terms of section 128. 25  
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(2) Subject to section 127, the Director-General must respond to the enquiry contemplated in subsection (1) in writing within 21 working days and indicate whether or not the particulars of the person concerned have been included or recorded in the Register or whether or not that person’s particulars and any information relating to that person have been removed from the Register in terms of section 128.”. 35

### Amendment of Table of Contents of Act 38 of 2005

32. The Table of Contents of the Children’s Act, 2005, is hereby amended by the insertion after item 128 of the following item:

“128A. Enquiries for purposes of expungement applications in terms of Criminal Procedure Act”. 40

### Insertion of section 44A in Act 32 of 2007

33. The following section is hereby inserted in the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, after section 44:

#### **“Enquiries for purposes of expungement applications in terms of Criminal Procedure Act 45**

**44A.** (1) For the purposes of section 271B of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), the Director-General: Justice and Constitutional Development may enquire from the Registrar whether or not the particulars

of a person are contained in the Register and whether or not that person's particulars have been removed from the Register in terms of section 51(1) or (3)(c), as the case may be.

(2) Subject to section 52, the Registrar must respond to the enquiry contemplated in subsection (1) in writing within 21 working days and must indicate whether or not the particulars of the person concerned are contained in the Register or whether or not that person's particulars have been removed from the Register in terms of section 51(1) or (3)(c), as the case may be.”.

#### Amendment of section 66 of Act 32 of 2007

34. Section 66 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, is hereby amended by the deletion in subsection (2)(a) of subparagraph (ix).

#### Amendment of Index to Act 32 of 2007

35. The Index to the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, is hereby amended by the insertion after item 44 of the following item:

“44A. Enquiries for purposes of expungement applications in terms of Criminal Procedure Act”.

#### Amendment of section 11 of Act 75 of 2008

36. Section 11 of the Child Justice Act, 2008, is hereby amended—

(a) by the substitution for subsections (2) and (3) of the following subsections, respectively:

“(2) In making a decision regarding the criminal capacity of the child in question—

(a) (i) the inquiry magistrate, for purposes of diversion; or

[(b)] (ii) if the matter has not been diverted, the child justice court, for purposes of plea and trial,

must consider the assessment report of the probation officer referred to in section 40 and all evidence placed before the inquiry magistrate or child justice court prior to diversion or conviction, as the case may be, which evidence may include a report of an evaluation referred to in subsection (3); and

(b) the inquiry magistrate or the child justice court must consider the cognitive, moral, emotional, psychological and social development of the child.

(3) An inquiry magistrate or child justice court may, on own accord, or on the request of the prosecutor or the child's legal representative, order an evaluation of the criminal capacity of the child referred to in subsection (1), in the prescribed manner, by a suitably qualified person[, **which must include an assessment of the cognitive, moral, emotional, psychological and social development of the child.**]; and

(b) by the insertion after subsection (4) of the following subsection:

“(4A) The provisions of section 77(2), (3) and (4) of the Criminal Procedure Act apply with the changes required by the context to a report referred to in subsection (4).”.

#### Amendment of section 28 of Act 75 of 2008

37. Section 28 of the Child Justice Act, 2008, is hereby amended by the substitution in subsection (2)(b) for the words preceding subparagraph (i) of the following words:

“In the event of a report being made as referred to in paragraph (a), that report must, in the prescribed manner, as soon as is reasonably possible, be submitted to the [National] Provincial Commissioner of Police concerned and a copy of the report must be submitted simultaneously to the National Commissioner of Police, indicating—”.

### Amendment of section 43 of Act 75 of 2008

38. Section 43 of the Child Justice Act, 2008, is hereby amended—

- (a) by the deletion in subsection (1) of the word “and” at the end of paragraph (a), the insertion of the expression “; and” after the word “place” in paragraph (b) and the addition of the following paragraph: 5  
“(c) must be presided over by a magistrate of the district within which the child is alleged to have committed the offence.”; and
- (b) by the addition of the following subsection:  
“(4) Section 90 of the Magistrates’ Court Act, 1944 (Act No. 32 of 1944), applies with the changes required by the context to subsection (1)(c).”. 10

### Amendment of section 56 of Act 75 of 2008

39. Section 56 of the Child Justice Act, 2008, is hereby amended by the addition of the following subsection:

- “(4) (a) The Cabinet member responsible for social development may delegate any power or assign any duty conferred on or imposed upon him or her by this section to any member of the Executive Council of a province responsible for welfare services, except the powers and duties referred to in subsection (2)(a). (b) A delegation or an assignment in terms of paragraph (a)— (i) is subject to any limitation, condition and direction that the Cabinet member responsible for social development may impose; (ii) must be in writing; and (iii) does not divest the Cabinet member responsible for social development of the responsibility concerning the exercise of the power or the performance of the duty. (c) The Cabinet member responsible for social development may— (i) confirm, vary or revoke any decision taken in consequence of a delegation or assignment in terms of this section, subject to any rights that may have accrued to a person as a result of the decision; and (ii) at any time withdraw a delegation or assignment.”. 15 20 25 30

### Amendment of section 65 of Act 75 of 2008

40. Section 65 of the Child Justice Act, 2008, is hereby amended by the substitution for subsection (3) of the following subsection:

- “(3) The parent of a child, an appropriate adult or a guardian who has been warned by an inquiry [or a guardian] magistrate to attend proceedings in terms of section 49(2), must attend the proceedings, unless he or she has been exempted in terms of subsection (5).”. 35

### Substitution of section 75 of Act 75 of 2008

41. The following section is hereby substituted for section 75 of the Child Justice Act, 2008: 40

#### **“Sentences [involving] of correctional supervision**

- 75. A child justice court that convicts a child of an offence may impose a sentence [involving] of correctional supervision[—**
- (a) in the case of a child who is 14 years or older, in terms of section 276(1)(h) or (i) of the Criminal Procedure Act; or** 45
- (b) in the case of a child who is under the age of 14 years, in terms of] envisaged in section 276(1)(h) of the Criminal Procedure Act.”.**

### Amendment of section 77 of Act 75 of 2008

42. Section 77 of the Child Justice Act, 2008, is hereby amended—

- (a) by the deletion of subsection (2); 50
- (b) by the substitution for subsection (3) of the following subsection:

“(3) A child who is 14 years or older at the time of being sentenced for the offence [, **and in respect of whom subsection (2) does not apply,**] may only be sentenced to imprisonment, if the child is convicted of an offence referred to in—

- (a) Schedule 3; 5
- (b) Schedule 2, if substantial and compelling reasons exist for imposing a sentence of imprisonment;
- (c) Schedule 1, if the child has a record of relevant previous convictions and substantial and compelling reasons exist for imposing a sentence of imprisonment.”; 10

(c) by the substitution for subsection (4) of the following subsection:

“(4) A child referred to in subsection (3) may be sentenced to a sentence of imprisonment—

- (a) for a period not exceeding 25 years; or
- (b) envisaged in section 276(1)(i) of the Criminal Procedure Act.”; and 15

(d) by the substitution for subsection (5) of the following subsection:

“(5) A child justice court imposing a sentence of imprisonment must **[antedate the term of imprisonment by]** take into account the number of days that the child has spent in prison or a child and youth care centre prior to the sentence being imposed.”. 20

#### Amendment of section 78 of Act 75 of 2008

43. Section 78 of the Child Justice Act, 2008, is hereby amended by the substitution for subsection (1) of the following subsection:

“(1) **[Subject to section 77(2), the]** The provisions of section 297 of the Criminal Procedure Act apply in relation to the postponement or suspension of passing of sentence by a child justice court in terms of this Act.”. 25

#### Amendment of section 85 of Act 75 of 2008

44. Section 85 of the Child Justice Act, 2008, is hereby amended by the substitution for subsection (1) of the following subsection:

“(1) The provisions of Chapter 30 of the Criminal Procedure Act dealing with the review of criminal proceedings in the lower courts apply in respect of all children convicted in terms of this Act: Provided that if a child **[was, at the time of the commission of the alleged offence—**

- (a) **under the age of 16 years; or**
- (b) **16 years or older but under the age of 18 years, and]** has been sentenced to any form of imprisonment **[that was not wholly suspended,]** or any sentence of compulsory residence in a child and youth care centre providing a programme provided for in section 191(2)(j) of the Children’s Act, the sentence is subject to review in terms of section 304 of the Criminal Procedure Act by a judge of the High Court having jurisdiction, irrespective of— 40
  - (a) the duration of the sentence;
  - (b) the period the judicial officer who sentenced the child in question has held the substantive rank of magistrate or regional magistrate;
  - (c) whether the child in question was represented by a legal representative; or
  - (d) whether the child in question appeared before a district court or a regional court sitting as a child justice court.”. 45

#### Amendment of section 87 of Act 75 of 2008

45. Section 87 of the Child Justice Act, 2008, is hereby amended by the addition of the following subsections: 50

“(7) Where the Director-General: Justice and Constitutional Development, in terms of subsection (2), or the Minister, in terms of subsection (3), has issued a certificate of expungement and it subsequently appears that the applicant did not qualify for the expungement of his or her criminal record, the Director-General must— 55

- (a) inform the applicant in writing of the information that has come to his or her attention and that he or she or the Minister intends to revoke the certificate of expungement;
  - (b) afford the applicant an opportunity to furnish compelling written reasons to him or her or the Minister within 90 working days after he or she is informed of the intention to revoke, why his or her record should remain expunged;
  - (c) inform the applicant in writing within 30 working days after a decision is made of—
    - (i) his or her or the Minister's decision; and
    - (ii) the reasons for revoking the certificate of expungement; and
  - (d) inform the head of the Criminal Record Centre of the South African Police Service, in writing within 14 working days after the decision was made, to revoke the certificate of expungement and to reinstate the convictions and sentences in question.
- (8) If the applicant fails to furnish compelling reasons contemplated in subsection (1)(b), the Director-General or Minister, as the case may be, may, subject to the Promotion of Administrative Justice Act, 2000 (Act No. 2 of 2000), revoke the certificate of expungement.
- (9) (a) The Director-General: Justice and Constitutional Development may delegate any power or assign any duty conferred upon or assigned to him or her in terms of subsection (2) to an appropriately qualified official in the employ of the Department of Justice and Constitutional Development at the rank of Deputy Director-General.
- (b) A delegation or assignment in terms of paragraph (a)—
- (i) is subject to any limitation, condition and direction which the Director-General may impose;
  - (ii) must be in writing; and
  - (iii) does not divest the Director-General of the responsibility concerning the exercise of the power or the performance of the duty.
- (c) The Director-General may—
- (i) confirm, vary or revoke any decision taken in consequence of a delegation or assignment in terms of this subsection, subject to any rights that may have accrued to a person as a result of the decision; and
  - (ii) at any time, in writing, withdraw a delegation or assignment.”.

#### **Amendment of section 97 of Act 75 of 2008**

46. Section 97 of the Child Justice Act, 2008, is hereby amended by the substitution for subsection (3) of the following subsection:

- “(3) (a) The Cabinet member responsible for the administration of justice must by notice in the *Gazette*—
- [(a)] (i) determine the persons or the category or class of persons who are competent to conduct the evaluation of the criminal capacity of a child referred to in section 11(3); and
  - [(b)] (ii) in consultation with the Cabinet member responsible for finance, determine the allowances and remuneration of those persons.
- (b) Different categories or classes of persons may be determined for the purposes of the different aspects of development of a child referred to in section 11(2)(b).
- (c) Different allowances and tariffs of remuneration may be determined for the persons referred to in paragraph (a), according to their calling, occupation and stations in life.”.

#### **Substitution of section 100 of Act 75 of 2008**

47. The following section is hereby substituted for section 100 in the Setswana text of the Child Justice Act, 2008:

**“Setlhogo se se khutshwane le tshimilogo**

**100.** Molao ono, o bidiwa [Child Justice Act] Molao wa Bosiamisi wa Ngwana, 2008, mme o simolola go tsengwa tirisong ka kgwedi ya Moranang ngwaga wa 2010, kgotsa letlha lengwe le lengwe pele ga foo, le

le beilweng ke Moporesidente ka go itsise batho semmuso mo Kurenteng ya Molao.”.

#### **Amendment of section 3 of Act 11 of 2009**

**48.** Section 3 of the Reform of Customary Law of Succession and Regulation of Related Matters Act, 2009, is hereby amended by the substitution in subsections (2) and (3) for the expression “2008” wherever it occurs, of the expression “2009”. 5

#### **Short title and commencement**

**49.** (1) This Act is called the Judicial Matters Amendment Act, 2013.

(2) Sections 10 and 11 are deemed to have come into operation on 1 April 2010 and section 48 is deemed to have come into operation on 20 September 2010. 10

(3) Sections 36, 39 and 46 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, 2013

### 1. PURPOSE OF BILL

The primary aim of the Judicial Matters Amendment Bill, 2013 (the “Bill”), is to amend numerous Acts, most of which are administered by the Department of Justice and Constitutional Development (the “Department”) and are intended to address practical and technical issues of a non—contentious nature.

### 2. OBJECTS OF BILL

2.1 Section 29 of the Magistrates’ Courts Act, 1944 (Act No. 32 of 1944) (the “Magistrates’ Court Act”), sets out the causes of action in respect of which magistrates’ courts have jurisdiction in civil matters. Section 29(1)(e) provides that these courts have jurisdiction over actions on or arising out of any credit agreement, as defined in section 1 of the National Credit Act, 2005 (Act No. 34 of 2005) (the “National Credit Act”), with no limit on the amount in dispute. The Afrikaans text of this provision, however, is not in line with the English text and gives the Minister of Justice and Constitutional Development the discretion to place a monetary limit on the amounts over which magistrates’ courts have jurisdiction in disputes of this nature. Clause 1(a) addresses this disparity. Clause 1(b) is consequential in nature.

2.2 On 24 August 2010 the Constitutional Court in the case of *Malachi v Cape Dance Academy International (Pty) Ltd and Others* 2010 (6) SA 1 (CC); 2010 (11) 1116 (CC) (24 August 2010) declared the procedure of arrest *tanquam suspectus de fuga* in terms of section 30(1) and (3) of the Magistrates’ Courts Act to be unconstitutional and invalid. The purpose of the arrest procedure is to prevent a person, who owes a creditor R40 or more, and against whom a creditor intends to institute, or has already instituted, an action, from fleeing from the jurisdiction of the court to avoid or delay payment of the claim. The object of the arrest is not to force the debtor to pay the claim. The object is to ensure that he or she remains within the jurisdiction of the court until the court has given judgment in the matter. The Constitutional Court came to the conclusion that section 30(1) and (3) of the Magistrates’ Courts Act infringes on the right to freedom of a person for no just reason, because—

- (a) the arrest does not necessarily render the debt any more executable than would have been the case had the debtor left the country;
- (b) the impugned provisions severely curtail a person’s fundamental right to freedom;
- (c) the degrading effect of incarceration could not be undone if it is determined that the money is not owed;
- (d) it is inconceivable that imprisonment of a person can ever be justified where liability has not been established, bearing in mind that imprisonment for non-payment of an established debt is unconstitutional; and
- (e) the amount of R40 was minimal.

The proposed amendments in clauses 2 and 3 to sections 30 and 30bis of the Magistrates’ Courts Act respectively, give effect to the Constitutional Court judgment and also increase the prevailing amount of R40 in accordance with the Consumer Price Index (CPIX) to an amount of R2500 (the calculated amount according to the CPIX is R2346-40).

2.3 Clauses 4 and 5 seek to correct textual inaccuracies which are the result of amendments to sections 38 and 73 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977) (the “Criminal Procedure Act”), by Schedule 4 to the Child Justice Act, 2008 (Act No. 75 of 2008) (the “Child Justice Act”).

2.4 Clause 6 amends section 271B of the Criminal Procedure Act which deals with the expungement of certain criminal records. This section provides that a person may apply for the expungement of his or her criminal record if a sentence provided for in section 271B was imposed on him or her and if



certain other criteria have been complied with, which are among others, that a period of 10 years has lapsed since he or she was convicted.

The section, however, does not make provision for the expungement of a criminal record if the person convicted of an offence was a child at the time of the commission of the offence and the court made an order in terms of section 290(1)(a) or (b) of the Criminal Procedure Act. Although section 87 of the Child Justice Act regulates the expungement of certain criminal records of persons who were convicted of offences when they were children, one of the qualifying criteria for expungement under this regime is based on the offence committed and not the sentence imposed.

Section 290 of the Criminal Procedure Act dealing with orders that could be made in the place of penalties in the case of children who had been convicted of offences, was repealed by section 99 of the Child Justice Act. In terms of section 290(1)(a) a court could make an order that the child be placed under the supervision of a probation officer. In terms of section 290(1)(b) a court could make an order that the child be kept in the custody of a suitable person designated by the court in the order. In terms of section 290(1)(d) the court could make an order that the child be referred to a reform school.

In order to come to the relief of persons who were convicted as children and who otherwise qualify to have their records expunged under section 271B of the Criminal Procedure Act, clause 6 seeks to add court orders made under section 290(1)(a) and (b) as sentences that qualify for expungement. It should be noted, however, that an order under section 290(1)(d) is not listed. An order under this provision is a custodial sentence and, as such, does not fall within the scope of the other sentences which qualify for expungement under section 271B.

- 2.5 Clause 7 proposes amendments to section 271C of the Criminal Procedure Act in order to include offences which may automatically be expunged by the Criminal Record Centre of the South African Police Service. These offences are also “apartheid offences” which were put on the Statute Book before the new constitutional dispensation took effect and relate to racial segregation and job reservation.
- 2.6 Clause 8 seeks to insert sections 271DA and 271DB in the Criminal Procedure Act.
  - 2.6.1 The insertion of section 271DA allows the Minister or the Director-General: Justice and Constitutional Development to revoke a certificate of expungement which was erroneously issued. The Director-General is empowered to request the head of the Criminal Record Centre to rectify the information on the person’s criminal record. The amendment is required for the following reasons:
    - (a) The National Register for Sex Offenders in terms of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (Act No. 32 of 2007) (the “Sexual Offences Act”), and the National Child Protection Register in terms of the Children’s Act, 2005 (Act No. 38 of 2005) (the “Children’s Act”), have not been fully implemented yet. In terms of section 271B a person’s criminal record may not be expunged if his or her name appears on either of the Registers. It might happen that a certificate of expungement is issued in respect of a person whose name is entered in one of those Registers at a later stage.
    - (b) At the time an applicant applies for a certificate of expungement of a criminal record, his or her criminal record might not have been updated by the Criminal Record Centre, or the applicant may have withheld information on a pending criminal case against him or her.
    - (c) A certificate of expungement might have been issued due to incorrect information or advice or the offence was not an offence

referred to in section 271C(1) or (2) of the Criminal Procedure Act.

- 2.6.2 In terms of the proposed section 271DB the Director-General may delegate any power or assign any duty conferred on or assigned to him or her in terms of section 271B(2) or (3) or 271C(3) or (4) to an appropriately qualified employee of the Department of Justice and Constitutional Development holding the rank of Deputy Director-General. This amendment is necessary in light of the many expungement applications that have been received by the Department.
- 2.7 Clauses 9, 10, 11 and 12 seek to correct textual inaccuracies which are the result of amendments to sections 276A, 309, 309B and 309D of the Criminal Procedure Act by Schedule 4 to the Child Justice Act. In these instances the consequential amendments to the Criminal Procedure Act in the said Schedule 4 did not incorporate amendments by the Criminal Law (Sentencing) Amendment Act, 2007 (Act No. 38 of 2007) (the “Sentencing Act”), and the Sexual Offences Act in the provisions of the Criminal Procedure Act in question.
- 2.8 Clauses 13 to 18 amend the Attorneys Act, 1979 (Act No. 53 of 1979) (the “Attorneys Act”). The board of control (the “board”) of the Attorneys Fidelity Fund (the “Fund”) requested the proposed amendments due to the constantly increasing number of theft by attorneys. The board wants to be able to act proactively to prevent damage, rather than only be obliged to pay out after the fact.
  - 2.8.1 Section 28 of the Attorneys Act provides that the board of control consists of the serving presidents of all societies and three members of each society, elected annually by the council of the society. “Society” is defined in section 1 of the Attorneys Act as any one of the four provincial law societies. The tenure of the presidents of the societies differs from law society to law society, but ranges from a year to two years. This has tended to accelerate the turnover of the membership of the Fund’s board of control. The application of section 28 in terms of which three members must be elected annually by each society sometimes leads to the situation where the board has new members every year. However, the high turnover is linked to the requirement that the presidents of the societies are members. The Fund spends money and time training its board members, who often serve for a short period, and when new members are elected the process of training must be started afresh. This is not only wasted expenditure, but the loss of these members constitutes a loss of institutional knowledge. The Fund requested that section 28(1) of the Attorneys Act be amended to repeal the requirement that the presidents of the societies must automatically become board members, as well as the requirement that three members are annually elected by the societies. Clause 13 proposes that section 28(1) should merely refer to four members per provincial law society, instead of referring to the presidents and three members. The amendment will lead to a measurable longevity of the board membership.
  - 2.8.2 The Fund’s board of control resolved in February 2011 to adopt the King Code 3 recommendation of having a board member serving a term of at least three years, which is renewable for one additional term only. Clause 14 seeks to substitute section 29 of the Attorneys Act to provide for this. At present section 29 provides that an elected member of the board holds office until his or her successor is elected.
  - 2.8.3 Clause 15 seeks to insert a new section 46A in the Attorneys Act to provide for specific powers of the board of control. The board requested these provisions to enhance its operational functions and to be able to act proactively. Section 76 of the Attorneys Act provides that

a law society may institute a private prosecution for an offence in terms of the Act or its regulations. The board requested that it also have this power, as it often happens that a society does not institute a criminal case against an attorney. This increases the risk the Fund faces, as an attorney might persist with, or repeat, his or her criminal activities, thereby exposing the Fund to claims. The proposed new section 46A provides that the board of control may, on written notice to the law society of the province concerned, institute a private prosecution for the misappropriation or theft of property or trust money, and that the provisions of section 8 of the Criminal Procedure Act and any other law relating to private prosecutions will apply to such prosecution as if the board of control is a public body. Section 8 of the Criminal Procedure Act deals fully with the procedure relating to private prosecutions, and it is unnecessary to duplicate it in the Bill.

- 2.8.4 Clause 16 amends section 48 of the Attorneys Act by the addition of subsection (3) to provide that the board of control may delegate to any of its employees the duty, subject to conditions that may be imposed by the board of control, to consider any claim against the Fund. Clause 16 seeks to enhance organizational efficiency, as the current process where the board of control must consider all claims is ineffective.
- 2.8.5 Section 78(8) of the Attorneys Act provides that the Court may, on application made by the society of the province concerned prohibit a practitioner from operating in any way on his or her trust account, and may appoint a *curator bonis* to control and administer such trust account. At the request of the board clause 17 seeks to amend section 78(8) of the Act to provide that the Fund may also apply for this remedy, in consultation with the law society of the province concerned. According to the board some law societies often take a long time after they have been alerted to irregularities to bring an application to “freeze” an attorney’s trust account, during which time the Fund’s exposure is increased.
- 2.8.6 Clause 18 substitutes the words “chairman”, “vice-chairman” and “chairman’s”, on the one hand, and the words “he”, “him”, “his”, “himself” and “he or his”, on the other hand, wherever they appear in the Attorneys Act, with the gender-neutral words of “chairperson”, “vice-chairperson” and “chairperson’s” and “he or she”, “him or her”, “his or her”, “himself or herself” and “he or his or she or her”, respectively, except where the latter already occur in that Act.
- 2.9 Clause 19 proposes an amendment to section 9 of the Small Claims Courts Act, 1984 (Act No. 61 of 1984), in order to enable a commissioner who was appointed for a specific small claims court to also preside over cases in other small claims courts within the province. In some districts no persons are willing to serve as commissioners, especially in the rural areas. The only option is to appoint a commissioner on an *ad hoc* basis, which is time consuming and delays the process. The proposed amendment will greatly improve access to justice.
- 2.10 In terms of the Judicial Service Commission Act, 1994 (Act No. 9 of 1994) (the “JSC Act”), the Chief Justice is the Chairperson of both the Judicial Service Commission (the “JSC”) and the Judicial Conduct Committee (the “JCC”). Section 14 of the JSC Act provides that complaints against judges may be lodged with the Chairperson of the JCC. With regard to impeachable complaints, if the Chairperson is satisfied that a complaint is likely to lead to a finding that the respondent (*judge*) suffers from incapacity, is grossly incompetent or is guilty of gross misconduct, the Chairperson must refer the complaint to the JCC to consider whether it should recommend to the JSC that the complaint should be investigated and reported on by a Tribunal.

- 2.10.1 If the Chairperson refers the complaint to the JCC, he or she must determine a time for the JCC to meet and consider the complaint. If, at this meeting the JCC finds that the complaint, if established will *prima facie* indicate incapacity, gross incompetence or gross misconduct by the respondent, the JCC may refer the complaint to the Chairperson for an inquiry or recommend to the JSC that the complaint should be investigated by a Tribunal. Following this recommendation, the JSC must request the Chief Justice to appoint a Tribunal. The JSC Act envisages that the Chairperson has to participate in all these various phases up until the appointment of the Tribunal. The Chief Justice is also expected to sit in the JCC when considering appeals.
- 2.10.2 Section 8(3) of the JSC Act provides that the Chairperson of the JCC may delegate any of his or her powers or functions to the Deputy Chief Justice. The Act does not provide for a situation where the Deputy Chief Justice is unavailable.
- 2.10.3 The role of the Chief Justice under the JSC Act generally and specifically with regard to the provisions of section 16(1)(a) of the JSC Act, is that the Chief Justice is the Chairperson of the JCC and also the chairperson of the JSC. Any decision that the JSC may take may be challenged as the Chairperson of the JCC, who would have referred the matter for a decision to the JSC, is also the Chairperson of the JSC.
- 2.10.4 The JSC Act only provides for the Chief Justice or the Deputy Chief Justice to chair the meetings of the JCC. The view is held that it may in certain circumstances be undesirable for the Chief Justice to be the chairperson of the JCC and it is further felt that the JSC Act should address the situation where both the Chief Justice and Deputy Chief Justice are absent from a JCC meeting.
- 2.10.5 Clause 20 proposes the amendment of section 8 of the JSC Act. Section 8(3) of the JSC Act provides that the Chairperson of the JCC may delegate any of his or her powers or functions to the Deputy Chief Justice. It is proposed that this provision be amended so that the Chief Justice appoints an acting Chairperson as set out in the proposed new section 9(4) discussed in paragraph 2.10.6 below. The Chief Justice's involvement in the activities of the JCC may, at times, be difficult due to his or her many other responsibilities.
- 2.10.6 The JSC Act does not provide for a situation where the Deputy Chief Justice is unavailable. Clause 21 proposes that a new subsection (4) be added in section 9 of the JSC Act to provide for the following different scenarios—
- (a) for the Deputy Chief Justice to act as Chairperson of the JCC in the absence of the Chief Justice;
  - (b) in the absence of both the Chief Justice and the Deputy Chief Justice, for the Chief Justice to nominate one of the members of the JCC as acting Chairperson; or
  - (c) where the Chief Justice has not nominated an acting Chairperson and the Deputy Chief Justice is also absent from the meeting, for the members of the JCC to elect a Chairperson from their number.
- 2.10.7 Clause 22 provides for an amendment to section 14(1) of the JSC Act by providing that the Chairperson may refer a complaint about a judge to the Deputy Chief Justice to deal with in terms of the provisions of the Act, with the understanding that the Deputy Chief Justice assumes the role of the chairperson in respect of that complaint. This amendment is proposed especially in light of the workload of the Chief Justice.

- 2.10.8 Clause 23 provides for the deletion of paragraph (b) of section 18(2) from the JSC Act, which is a consequential amendment to the addition of section 9(4) by clause 21.
- 2.10.9 Clauses 24 and 25 correct textual errors in sections 19(3) and 34(1) of the JSC Act.
- 2.10.10 Clause 26 corrects a textual error in section 35(1)(a) of the JSC Act, and also provides that the Minister may make regulations regarding witness fees for witnesses attending the JCC or a Tribunal, by the insertion of a new subparagraph (1)(c). Section 25(1) of the JSC Act provides that the Chief Justice must make rules, regulating the procedure before a Tribunal. Rules were made for this purpose. Section 30 of the JSC Act provides that a witness may be subpoenaed to appear before a Tribunal. Section 17(5), *inter alia*, makes section 30 applicable to enquiries before a JCC. No provision is made in the JSC Act for the payment of witness fees and reimbursement of expenses. Clause 26 seeks to address this *lacuna*.
- 2.11 Clauses 27, 43 and 44 seek to give effect to the Constitutional Court's order in *Centre for Child Law v Minister of Justice and Constitutional Development and Others* 2009 (2) SACR 477 (CC); 2009 (6) SA 632 (CC); 2009 (11) BCLR 1105 (CC) (15 July 2009). In this case the Constitutional Court declared certain provisions of section 51 of the Criminal Law Amendment Act, 1997 (Act No. 105 of 1997) (the "Minimum Sentences Act") to be inconsistent with the Constitution and invalid to the extent that they apply to persons who were under 18 years of age at the time of the commission of the offence. Clause 27 proposes amendments to section 51 of the Minimum Sentences Act by excluding an accused person who was under the age of 18 years at the time of the commission of an offence from its operation. Clauses 42 and 43 propose consequential amendments to sections 77 and 78 of the Child Justice Act, respectively.
- 2.12 Clauses 28, 29 and 30 seek to give effect to the Constitutional Court judgment in the case of *Brümmer vs Minister of Social Development and Others* 2009 (6) SA 323 (CC); 2009 (11) BCLR 1075 (CC) (13 August 2009). The Constitutional Court came to the conclusion that the time periods prescribed by sections 77(5)(c) and 78(2) of the Promotion of Access to Information Act, 2000 (Act No. 2 of 2000) ("PAIA"), are unconstitutional.

The Court was of the view that before a litigant can launch an application to court, the litigant must go through a number of steps, including the consideration of the reasons given for the refusal of access to information and the need to seek legal advice on whether a court application will be successful, as well as the need to raise funds for litigation. In order to do this meaningfully, litigants must be given an adequate and fair opportunity. The Court held that the 30 day period prescribed by section 78(2) and the 30 day and 60 day periods by section 77(5)(c) limit the right of access to court as well as the right of access to information, which is not reasonable nor justifiable. In terms of the judgment—

- (a) Parliament must enact legislation that prescribes a time limit that is consistent with the Constitution, bearing in mind the right of access to information and the right of access to court; and
- (b) pending the enactment of this legislation, a person who wishes to challenge the refusal of a request for access to information must lodge an application to court within 180 days of being notified of a decision of an internal appeal refusing access to information.

The Court was also of the view that there should be flexibility so that courts can condone non-compliance with the 180 day time limit where the interests of justice so require, which clause 30 seeks to do by amending PAIA.

- 2.13 Clause 31 seeks to insert section 128A into the Children's Act and clause 32 seeks to amend the Table of Contents to that Act. If the name of a person has been included in the National Child Protection Register as a result of a conviction for an offence provided for in the Children's Act, such person does not qualify for the expungement of his or her criminal record in terms of section 271B of the Criminal Procedure Act. The amendments will enable the Director-General: Justice and Constitutional Development to establish whether there is compliance with section 271B of the Criminal Procedure Act when considering an application for the expungement of criminal records.
- 2.14 In similar vein to clauses 31 and 32 referred to above, clause 33 seeks to insert section 44A into the Sexual Offences Act in order to give the Director-General: Justice and Constitutional Development the power to obtain particulars from the Registrar of the National Register for Sex Offenders regarding a person whose name appears on the National Register for Sex Offenders for the purposes of processing applications for the expungement of criminal records in terms of section 271B of the Criminal Procedure Act.
- 2.15 Clause 35 consequentially amends the Index to the Act in order to accommodate the amendments referred to paragraph 2.14 above.
- 2.16 Clause 34 seeks to delete section 66(2)(a)(ix) of the Sexual Offences Act. In terms of section 66(2) the National Director of Public Prosecutions must issue directives regarding a number of matters, among others, directives in respect of the manner in which prosecutors must ensure that court orders directing that a person's name be entered in the National Register for Sex Offenders are forwarded to and received by the Registrar of the Register. This provision amounts to a duplication of duties since section 50(3) of the Act already places an obligation on the Registrar of the High Court or the clerk of the magistrate's court to forward these court orders to the Registrar of the National Register.
- 2.17 Clauses 36 and 46 propose amendments to sections 11 and 97 of the Child Justice Act, respectively, dealing with the proof of criminal capacity of children who are 10 years or older but under the age of 14 years and who are alleged to have committed an offence. In terms of section 11(2), an inquiry magistrate or child justice court, when making a decision regarding the criminal capacity of a child, must consider the assessment report of the probation officer and all other evidence placed before the court, which may include a report of an evaluation done by a suitably qualified person referred to in section 11(3).

In terms of section 11(3), an inquiry magistrate or child justice court may on its own accord or at the request of the prosecutor or the child's legal representative, order an evaluation of the child's criminal capacity by a suitably qualified person which must include an assessment of the cognitive, moral, emotional, psychological and social development of the child.

In terms of section 97(3), the Cabinet member responsible for the administration of justice must determine the persons or category or class of persons who are competent to conduct the evaluation of the criminal capacity of children in accordance with section 11(3).

After thorough consultation with all roleplayers, the Minister of Justice and Constitutional Development determined that psychiatrists and clinical psychologists are competent to conduct the evaluations.

The Department of Health has, however, indicated that psychiatrists and clinical psychologists are not able to assess the moral development of a child and are only equipped to assess the cognitive, emotional, psychological and social development of a child.

The amendments proposed in clause 36 therefore require the inquiry magistrate or child justice court to consider the cognitive, moral, emotional, psychological and social development of the child on the basis of all evidence placed before the court, including the report of the person appointed to evaluate the criminal capacity of the child, if such an order is made. A new subclause (4A) is proposed to regulate the handing in of the report during court proceedings, setting out how the report is to be dealt with if all parties agree with its findings and also how the report is to be dealt with if its findings are disputed by any of the parties.

Clause 46 seeks to consequentially amend section 97 of the Child Justice Act and provides that different categories or classes of persons may be determined for the purposes of the different aspects of development of a child referred to in the amended section 11(2)(b). It also provides that the Minister may determine different allowances and tariffs of remuneration for the different categories or classes of persons who do the assessments.

- 2.18 Clause 37 seeks to amend section 28 of the Child Justice Act which deals with the protection of children in police custody. Section 28(2)(a) provides that if there is a complaint about any injury to a child or that a child is severely traumatised, this must be reported to the station commander. Section 28(2)(b) requires the report to the station commander to be submitted to the National Commissioner of Police.

The amendment seeks to address a concern raised by the Select Committee on Security and Constitutional Development (National Council of Province) regarding reporting lines in the South African Police Service. The view was expressed that the report should be submitted to the Provincial Commissioner and that a copy thereof should be submitted to the National Commissioner.

- 2.19 Clause 38 proposes an amendment to section 43 of the Child Justice Act, which section deals with the nature and objectives of a preliminary inquiry. After the Act was implemented on 1 April 2010, a number of roleplayers raised the question whether preliminary inquiries should be conducted in the court which will eventually adjudicate on the matter if it proceeds to trial (that is either in the district court, regional court or High Court) or whether all preliminary inquiries should rather be conducted in the district courts. Although the Act is silent on the matter and while it was accepted that preliminary inquiries should be conducted in the court at which the trial would eventually take place, it is proposed that preliminary inquiries should be conducted at district court level.

The reason why this is proposed is that such an arrangement would facilitate the establishment of a trained and dedicated pool of functionaries (magistrates, prosecutors, police officials and probation officers) who are equipped to deal with preliminary inquiries at a central point. Preliminary inquiries are moreover akin to the proceedings in terms of section 119 of the Criminal Procedure Act in terms of which certain serious offences are initiated in the district courts, pending their readiness to proceed to trial in the High Courts.

Clause 38 seeks to give effect to this practical arrangement.

- 2.20 Clause 39 seeks to allow the Minister of Social Development to delegate certain of the powers contained in section 56 of the Child Justice Act to the provincial level. Section 56 confers a number of powers on and assigns a number of duties to the Minister of Social Development relating to the accreditation of diversion programmes and diversion service providers. The Minister must develop and table in Parliament a policy framework and system for accreditation, which has already been done. The Minister must thereafter invite applications for accreditation, consider the applications and issue certificates of accreditation to the successful applicants. Because welfare services falls within functional areas of concurrent national and provincial competence in terms of Part A of Schedule 4 to the Constitution, the Minister

of Social Development has requested an amendment to section 56 in order to allow him or her to delegate his or her powers in terms of section 56 to the provincial level to facilitate the successful implementation of the accreditation process. The implementation of the policy framework for accreditation of diversion services will essentially take place in the provinces which also have the budgets to fund the programmes and service providers.

- 2.21 Clause 40 seeks to correct a textual inaccuracy in section 65(3) of the Child Justice Act.
- 2.22 Clause 41 substitutes section 75 of the Child Justice Act which currently provides that a child justice court that convicts a child of any offence may impose a sentence involving correctional supervision—
- (a) in the case of a child who is 14 years or older, in terms of section 276(1)(h) or (i) of the Criminal Procedure Act; or
  - (b) in the case of a child who is under 14 years, in terms of section 276(1)(h) of the Criminal Procedure Act.

Section 276 of the Criminal Procedure Act sets out sentences a court may impose upon a convicted person. Section 276(1)(h) refers to “correctional supervision” and section 276(1)(i) refers to “imprisonment from which such a person may be placed under correctional supervision in the discretion of the Commissioner or a parole board”. The reference to the two categories of correctional supervision in section 75 of the Child Justice Act is thus incorrect. Clause 41 seeks to address this. The amendment proposed to section 75 requires a consequential amendment to section 77 of the Child Justice Act. Clause 42(c) proposes an amendment to section 77(4) of the Child Justice Act in order to accomplish the required consequential amendment.

- 2.23 Clauses 42 and 43 propose amendments to sections 77 and 78(1) of the Child Justice Act and the amendments are discussed in paragraphs 2.11 and 2.22 above.

- 2.24 Clause 44 seeks to amend section 85 of the Child Justice Act which deals with automatic reviews in certain cases.

- 2.24.1 Section 85(1) provides that Chapter 30 of the Criminal Procedure Act dealing with the review of criminal proceedings in the lower courts applies in respect of all children who are convicted of an offence under the Child Justice Act. It, however, goes on to provide that if the child, at the time of the commission of the offence, was—
- (a) under the age of 16 years; or
  - (b) 16 years or older but under the age of 18 years, and has been sentenced to any form of imprisonment that was not wholly suspended or any sentence of compulsory residence in a child and youth care centre,
- the sentence is subject to automatic review in terms of section 304 of the Criminal Procedure Act by a judge of the relevant Division of the High Court, irrespective of the duration of the sentence.

- 2.24.2 Chapter 30 and, more specifically, section 302(1) of the Criminal Procedure Act, provides that where a magistrate’s court imposes a sentence of imprisonment, including detention in a child and youth care centre, which exceeds three months if imposed by a judicial officer who has not held the substantive rank of magistrate for a period of seven years or which exceeds six months if imposed by a judicial officer who has held the substantive rank of magistrate for a period of seven years or longer, the matter is subject to automatic review by a judge in the relevant Division of the High Court in terms of section 304 of the Criminal Procedure Act. Section 302(3), in turn, provides that a matter is not subject to automatic review if the accused was represented by a legal representative in the trial court.



2.24.3 The following questions regarding the application of section 85(1) have arisen which have resulted in a number of special review cases where magistrates themselves have submitted their decisions to the High Courts in order to obtain clarity on the application of section 85(1):

- (a) Whether sentences imposed in regional courts are subject to automatic review;
- (b) whether matters are subject to automatic review in the case where the accused was legally represented; and
- (c) whether non-custodial sentences in the case of children under the age of 16 years should be subject to automatic review.

2.24.4 The outcome of most of the special review cases referred to above is that, because the Child Justice Act is intended to put in place special protective measures for children in trouble with the law as envisaged in section 28 of the Constitution, there is a need to ensure a high degree of scrutiny over sentences imposed on child offenders and therefore that matters emanating from regional courts and matters where children were legally represented should be subject to automatic review. What the courts have not pronounced on is whether non-custodial sentences in the case of children under the age of 16 years should be subject to automatic review. It is suggested that it is not necessary to subject a matter in which a non-custodial sentence has been imposed to automatic review.

Clause 44 is intended to clarify the above uncertainties.

2.25 Clause 45 seeks to amend section 87 of the Child Justice Act which deals with the expungement of certain criminal records of children. The amendments proposed to section 87 are similar to those proposed in clause 8 which also deal with expungements of certain criminal records.

The proposed new section 87(7) and (8) provides that the Minister or the Director-General: Justice and Constitutional Development may revoke a certificate of expungement which was erroneously issued. The Director-General is empowered to request the head of the Criminal Record Centre to rectify the information on the person's criminal record.

The proposed new section 87(9) provides that the Director-General may delegate any power or assign any duty conferred on or assigned to him or her in terms of section 87(2) to an appropriately qualified official in the employ of the Department of Justice and Constitutional Development at the rank of Deputy Director-General.

2.26 Clause 46 proposes an amendment to section 97 of the Child Justice Act and is discussed in paragraph 2.17 above.

2.27 Clause 47 seeks to address a textual inaccuracy in section 100 of the Setswana text of the Child Justice Act.

2.28 Clause 48 seeks to effect textual corrections to section 3 of the Reform of Customary Law of Succession and Regulation of Related Matters Act, 2009 (Act No. 11 of 2009).

2.29 Clause 49 deals with the short title and the coming into operation of the Act, once the Bill becomes an Act of Parliament after it has been assented to and signed by the President of the Republic.

### **3. FINANCIAL IMPLICATIONS**

There are no additional financial implications foreseen in the implementation of the Bill.

### **4. DEPARTMENTS AND PARTIES CONSULTED**

- 4.1 The Bill was submitted to the Chief Justice, respective Judges President, magistrates, Magistrates Commission, Law Society of South Africa, General Council of the Bar, various Bar Councils, Chief Family Advocate, NADEL, BLA, Centre for Child Law, South African Police Service and the National Director of Public Prosecutions, for comments. The Bill was also made available on the Website of the Department together with a document explaining the objects of the Bill and which invited the public to comment on the Bill.
- 4.2 Comments were received from the Tshwaranang Advocacy Centre, Chief Directorate: Legal Administration within the Department of Justice and Constitutional Development, National Prosecuting Authority of South Africa, South African Police Service, Cape Bar Council, Bell Dewar Attorneys on behalf of Avusa Media Limited, Law Society of South Africa, Aids Law Project, Commission for Gender Equality, Magistrate: Wynberg, Centre for Child Law and the Magistrate: Tembisa, which had been accommodated where possible.
- 4.3 The amendments proposed to the JSC Act and the Attorneys Act had been requested by the Office of the Chief Justice and the board of the Fund, respectively.

### **5. PARLIAMENTARY PROCEDURE**

- 5.1 The Department of Justice and Constitutional Development and the State Law Advisers are of the opinion that the Bill must be dealt with in accordance with the procedure established by section 75 of the Constitution since it contains no provision to which the procedure set out in section 74 or 76 of the Constitution applies.
- 5.2 The State Law Advisers are of the opinion that it is not necessary to refer the Bill to the National House of Traditional Leaders in terms of section 18(1)(a) of the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003), since it does not contain provisions pertaining to customary law or customs of traditional communities.