REPUBLIC OF SOUTH AFRICA

JUDICIAL MATTERS SECOND AMENDMENT BILL

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

(MINISTER FOR JUSTICE AND CONSTITUTIONAL DEVELOPMENT)

[B 41B—2003]

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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 Administration Amendment Act, 1929, so as to eliminate any uncertainty relating to the appointment of presiding officers of Divorce Courts in an acting, temporary or permanent capacity; to amend the Insolvency Act, 1936, so as to further regulate agreements providing for termination and netting of certain unperformed obligations and obligations in respect of assets transferred as collateral security in the event of sequestration; to amend the Prevention of Counterfeiting of Currency Act, 1965, so as to make further provision regarding the evidentiary burden of proof on an accused person; to amend the Criminal Procedure Act, 1977, so as to ensure the consideration of a pre-trial services report in respect of bail proceedings; to further regulate correctional supervision as a sentencing option in certain circumstances; to make provision for a complainant to make representations with regard to the placement of accused persons on parole and to set out the duties of such complainant; and to make provision for the submission of a report to Parliament containing certain particulars in respect of accused persons whose trials have not commenced and who have been in custody for a particular period of time; to amend the Attorneys Act, 1979, so as to provide for the mandatory attendance of a legal practice management course by certain attorneys; to amend the Divorce Act, 1979, so as to make further provision regarding pension benefits in respect of the division of assets and maintenance of parties; to amend the Sheriffs Act, 1986, so as to effect a change of name; to amend the Mediation in Certain Divorce Matters Act, 1987, so as to prescribe the circumstances in which a Family Advocate may intervene in maintenance and domestic violence proceedings; to amend the Maintenance Act, 1998, so as to provide for the consideration by a court of the report and recommendations of a Family Advocate at a maintenance enquiry; to further regulate the payment of a maintenance benefit by a third party; and to extend maintenance orders by including maintenance orders made by High Courts and Divorce Courts in certain circumstances; to amend the Domestic Violence Act, 1998, so as to provide for the consideration by a court of the report and recommendations of a Family Advocate; to amend the Promotion of Access to Information Act, 2000, so as to extend the period within which the South African Human Rights Commission must compile a guide to assist persons who wish to gain access to information; to make provision regarding the exclusion of the Judicial Service Commission from the application of that Act in certain circumstances; to extend the period of time within which the rules of procedure must be made; to further regulate the institution of legal proceedings in terms of the Act in a court; to make provision regarding the failure to comply with certain provisions of the Act; and to sanction the punishment for failure to comply with certain regulations; to amend the Promotion of Administrative Justice Act, 2000, so as to adapt the definition of "administrative action"; to

extend the period of time within which the rules of procedure for judicial review must be made; and to further regulate the institution of legal proceedings in terms of the Act in a court; to amend the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000, so as to further regulate the publication of a notice altering the boundaries of an equality court; and to make provision for the delegation of certain powers; to amend the Cross-Border Insolvency Act, 2000, so as to regulate the position of legal proceedings when a notice designating a State for the purposes of that Act is withdrawn; to amend the Judges' Remuneration and Conditions of Employment Act, 2001, so as to address a technical problem during the enactment of the Judicial Officers (Amendment of Conditions of Service) Act, 2003; and to make provision regarding pensions paid to retired judges and to surviving spouses of retired judges; to amend the Judicial Officers (Amendment of Conditions of Service) Act, 2003, so as to address a technical problem during the enactment of that Act; and to provide for matters connected therewith.

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

Amendment of section 10 of Act 9 of 1929, as amended by section 5 of Act 42 of 1942, section 27 of Act 56 of 1949, section 26 of Act 54 of 1952, section 2 of Act 34 of 1986, section 1 of Act 51 of 1991, section 1 of Act 65 of 1997 and section 1 of Act 42 of 2001

1. Section 10 of the Administration Amendment Act, 1929, is hereby amended —

(a) by the substitution in subsection (3) for paragraph *(b)* of the following paragraph:

"*(b)* A division of the court—

(i) shall consist of one or more presiding officers, one of whom shall be the president of the division, who shall be fit and proper persons appointed by the Minister of Justice in a permanent capacity after consultation with the Magistrates Commission[,]; and

(ii) such persons shall for the purposes of the Magistrates Act, 1993 (Act No. 90 of 1993), be deemed to be magistrates of a regional division as contemplated in the Magistrates' Courts Act, 1944 (Act No. 32 of 1944).''; and

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

"(3A) Section 9 of the Magistrates' Courts Act, 1944 (Act No. 32 of 1944), relating to the appointment of magistrates in an acting or temporary capacity is applicable with the changes required by the context in respect of the appointment of acting or temporary presiding officers of Courts established under this section.".

Substitution of section 35B of Act 24 of 1936, as inserted by section 1 of Act 32 of 1995

2. The following section is hereby substituted for section 35B of the Insolvency Act, 1936:

"Agreements providing for termination and netting

35B. (1) Notwithstanding any rule of the common law to the contrary, all unperformed obligations arising out of one or more master agreements between the parties, or obligations arising from such agreement or agreements in respect of assets in which ownership has been transferred as collateral security, shall, upon the sequestration of the estate of a party to such master agreement, terminate automatically at the date of sequestration, the values of those obligations shall be calculated at market value as at that date, the values so calculated shall be netted and the net amount shall be payable.

(2) For purposes of this section "master agreement" means—

(a) an agreement in accordance with standard terms published by the International Swaps and Derivatives Association, the International Securities Lenders Association, the Bond Market Association or the International Securities Market Association, or any similar agreement, which provides that, upon the sequestration of one of the parties—

(i) all unperformed obligations of the parties in terms of the agreement—

(aa) terminate or may be terminated; or

(bb) become or may become due immediately; and

(ii) the values of the unperformed obligations are determined or may be determined; and

(iii) the values are netted or may be netted, so that only a net amount (whether in the currency of the Republic or any other currency) is payable to or by a party,

and which may further provide that the values of assets which have been transferred as collateral security for obligations under that agreement shall be included in the calculation of the net amount payable upon sequestration; or

(b) any agreement declared by the Minister, after consultation with the Minister of Finance, by notice in the *Gazette* to be a master agreement for the purposes of this section.

(3) The provisions of this section shall not apply to—

(a) a transaction contemplated in section 35A; or

(b) a netting arrangement contemplated in the National Payment System Act, 1998 (Act No. 78 of 1998).

(4) Section 341(2) of the Companies Act, 1973 (Act No. 61 of 1973), and sections 26, 29 and 30 of this Act shall not apply to dispositions in terms of a master agreement.".

Amendment of section 4 of Act 16 of 1965, as amended by section 4 of Act 18 of 1996

3. Section 4 of the Prevention of Counterfeiting of Currency Act, 1965, is hereby amended by the substitution for subsection (2) of the following subsection:

"(2) If in any prosecution for a contravention of paragraph *(d)*, *(j)* or *(l)* of section **[*two*]** 2 the question arises whether any person had lawful authority or excuse for possessing or doing any thing referred to in the said paragraphs, **[the onus of proving that such was the case shall be on the accused]** in the absence of evidence to the contrary which raises reasonable doubt, proof of possession or conduct contemplated in the said paragraphs *(d)*, *(j)* and *(l)* shall be sufficient evidence of the absence of lawful authority or excuse.".

Amendment of section 60 of Act 51 of 1977, as substituted by section 3 of Act 75 of 1995 and amended by section 4 of Act 85 of 1997, section 5 of Act 34 of 1998 and section 9 of Act 62 of 2000

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

"(2A) The court must, before reaching a decision on the bail application, take into consideration any pre-trial services report regarding the desirability of releasing an accused on bail, if such a report is available.".

Amendment of section 276 of Act 51 of 1977, as amended by section 3 of Act 107 of 1990, section 41 of Act 122 of 1991, section 18 of Act 139 of 1992, section 20 of Act 116 of 1993, section 2 of Act 33 of 1997 and section 34 of Act 105 of 1997

5. Section 276 of the Criminal Procedure Act, 1977, is hereby amended by the substitution for subsection (3) of the following subsection:

"(3) Notwithstanding anything to the contrary in any law contained, other than the Criminal Law Amendment Act, 1997 (Act No. 105 of 1997), the provisions of subsection (1) shall not be construed as prohibiting the court—

(a) from imposing imprisonment together with correctional supervision; or

(b) from imposing the punishment referred to in subsection (1)*(h)* or *(i)* in respect of any offence, whether under the common law or a statutory provision, irrespective of whether the law in question provides for such or any other punishment: Provided that any punishment contemplated in this paragraph may not be imposed in any case where the court intends imposing a sentence contemplated in section 51(1) or (2), read with section 52, of the Criminal Law Amendment Act, 1997.".

Insertion of section 299A in Act 51 of 1977

6. The following section is hereby inserted in the Criminal Procedure Act, 1977, after section 299:

"Right of complainant to make representations in certain matters with regard to placement on parole, on day parole, or under correctional supervision

299A. (1) When a court sentences a person to imprisonment for—

(a) murder or any other offence which involves the intentional killing of a person;

(b) rape;

(c) robbery where the wielding of a fire-arm or any other dangerous weapon or the infliction of grievous bodily harm or the robbery of a motor vehicle is involved;

(d) assault of a sexual nature;

(e) kidnapping; or

(f) any conspiracy, incitement or attempt to commit any offence contemplated in paragraphs *(a)* to *(e)*,

it shall inform—

(i) the complainant; or

(ii) in the case of murder or any other offence contemplated in paragraph *(a)*, any immediate relative of the deceased,

if he or she is present that he or she has a right, subject to the directives issued by the Commissioner of Correctional Services under subsection (4), to make representations when placement of the prisoner on parole, on day parole or under correctional supervision is considered or to attend any relevant meeting of the parole board.

(2) If the complainant or a relative intends to exercise the right contemplated in subsection (1) by making representations to or attending a meeting of the parole board, he or she has a duty—

(i) to inform the Commissioner of Correctional Services thereof in writing;

(ii) to provide the said Commissioner with his or her postal and physical address in writing; and

(iii) to inform the said Commissioner in writing of any change of address.

(3) The Commissioner of Correctional Services shall inform the parole board in question accordingly and that parole board shall inform the complainant or relative in writing when and to whom he or she may make representations or when and where a meeting will take place.

(4) *(a)* The Commissioner of Correctional Services must issue directives regarding the manner and circumstances in which a complainant or relative contemplated in subsection (1) may exercise the right contemplated in that subsection.

(b) Directives issued under paragraph *(a)* must be published in the *Gazette*.

(c) Before the directives issued under paragraph *(a)* are published in the *Gazette*, the Commissioner of Correctional Services must submit them to Parliament, and the first directives so issued, must be submitted to Parliament within three months of the commencement of this section.

(d) Any directive issued under paragraph *(a)* may be amended or withdrawn in like manner.".

Amendment of section 342A of Act 51 of 1977, as inserted by section 13 of Act 86 of 1996

7. Section 342A of the Criminal Procedure Act, 1977, is hereby amended by the addition of the following subsection:

"(7) *(a)* The National Director of Public Prosecutions must, within 14 days after the end of January and of July of each year, submit a report to the Cabinet member responsible for the administration of justice, containing the particulars indicated in the Table of Awaiting Trial Accused in respect of each accused whose trial has not yet commenced in respect of the leading of evidence, as contemplated in section 150 and who, by the end of the month in question, has been in custody for a continuous period exceeding—

(i) 18 months from date of arrest, where the trial is to be conducted in a High Court;

(ii) 12 months from date of arrest, where the trial is to be conducted in a regional court; and

(iii) six months from date of arrest, where the trial is to be conducted in a magistrate's court.

(b) The Cabinet member responsible for the administration of justice must, within 14 days of receipt of a report contemplated in paragraph *(a)*, table such report in Parliament.

Table of Awaiting Trial Accused

Court and case number	Name and age of accused	Particulars of charge*(s)*	Period in detention	Number of court appearances	Date of next court appearance	Reasons why trial has not commenced	Whether bail has been granted and if so, the conditions of bail".

Insertion of section 13B in Act 53 of 1979

8. The following section is hereby inserted in the Attorneys Act, 1979, after section 13A:

"**Certain attorneys to complete training in legal practice management**

13B. After the commencement of the Judicial Matters Second Amendment Act, 2003, every attorney who, for the first time, practises as a partner in a firm of attorneys or who practises on his or her own account, must—

(a) within the period contemplated in section 74(1)*(d*A*)*; and

(b) after payment of the fee prescribed in terms of section 80(1)*(i)*,

complete a legal practice management course approved by the council of the province in which he or she practises.".

Amendment of section 74 of Act 53 of 1979, as amended by section 26 of Act 87 of 1989 and section 18 of Act 115 of 1993

9. Section 74 of the Attorneys Act, 1979, is hereby amended by the insertion in subsection (1) after paragraph *(d)* of the following paragraph:

"*(d*A*)* legal practice management courses to be completed by attorneys as contemplated in section 13B and determine the period within which such courses must be completed;".

Amendment of section 80 of Act 53 of 1979, as amended by section 10 of Act 108 of 1984, section 19 of Act 115 of 1993 and section 12 of Act 104 of 1996

10. Section 80 of the Attorneys Act, 1979, is hereby amended by the addition to subsection (1) of the following paragraph:

"*(i)* the completion of legal practice management courses as contemplated in section 13B.".

Amendment of section 7 of Act 70 of 1979, as amended by section 36 of Act 88 of 1984, section 2 of Act 3 of 1988, section 2 of Act 7 of 1989 and section 1 of Act 44 of 1992

11. Section 7 of the Divorce Act, 1979, is hereby amended by the substitution in subsection (8)*(a)* for subparagraph (ii) of the following subparagraph:

"(ii) the registrar of the court in question forthwith notify the fund concerned that an endorsement be made in the records of that fund that that part of the pension interest concerned is so payable to that other party and that the administrator of the pension fund furnish proof of such endorsement to the registrar, in writing, within one month of receipt of such notification;".

Amendment of section 1 of Act 90 of 1986, as amended by section 1 of Act 74 of 1998

12. Section 1 of the Sheriffs Act, 1986, is hereby amended by the substitution for the definition of "Board" of the following definition:

" 'Board' means the South African Board for Sheriffs established by section 7, and includes, for the purposes of Chapter IV (excluding section 52), a disciplinary committee;".

Substitution of section 7 of Act 90 of 1986

13. The following section is hereby substituted for section 7 of the Sheriffs Act, 1986:

"**Establishment of South African Board for Sheriffs**

7. There is hereby established a board to be known as the South African Board for Sheriffs and which shall be a juristic person.".

Substitution of long title of Act 90 of 1986

14. The following long title is hereby substituted for the long title to the Sheriffs Act, 1986:

"**To provide for the appointment of sheriffs, the establishment of a South African Board for Sheriffs and a Fidelity Fund for Sheriffs, the regulation of the conduct of sheriffs, and matters connected therewith.**".

Amendment of section 5 of Act 24 of 1987, as amended by section 2 of Act 121 of 1991 and section 9 of Act 86 of 1997

15. Section 5 of the Mediation in Certain Divorce Matters Act, 1987, is hereby amended by the insertion in subsection (1) after paragraph *(d)* of the following paragraph:

"*(d*A*)* the circumstances in which a court may cause an investigation to be carried out by a Family Advocate as contemplated in section 10(1A) of the Maintenance Act, 1998 (Act No. 99 of 1998), and section 5(1A) of the Domestic Violence Act, 1998 (Act No. 116 of 1998);".

Amendment of section 10 of Act 99 of 1998

16. Section 10 of the Maintenance Act, 1998, is hereby amended by the insertion after subsection (1) of the following subsection:

"(1A) Where circumstances permit and where a Family Advocate is available, a maintenance court may, in the circumstances as may be prescribed in the Mediation in Certain Divorce Matters Act, 1987 (Act No. 24 of 1987), at any time during the enquiry, cause an investigation to be carried out by a Family Advocate, contemplated in the Mediation in Certain Divorce Matters Act, 1987, in whose area of jurisdiction that maintenance court is, with regard to the welfare of any minor or dependent child affected by such enquiry, whereupon the provisions of that Act apply with the changes required by the context.".

Amendment of section 16 of Act 99 of 1998

17. Section 16 of the Maintenance Act, 1998, is hereby amended by the substitution for paragraph *(a)* of subsection (2) of the following paragraph:

"*(a)* Any court—

(i) that has at any time, whether before or after the commencement of this Act, made a maintenance order under subsection (1)*(a)*(i) or *(b)*(i);

(ii) that makes such a maintenance order; or

(iii) that convicts any person of an offence referred to in section 31(1),

shall, subject to paragraph *(b)*(i), make an order directing any person, including any administrator of a pension fund, who is obliged under any contract to pay any sums of money on a periodical basis to the person against whom the maintenance order in question has been or is made, to make on behalf of the latter person such periodical payments from moneys at present or in future owing or accruing to the latter person as may be required to be made in accordance with that maintenance order if that court is satisfied—

(aa) in the case of subparagraph (i), after hearing such evidence, either in writing or orally, as that court may consider necessary;

(bb) in the case of subparagraph (ii), after referring to the evidence adduced at the enquiry or the application for an order by default, as the case may be; or

(cc) in the case of subparagraph (iii), after referring to the evidence at the trial,

that it is not impracticable in the circumstances of the case.".

Amendment of section 26 of Act 99 of 1998, as amended by section 18 of Act 42 of 2001

18. Section 26 of the Maintenance Act, 1998, is hereby amended—

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

"*(a)* against whom any maintenance order has been made **[under this Act]** has failed to make any particular payment in accordance with that maintenance order; or" ; and

(b) by the substitution in subsection (2) for paragraph *(a)* of the following paragraph:

"*(a)* If any maintenance order **[made under this Act]** or any order made under section 16(1)*(a)*(ii), 20 or 21(4) has remained unsatisfied for a period of ten days from the day on which the relevant amount became payable or any such order was made, as the case may be, the person in whose favour any such order was made may apply to the maintenance court where that person is resident—

(i) for the authorisation of the issue of a warrant of execution referred to in section 27(1);

(ii) for an order for the attachment of emoluments referred to in section 28(1); or

(iii) for an order for the attachment of any debt referred to in section 30(1).".

Amendment of section 5 of Act 116 of 1998

19. Section 5 of the Domestic Violence Act, 1998, is hereby amended by the insertion after subsection (1) of the following subsection:

"(1A) Where circumstances permit and where a Family Advocate is available, a court may, in the circumstances as may be prescribed in the Mediation in Certain Divorce Matters Act, 1987 (Act No. 24 of 1987), when considering an application contemplated in subsection (1), cause an investigation to be carried out by a Family Advocate, contemplated in the Mediation in Certain Divorce Matters Act, 1987, in whose area of jurisdiction that court is, with regard to the welfare of any minor or dependent child affected by the proceedings in question, whereupon the provisions of that Act apply with the changes required by the context.".

Amendment of section 10 of Act 2 of 2000, as amended by section 24 of Act 42 of 2001

20. Section 10 of the Promotion of Access to Information Act, 2000, is hereby amended by the substitution for subsection (1) of the following subsection:

"(1) The Human Rights Commission must, within **[18 months]** three years after the commencement of this section, compile in each official language a guide containing such information, in an easily comprehensible form and manner, as may reasonably be required by a person who wishes to exercise any right contemplated in this Act.".

Substitution of section 12 of Act 2 of 2000, as substituted by section 25 of Act 42 of 2001

21. The following section is hereby substituted for section 12 of the Promotion of Access to Information Act, 2000:

"**Act not applying to certain public bodies or officials thereof**

12. This Act does not apply to a record—

(a) of the Cabinet and its committees;

(b) relating to the judicial functions of—

(i) a court referred to in section 166 of the Constitution;

(ii) a Special Tribunal established in terms of section 2 of the Special Investigating Units and Special Tribunals Act, 1996 (Act 74 of 1996); or

(iii) a judicial officer of such court or Special Tribunal; **[or]**

(c) of an individual member of Parliament or of a provincial legislature in that capacity**[.]** ; or

(d) relating to a decision referred to in paragraph *(gg)* of the definition of "administrative action" in section 1 of the Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000), regarding the nomination, selection or appointment of a judicial officer or any other person by the Judicial Service Commission in terms of any law.".

Amendment of section 44 of Act 2 of 2000, as amended by section 36 of Act 42 of 2001

22. Section 44 of the Promotion of Access to Information Act, 2000, is hereby amended by the substitution for subsection (4) of the following subsection:

"(4) A record may not be refused in terms of subsection (1) or (2) insofar as it consists of an account or a statement of reasons required to be given in accordance with section 5 of the Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000), except if the record relates to a decision referred to in paragraph *(gg)* of the definition of "administrative action" in section 1 of the Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000), regarding the nomination, selection or appointment of a judicial officer or any other person by the Judicial Service Commission in terms of any law.".

Amendment of section 79 of Act 2 of 2000

23. Section 79 of the Promotion of Access to Information Act, 2000, is hereby amended—

(a) by the substitution in subsection (1) for the words preceding paragraph *(a)* of the following words:

"(1) 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 **[12 months]** four years after the commencement of this section, make **[and implement]** rules of procedure for—"; and

(b) by the substitution for subsection (2) of the following subsection:

"(2) **[Before the implementation of]** Until the rules of procedure in terms of subsection (1)*(a)* come into operation, an application in terms of

section 78 **[may only]** must be lodged with a High Court or another court **[of similar status]** having jurisdiction.".

Substitution of section 90 of Act 2 of 2000

24. The following section is hereby substituted for section 90 of the Promotion of Access to Information Act, 2000:

"**Offences**

90. (1) A person who with intent to deny a right of access in terms of this Act—

(a) destroys, damages or alters a record;

(b) conceals a record; or

(c) falsifies a record or makes a false record,

commits an offence and is liable on conviction to a fine or to imprisonment for a period not exceeding two years.

(2) An information officer who wilfully or in a grossly negligent manner fails to comply with the provisions of section 14 commits an offence and is liable on conviction to a fine, or to imprisonment for a period not exceeding two years.

(3) A head of a private body who wilfully or in a grossly negligent manner fails to comply with the provisions of section 51 commits an offence and is liable on conviction to a fine, or to imprisonment for a period not exceeding two years.".

Amendment of section 92 of Act 2 of 2000

25. Section 92 of the Promotion of Access to Information Act, 2000, is hereby amended by the addition of the following subsection:

"(4) Any regulation in terms of subsection (1) may provide that any person who contravenes a provision thereof or fails to comply therewith is guilty of an offence and on conviction liable to a fine or to imprisonment for a period not exceeding two years.".

Amendment of section 1 of Act 3 of 2000, as amended by section 1 of Act 53 of 2002

26. Section 1 of the Promotion of Administrative Justice Act, 2000, is hereby amended by the substitution for paragraph *(gg)* of the definition of "administrative action" of the following paragraph:

"*(gg)* a decision relating to any aspect regarding the nomination, selection or appointment of a judicial officer or any other person, by the Judicial Service Commission in terms of any law;".

Amendment of section 7 of Act 3 of 2000

27. Section 7 of the Promotion of Administrative Justice Act, 2000, is hereby amended—

(a) 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 107 of 1985), must within **[one year]** three years after the date of commencement of section 10 of this Act, make **[and implement]** rules of procedure for judicial review."; and

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

"(4) **[Before the implementation of]** Until the rules of procedure referred to in subsection (3) come into operation, all proceedings for judicial review under this Act must be instituted in a High Court or **[the Constitutional Court]** another court having jurisdiction.".

Amendment of section 16 of Act 4 of 2000, as substituted by section 1 of Act 52 of 2002

28. Section 16 of the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000, is hereby amended by the substitution in subsection (1) for paragraph *(c)* of the following paragraph:

"*(c)* the Minister must, after consultation with the head of an administrative region defined in section 1 of the Magistrates' Courts Act, 1944 (Act No. 32 of 1944), by notice in the *Gazette*—

(i) designate one or more magistrate's courts as equality courts for the administrative region concerned;

(ii) define the area of jurisdiction of each equality court, which may consist of any number of districts, sub-districts or other areas of jurisdiction created in terms of section 2 of the Magistrates' Courts Act, 1944;

(iii) increase or reduce the area of jurisdiction of each equality court;

(iv) appoint one or more places within the area of jurisdiction of each equality court for the holding of equality court sittings;

(v) withdraw or vary any notice under this paragraph**[; and]**;

Provided that any proceedings pending before an equality court which are not finalised at the time of the publication of a notice in the *Gazette* as contemplated in this paragraph, must be finalised by that court, as if such notice had not been published; and".

Amendment of section 17 of Act 4 of 2000, as amended by section 2 of Act 52 of 2002

29. Section 17 of the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000, is hereby amended by the addition of the following subsection:

"(4) The Director-General may, subject to such conditions as he or she may determine, in writing delegate any power conferred on him or her by this section to an officer employed by the Department, but shall not be divested of any power so delegated and may amend or set aside any decision of the delegatee made in the exercise of such power.".

Amendment of section 2 of Act 42 of 2000

30. Section 2 of the Cross-Border Insolvency Act, 2000, is hereby amended by the addition of the following subsection:

"(5) Where the Minister withdraws a notice in terms of subsection (3), such withdrawal does not affect any pending legal proceedings and such proceedings must continue as if the notice had not been withdrawn.".

Amendment of section 11 of Act 47 of 2001

31. Section 11 of the Judges' Remuneration and Conditions of Employment Act, 2001, is hereby amended by the substitution for subsection (7) of the following subsection:

"(7) The surviving spouse or partner of a Constitutional Court judge or judge referred to in subsection (2) or (4) must, with effect from the first day of the month immediately succeeding the month in which he or she dies, be paid an amount equal to two thirds of the salary which was payable to that Constitutional Court judge or judge in terms of subsection (3)*(a)* or (5)*(a)*, which amount shall be payable until the death of such spouse or partner: Provided that if the Constitutional Court judge or judge is survived by more than one spouse, the amount concerned shall be divided equally between the spouses concerned, unless the judge concerned determined otherwise in accordance with a regulation made under section 13(1)*(cB)*.".

Amendment of section 16 of Act 47 of 2001

32. Section 16 of the Judges' Remuneration and Conditions of Employment Act, 2001, is hereby amended—

(a) by the substitution in subsection (4) for paragraphs *(b)* and *(c)* of the following paragraphs, respectively:

"*(b)* After **[the commencement of this section]** 3 May 2002, any surviving spouse of a retired judge referred to in paragraph *(a)* shall be paid with effect from the first day of the month immediately succeeding the day on which the retired judge dies or died, an amount equal to **[one half]** three quarters of the amount to which his or her deceased spouse would have been entitled under paragraph *(a)*.

(c) Any surviving spouse of a judge who retired as a judge in terms of the Judges' Pensions Act, 1978, and who, **[at the commencement of this section]** on or after 3 May 2002, receives a pension in terms of the said Act, is, from **[the date of commencement of this section]** 3 May 2002 or any later date from which such surviving spouse is entitled to such a pension, entitled to an amount equal to **[one half]** three quarters of the amount to which his or her deceased spouse would have been entitled under paragraph *(a)*."; and

(b) by the addition to subsection (4) of the following paragraphs:

"*(d)* The amounts payable to a surviving spouse contemplated in paragraphs *(b)* and *(c)* shall be payable until the death of such spouse.

(e) The amounts payable to persons in terms of this subsection shall be adjusted whenever the annual salary payable to a Constitutional Court judge or a judge, as the case may be, is increased.

(f) In applying this subsection, no person may be paid an amount which is less than that which he or she received before any adjustment was made under this subsection.".

Repeal of section 18 of Act 28 of 2003

33. Section 18 of the Judicial Officers (Amendment of Conditions of Service) Act, 2003, is hereby repealed.

Short title and commencement

34. This Act is called the Judicial Matters Second Amendment Act, 2003, and comes into operation on a date fixed by the President by proclamation in the *Gazette*.

MEMORANDUM ON THE OBJECTS OF THE JUDICIAL MATTERS SECOND AMENDMENT BILL, 2003

1. PURPOSE OF BILL

The main purpose of the Bill is to encompass in a single Bill a variety of amendments to laws administered by the Department of Justice and Constitutional Development and which amendments do not require individual Amendment Acts. These amendments mainly address certain problem areas which have arisen in practice. The Bill also contains certain amendments which are of a more substantial nature.

2. OBJECTS OF BILL

The objects of the respective clauses of the Bill are briefly explained below.

2.1 Clause 1 amends the Administration Amendment Act, 1929 (Act No. 9 of 1929), so as to provide for the appointment of presiding officers of Divorce Courts. The amendment is necessary so as eliminate any uncertainty in the interpretation of the provisions relating to the appointment of presiding officers of these Courts, be it in a permanent, acting or temporary capacity.

2.2 Clause 2 substitutes section 35B of the Insolvency Act, 1936 (Act No. 24 of 1936), which deals with agreements on informal markets. Section 35B allows for post-insolvency netting or set-off in respect of unperformed obligations of parties arising from agreements which fall within the definition of "master agreement" contained in the amendment or obligations in respect of assets transferred as collateral security. Netting involves the setting off of obligations under transactions, one obligation against another so that payments between the relevant parties are made on a net rather than a gross basis. A concern was raised that the provisions of section 35B fall short of expectations and that many of the international banks and securities firms operating in South Africa are still constrained in the taking on of larger exposures because of legal concerns regarding the ambit and effectiveness of the current section 35B. The proposed amendment will allow for agreements that provide for termination and netting of specified obligations. Market participants require certainty regarding the effect of netting in order to adjust their market positions without delay. The proposed subclause (4) accordingly makes provision that netting after the commencement of liquidation will not be void and that dispositions without value, voidable preferences and undue preferences cannot be set aside. However, collusive transactions and fraudulent dispositions can still be set aside.

2.3 Clause 3 seeks to amend section 4 of the Prevention of Counterfeiting of Currency Act, 1965 (Act No. 16 of 1965), by addressing the evidentiary burden of proof that is placed on accused persons, to bring it in line with constitutional jurisprudence.

2.4 It is proposed that section 60 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), be amended by adding a new subsection (2A) which compels the court, before reaching a decision on any bail application, to take a pre-trial services report into account, if such a report is available (Clause 4). The purpose of the pre-trial services report is to assist the court in making a decision regarding the release of a person on bail.

2.5 Subsection (3) was inserted in section 276 of the Criminal Procedure Act, 1977, by the General Law Amendment Act, 1992 (Act No. 139 of 1992), to confirm that correctional supervision may be imposed for statutory offences. Although the Supreme Court of Appeal has stated authoritatively that correctional supervision is a competent sentencing option in the case of statutory offences, there are examples where section 276 has been interpreted in the High Courts to exclude correctional supervision as a sentencing option where the relevant statutory provisions do not expressly provide for correctional supervision as a sentencing option. The amendment in clause 5 aims to establish legal certainty regarding correctional supervision as a sentencing option in respect of all offences, except where a court is to impose a sentence in terms of section 51(1) or (2), read with section 52, of the Criminal Law Amendment Act, 1997 (Act No. 105 of 1997).

2.6 Clause 6 inserts a new provision in the Criminal Procedure Act, 1977, thereby imposing a duty on the court, at sentencing stage, to inform a complainant or relative of a complainant in a murder case of his or her right to make representations to a Parole Board when the parole of the prisoner is considered. It also spells out what is expected of the victim.

2.7 It is proposed in clause 7 that the Criminal Procedure Act, 1977, be amended to provide that the National Director of Public Prosecutions must, within a specific time, submit a report to the Minister responsible for the administration of justice containing particulars in respect of each accused whose trial has not yet commenced and who has been in custody for a particular period, which report must be tabled in Parliament.

2.8 The proposed amendments to the Attorneys Act, 1979 (Act No. 53 of 1979), will make it compulsory for all newly admitted attorneys, whether they are practising as partners in an existing firm of attorneys or whether they are practising on their own account, to complete a legal practice management course. The aim is to reduce the number of claims against attorneys which arise as a result of a lack of management and administrative skills.

2.9 Section 7(8) of the Divorce Act, 1979 (Act No. 70 of 1979), allows a court when, granting a decree of divorce, to make an order that any part of a pension interest which is due to the other party, be paid to such person when the pension benefits accrue in respect of that member. This subsection presently empowers a court, when making such an order, to make an order that an endorsement is to be made in the records of that fund that that part of the pension interest concerned is so payable to that other party. The proposed amendment to this Act places a duty on the registrar of the divorce court to ensure that the endorsement takes place as soon as possible since the Act is at present silent on this aspect and it has happened in practice at times that no endorsement has ever taken place, to the detriment of the other party.

2.10 Certain amendments to the Sheriff's Act, 1986 (Act No. 90 of 1986), are proposed to reflect the change in name of the Board for Sheriffs in order to accord the Board its national status.

2.11 The proposed amendment to the Mediation in Certain Divorce Matters Act, 1987 (Act No. 24 of 1987), empowers the Minister of Justice to prescribe by regulation the circumstances in which a Family Advocate may be requested to carry out an investigation as discussed in paragraph 2.12 below.

2.12 It is proposed in clause 16 that a maintenance court, where circumstances permit, e.g. the availability of a Family Advocate, may, in prescribed circumstances, request a Family Advocate to investigate and report on the welfare of any minor or dependent child affected by a maintenance inquiry. The proposed amendment extends the current role of the Family Advocate as provided for in the Mediation in Certain Divorce Matters Act, 1987. The main role of the Family Advocate at present is to inquire into and report and make recommendations to the court on any matter concerning the welfare of children in divorce-related proceedings and, where requested by the court, to adduce evidence in court and to cross-examine witnesses. The amendment contained in this clause extends the current functions of Family Advocates to maintenance inquiries. In similar vein, an amendment to the Domestic Violence Act, 1998 (Act No. 116 of 1998), extends the present role of Family Advocates to domestic violence proceedings (Clause 19).

2.13 Section 16(2) of the Maintenance Act, 1998 (Act No. 99 of 1998), envisages a maintenance court making an order, in appropriate cases, against any person who is under a contractual obligation to pay money on a periodical basis to any person who has a maintenance obligation, to pay such money to the maintenance beneficiary on behalf of the person who has such maintenance obligation. The proposed amendment in clause 17 eliminates any uncertainty about whether pension funds can be ordered to make payments in terms of section 16(2) of the Maintenance Act, 1998.

2.14 Section 26 of the Maintenance Act, 1998, provides, among others, for circumstances where a person against whom a maintenance order has been granted, fails to make any particular payment in accordance with that maintenance order, that such order would be enforceable in respect of the arrear amount by execution. The amendments in clause 18 are necessary to ensure that these provisions are also applicable in respect of maintenance orders made by the High Courts and Divorce Courts.

2.15 Section 10 of the Promotion of Access to Information Act, 2000 (Act No. 2 of 2000), provides that the South African Human Rights Commission must, within 18 months after the commencement of that section, compile, in each official language, a guide containing such information as may be required by a person who wishes to exercise any right contemplated in that Act. The time frames for public and private bodies to publish their manuals have been extended on two occasions, making it impossible for the SA Human Rights Commission to compile its guide within 18 months

after the commencement of section 10. It is proposed that this section be amended to extend the period in which the SA Human Rights Commission must compile a guide.

2.16 Section 12 of the Promotion of Access to Information Act, 2000, provides for certain public bodies or officials to be exempt from the application of the Act. The proposed amendment to this section will exclude the Judicial Service Commission from the application of this Act in respect of a record regarding the nomination, selection or appointment of a judicial officer or any other person by the Judicial Services Commission in terms of any law. This principle is also applicable to the amendments of section 44 of the Act and section 1 of the Promotion of Administrative Justice Act, 2000.

2.17 The proposed amendments to section 79 of the Promotion of Access to Information Act, 2000, will extend the period in which the Rules Board for Courts of Law may make rules of procedure. It is proposed that the period be extended from one year to four years so that the Board can complete this task within the prescribed legislative time frame. These amendments also eliminate any uncertainty regarding the institution of legal proceedings in terms of the Act in a court.

2.18 The Promotion of Access to Information Act, 2000, currently contains no sanction for public or private bodies who fail to produce a manual, as required in terms of the Act. The Act is being amended to provide that an information officer is guilty of an offence and liable on conviction to a fine, or to imprisonment for a period not exceeding two years, if that information officer willfully or in a grossly negligent way fails to comply with the provisions of section 14. A similar amendment provides that a head of a private body is guilty of an offence and liable on conviction to a fine, or to imprisonment for a period not exceeding two years, if that head of a private body willfully or in a grossly negligent way fails to comply with the provisions of section 51. (Clause 24). In similar vein, section 92 of the Act is being amended to allow for regulations which criminalise the failure to comply with those regulations dealing with these manuals.

2.19 The proposed amendments in clause 27 to the Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000) extend the period in which the Rules Board for Courts of Law may make rules of procedure. The period has been extended from one year to three years so that the Board can complete this task within the prescribed legislative time frame. These amendments also eliminate any uncertainty regarding the institution of legal proceedings in terms of the Act in a court.

2.20 The proposed amendment to section 16 of the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (Act No. 4 of 2000), provides that the publication of a notice by the Minister, altering the boundaries of an equality court, does not affect any legal proceedings which have been instituted but not yet completed at the time of such publication.

2.21 Section 17(1)*(a)* of the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000, provides that the Director General may, for every equality court, appoint or designate one or more officers in the Department as clerks of an equality court. The proposed amendment to this section will allow the Director General to delegate this power to an officer employed by the Department.

2.22 The Department was requested to investigate the possibility of creating a mechanism in the Cross-Border Insolvency Act, 2000 (Act No. 42 of 2000), to regulate legal proceedings which are pending at the time when the Minister withdraws a notice in terms of which a State has been designated as a country for purposes of this Act. The proposed amendment to this Act gives effect to this request.

2.23 Clauses 31 and 33 have been inserted to address a technical problem that arose during the enactment of the Judicial Officers (Amendment of Conditions of Service) Act, 2003 (Act No. 28 of 2003).

2.24 The proposed amendment to the Judges' Remuneration and Conditions of Employment Act, 2001 (Act No. 47 of 2001), contained in clause 32 addresses problems regarding the application of section 16(4). Section 16(4) of this Act deals with the position of retired judges and surviving spouses of judges who retired under the provisions of the Judges' Pensions Act, 1978 (Act No. 90 of 1978). The pensions payable to these retired judges or to surviving spouses of such retired judges deteriorated over time to such an extent that these pensioners are in a very unfavourable position when compared to judges and surviving spouses of retired judges who fall under the scope of the Judges' Remuneration and Conditions of Employment Act, 1989, and the above-mentioned new 2001 Act. When attempting to apply these provisions in practice, the National Treasury experienced difficulties since some of the surviving spouses

would have received less than what they are currently receiving. The proposed amendment intends to address this difficulty.

3. DEPARTMENTS/BODIES/PERSONS CONSULTED

The following persons were consulted in respect of particular amendments:
The Banking Council of South Africa and Financial Services Board in respect of clause 2;
The Law Society of South Africa in respect of clauses 8, 9 and 10;
The National Prosecuting Authority in respect of clauses 5, 6 and 7;
Department of Correctional Services in respect of clause 6;
The Office of the Family Advocate in respect of clauses 11, 15, 16, 17, 18 and 19;
Board for Sheriffs in respect of clauses 12, 13 and 14;
South African Human Rights Commission in respect of clause 20; and
The National Treasury in respect of clauses 2 and 32.

4. IMPLICATIONS FOR PROVINCES

None.

5. FINANCIAL IMPLICATIONS FOR STATE

An additional amount of R4,4 million has been allocated by the Family Court Project for the current financial year for the Office of the Family Advocate to carry out substantive legal services in existing Family Court pilot sites, including those which will emanate from the extension of the role of the Family Advocate. It is estimated that the implementation of the proposed amendments relating to the payment of pensions will be approximately R2 million, considerably less than the R4 million originally set aside when the Judges' Remuneration and Conditions of Employment Act, 2002, was enacted.

6. PARLIAMENTARY PROCEDURE

The State Law Advisers and the Department of Justice and Constitutional Development are of the opinion that the Bill must be dealt with in accordance with the procedure established by section 75 of the Constitution since it contains no provision to which the procedure set out in section 74 or 76 of the Constitution applies.

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