EXPLANATORY NOTE ON THE JUDICIAL MATTERS AMENDMENT BILL, 2016

1. PURPOSE OF BILL

The primary aim of the Judicial Matters Amendment Bill, 2016 (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 **Clause 1** amends section 9 of the the Magistrates' Courts Act, 1944 (Act No. 32 of 1944) (hereinafter referred to as "the Magistrates' Courts Act"), dealing with the appointment of judicial officers. In terms of section 9(7)(*a*), a magistrate who has presided in criminal proceedings in which a plea has been recorded in accordance with section 106 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977) (hereinafter referred to as "the Criminal Procedure Act") shall, notwithstanding his or her subsequent vacation of the office of magistrate at any stage, dispose of those proceedings and, for such purpose, shall continue to hold such office in respect of any period during which he or she is necessarily engaged in connection with the disposal of those proceedings. In terms of section 9(7)(*d*) of the Magistrates' Courts Act, a magistrate who is required to dispose of proceedings which were not disposed of on vacation by him or her of the office of magistrate, is entitled to such benefits as determined by the Minister from time to time by notice in the *Gazette* at an hourly rate. Section 9(7)(*d*), does not provide for aspects such as travelling expenses, loss of income, research, reading the case record and preparations relating to the case, among others. The result is that many magistrates who have vacated office do not return to dispose of "part heard" matters. The proposed amendment to section 9(7)(*d*), gives the Cabinet member responsible for the administration of Justice a wider discretion in determining the benefits to which such magistrates, who have vacated the office of magistrate, are entitled. These amendments were requested by the Regional Court Presidents' Forum.

2.2.1 Section 12 of the the Magistrates' Courts Act, provides for the powers of judicial officers. Section 12(1)(*a*), among others, provides that a court of a regional division may, subject to subsection (6), only be held by a magistrate of a regional division.

Subsection (6) provides that only a magistrate of a regional division whose name appears on the list referred to in subsection (7), may adjudicate over civil disputes contemplated in section 29(1) (which relates to civil matters) or 29(1B) (which relates to divorce matters) of the Magistrates' Courts Act, in accordance with the criteria set out in subsection (8). Subsection (7) provides that the Magistrates Commission must enter the names of magistrates of regional divisions on a list of magistrates who may adjudicate on civil disputes. Subsection (8), among others, provides that the Magistrates Commission may only enter the name of a magistrate on the list contemplated in subsection (7) if—

* the head of the South African Judicial Education Institute has issued a duly signed certificate that the magistrate has successfully completed an appropriate training course in the adjudication of civil disputes;
* the Magistrates Commission is satisfied that, before the establishment of the Institute referred to in paragraph (a), the magistrate has successfully completed an appropriate training course in the adjudication of civil disputes; or
* the Magistrates Commission is satisfied that the magistrate, on account of previous experience, has suitable knowledge of, and expertise in, civil litigation matters to preside over the adjudication of civil disputes.

2.2.2 Section 91A of the Promotion of Access to Information Act, 2000 (Act No 2 of 2000), deals with the designation and training of presiding officers to adjudicate over aspects provided for in the Act relating to access to information. In terms of section 91A(2) of the Act, only a magistrate or additional magistrate who has completed a training course and whose name has been included in the list contemplated in subsection (4)(*a*), may be designated as a presiding officer to adjudicate over matters arising from the Act. Subsection (4) requires the Magistrates Commission to compile and keep a list of every magistrate or additional magistrate who has completed a training course and is designated as a presiding officer of a magistrate's court to adjudicate over matters arising from the Act.

2.2.3 Section 9A of the Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000) (hereinafter referred to as "the Promotion of Administrative Justice Act"), deals with the designation and training of presiding officers to adjudicate over aspects arising

from the Act relating to administrative actions. In terms of section 9A(2) of the Act, only a magistrate or additional magistrate who has completed a training course and whose name has been included in the list contemplated in subsection (4)(*a*), may be designated as a presiding officer to adjudicate over matters arising from the Act. Subsection (4) requires the Magistrates Commission to compile and keep a list of every magistrate or additional magistrate who has completed a training course and is designated as a presiding officer of a magistrate's court to adjudicate over matters arising from the Act.

2.2.4 Section 16 of the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (Act No. 4 of 2000) (hereinafter referred to as "the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000"), deals with the designation and training of presiding officers to adjudicate over aspects arising from the Act relating to equality and unfair discrimination. In terms of section 16(2) of the Act, only a judge, magistrate or additional magistrate who has completed a training course and whose name has been included in the list contemplated in subsection (4)(a), may be designated as a presiding officer to adjudicate over matters arising from the Act. Subsection (4) requires the Chief Justice and the Magistrates Commission to compile and keep a list of every judge, magistrate or additional magistrate who has completed a training course and is designated as a presiding officer of an equality court to adjudicate over matters arising from the Act.

2.2.5 The Regional Court Presidents are of the view that these requirements serve no purpose and create a huge administrative burden. They point out that there are many experienced magistrates who, due to their workload, are unable to attend the required training courses in order to qualify as a regional magistrate who can adjudicate over matters contemplated in section 29(1) or 29(1B) of the Magistrates' Courts Act, the Promotion of Access to Information Act, and the Promotion of Administrative Justice Act. In terms of section 174(1) of the Constitution of the Republic of South Africa, any appropriately qualified woman or man who is a fit and proper person may be appointed as a judicial officer, without any further training. Regional court magistrates may impose life imprisonment in terms of authorising legislation without further training or additional requirements. The Regional Court Presidents propose that these prerequisites for the

appointment of magistrates be removed from the legislation discussed in paragraphs 2.2.1, 2.2.2 and 2.2.3. It is submitted that similar considerations apply to the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000. The view is, however, held that specialised training for judicial officers in order to apply the statutes under discussion remains essential. Clauses 2, 30, 31 and 33 discussed below therefore retain the requirement of specialised training but do away with the administrative burden of having to compile and update a list of trained judicial officers.

2.2.6 **Clause 2** of the Bill deletes section 12(7) of the Magistrates' Courts Act so as to do away with the requirement that only a magistrate of a regional division whose name appears on the list referred to in subsection (7), may adjudicate on civil disputes contemplated in section 29(1) or 29(1B), in accordance with the criteria set out in subsection (8). It also effects consequential amendments to subsections, (6) and (8). The amendments to subsections (6) and (8) provide that Regional Court Presidents must now designate appropriately qualified magistrates to adjudicate on civil disputes in a regional courts.

2.2.7 **Clauses 30, 31 and 33** amend section 91A of the Promotion of Access to Information Act, section 9A of the Promotion of Administrative Justice Act, and section 16 of the Promotion of Equality and Prevention of Unfair Discrimination Act, respectively, in order to delete—

(a) the requirements that only judicial officers who have completed a training course and whose names have been included in a list, may adjudicate over matters arising from these Acts; and

(b) the obligations which are imposed on the Chief justice and Magistrates Commission to compile and keep lists of judicial officers who have completed a training course and who are specifically designated as presiding officers for courts designated in terms of these Acts.

2.3 **Clause 3** substitutes section 2 of the State Liability Act, 1957(Act No. 20 of 1957), dealing with proceedings against the State.

2.3.1 The Rules Board for Courts of Law has suggested that section 2(1) be amended by removing the words “by virtue of the provisions of section 1”. The Rules Board argues that the deletion of this wording will address the restrictive application of the Act to proceedings arising out of contract or delict and will make it applicable to all proceedings, for instance joinder and review applications.

2.3.2 Various default judgments are obtained against Government departments due to the fact that departments fail to oppose litigation against them. In most instances this happens because court process is served on persons who fail to bring this to the attention of the persons who are supposed to deal with litigation against the State. In order to address this state of affairs, the State Attorneys proposed amendments to section 2(2) of the State Liability Act, 1957, in order to make provision for a dual service of court process. Section 2(2) is amended in order to provide that—

(*a*) court process should be served on the department concerned; and

(*b*) a copy of the process should, within five days after the service of process contemplated in paragraph (*a*), also be served on the State Attorney operating within the area of jurisdiction of the court from which the process was issued.

This amendment aims to ensure that both the department and the State Attorney have knowledge of any pending litigation against the department concerned. The period of five days is consistent with the current procedural approach of multiples of five.

2.4. The failure by departments to defend actions results in warrants or writs of execution being issued against departments. Section 3 of the State Liability Act deals with the satisfaction of final court orders sounding in money. Section 3(1) prohibits the issue of a warrant of execution against the department concerned, unless certain steps have been taken. In terms of subsection (3) the debt must be paid within 30 days or within a time as agreed upon. If the relevant department fails to pay the judgment debt as aforementioned, the judgment creditor must serve the court order (judgment) on the executive authority and accounting officer of the department concerned, the State Attorney or attorney of record appearing on behalf of the department concerned and the relevant treasury (subsection 4). The relevant treasury must then, within 14 days, ensure that the judgment debt is satisfied or that acceptable arrangements for payment are made. If this is not done, a warrant or writ of execution may be issued. **Clause 4** of

the Bill aims to complement the amendments proposed to section 2(2), by providing a further safety measure for departments by requiring that the clerk or registrar may only issue a warrant of execution or writ of execution in terms of section 3(6) where default judgments have been granted, if they are satisfied that section 3(4), referred to above, has been complied with.

2.5 **Clause 5** amends section 4A of the State Liability Act dealing with definitions. A definition of "day" is inserted. The proposed definition of "day" is consistent with the definition in the Superior Courts Act, 2013. The insertion of a definition for "head of department" is necessitated by the proposed amendment to section 2(2). The amendment to the definition of "rules of court" covers all the rules that the Rules Board for Courts of Law is empowered to make. These amendments have been requested by the Rules Board for Courts of Law.

2.6 **Clause 6** amends section 3 of the South African Law Reform Commission Act, 1973 (Act No. 19 of 1973), dealing with the constitution of the South African Law Reform Commission (the Commission). The current wording of section 3(1)(*a*)(i) of the Act provides that a judge of the Constitutional Court, the Supreme Court of Appeal or the High Court may be appointed as chairperson of the Commission. Although the Judges' Remuneration and Conditions of Employment Act, defines a "judge" as "any person holding the office of—

(a) President or Deputy President of the Supreme Court of Appeal;
(b) judge of the Supreme Court of Appeal;
(c) Judge President or Deputy Judge President of any High Court; or
(d) judge of any High Court,

and includes any person who, at or since the fixed date, held the office of-

(i) Chief Justice of South Africa or Deputy Chief Justice;
(ii) judge of the Appellate Division of the Supreme Court of South Africa or of the Supreme Court of Appeal;
(iii) Judge President or Deputy Judge President of any provincial or local division of the Supreme Court of South Africa or of any High Court;
(iv) judge of any provincial or local division of the Supreme Court of South Africa or of any High Court; or

(v) judge of any court of a homeland referred to in Item 16 of Schedule 6 to the Constitution, read with Item 1 thereof;",

Uncertainty exists whether a judge who is discharged from active service in terms of the Judges' Remuneration and Conditions of Employment Act, 2001, a retired judge in other words, is a judge for purposes of this Act. In some circumstances it may be preferable to appoint a retired judge as chairperson of the Commission for the following reasons: Judges who are in active service are fully occupied in carrying out their primary responsibility of presiding over cases in court. They often find it very difficult to give attention to the responsibilities demanded of them as chairperson of the Commission. Furthermore, the primary responsibility of the Commission is to make recommendations relating to the reform of the law. The possibility of laws recommended by the Commission being challenged in court is a reality and this places judges in active service in an invidious position if they are called upon to take a stand on those laws which emanate from the Commission. **Clause 17** of the Bill proposes similar amendments in respect of the Rules Board for Courts of Law Act, 1985. Section 3 of the Rules Board for Courts of Law Act provides for the constitution of the Rules Board. In terms of section 3(1)(*a*), the Cabinet member responsible for the administration of justice must designate a judge of the Constitutional Court, the Supreme Court of Appeal or a High Court, as the chairperson of the Rules Board. In terms of section 3(1)(b) the Minister must designate a judge or a retired judge of the Constitutional Court, the Supreme Court of Appeal or a High Court as the vice-chairperson. This proposed amendment can also be justified on similar grounds as are provided in respect of the chairperson of the Commission.

2.7 South Africa ratified the United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment on 10 December 1998. To give effect to the Convention, the Prevention and Combating of Torture of Persons Act, 2013 (Act No. 13 of 2013), was enacted. The seriousness and nature of the crime of torture was dealt with in the judgment of ***Prosecutor v. Furundzija*** (IT-95-17/1-T) (judgment of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991), where it was remarked at paragraph 153 of the judgment that the prohibition against torture, because of the importance of the values it protects, has

evolved into a peremptory norm or *jus cogens*, that is, a norm that enjoys a higher rank in the international hierarchy than treaty law and even 'ordinary' customary rules. At paragraph 157 of the judgment it was stated that it would seem as if other consequences include the fact that torture may not be covered by a statute of limitations (as is envisaged in section 18 of the Criminal Procedure Act), and must also not be excluded from extradition under any political offence exemption.

2.7.1 Section 18 of the Criminal Procedure Act provides that the right to institute a prosecution lapses after a period of 20 years from the time that an offence was committed unless it is an offence referred to in paragraphs (*a*) to (*i*) of that section (South Africa's equivalent of the statute of limitations referred to above). A prosecution, in terms of section 18 can therefore be instituted after a period of 20 years has lapsed in the case of the following offences: murder; treason committed when the Republic is in a state of war; robbery, if aggravating circumstances were present; kidnapping; child-stealing; rape or compelled rape as contemplated in sections 3 or 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (Act No. 32 of 2007) (the Sexual Offences Act), respectively; genocide, crimes against humanity and war crimes, as contemplated in section 4 of the Implementation of the Rome Statute of the International Criminal Court Act, 2002; offences as provided for in sections 4, 5 and 7 and involvement in these offences as provided for in section 10 of the Prevention and Combating of Trafficking in Persons Act, 2013 (Act No. 7 of 2013) (the Trafficking Act); and using a child or person who is mentally disabled for pornographic purposes as contemplated in sections 20 (1) and 26 (1) of the Sexual Offences Act.

2.7.2 **Clause 7** of the Bill aims to substitute section 18 of the Criminal Procedure Act in order to effect the following amendments:

(*a*) The offence of trafficking in persons for sexual purposes by a person as contemplated in section 71(1) or (2) of the Sexual Offences Act, was repealed by section 48 of the Trafficking Act and was replaced with new offences relating to trafficking in persons, among others, for sexual purposes. Section 48 of Trafficking Act amended section 18 of the Criminal Procedure Act so as to include the new offences created by the Trafficking Act. However, it did not make provision for the offences contemplated in the repealed section 71(1) and

(2). The remote possibility exists that charges in terms of these provisions might materialise at a later date. In order to cater for this possibility, the proposed new paragraph (*h*A), seeks to insert these offences in section 18 of the Criminal Procedure Act.

(*b*) The offence of torture contemplated in section 4(1) and (2) of the Prevention and Combating of Torture of Persons Act, is incorporated, by the addition of paragraph (*j*) in the categories of offences which do not prescribe after a period of 20 years has lapsed, in order to ensure that the prosecution of the offence of torture is not subject to a statutory limitation.

2.8 **Clause 8** of the Bill repeals section 107 of the Criminal Procedure Act, which provides as follows:

> *" Truth and publication for public benefit of defamatory matter to be specially pleaded.—A person charged with the unlawful publication of defamatory matter, who sets up as a defence that the defamatory matter is true and that it was for the public benefit that the matter should be published, shall plead such defence specially, and may plead it with any other plea except the plea of guilty.".*

The repeal of the common law crime of defamation is discussed under **clause 44** below. Section 107 provides for procedural matters where a person is charged with defamation. There will be an anomaly if this section is on the statute book after the repeal of the common law crime of defamation.

2.9 **Clause 9** of the Bill amends section 184(1) of the Criminal Procedure Act in order to further provide for the circumstances where a court, before which criminal proceedings are pending, may issue a warrant of arrest, upon information in writing and on oath, for a witness who is about to abscond. If such a witness is arrested pursuant to a warrant of arrest, the court in question may, in terms of section 184(2), release him or her on any condition referred to in section 62(*a*), (*b*) or (*e*), (that he or she must report at a specified place or to a specified person, that he or she is forbidden to go to specified places or any other order which is in the interests of justice). However, a person who is likely to give material evidence concerning an offence referred to in Part III of Schedule

2 to the Criminal Procedure Act[1], is excluded from the operation of section 184(1), with the result that such a witness must be dealt with in terms of section 185 of the Criminal Procedure Act. Section 185 of the Criminal Procedure Act provides for the detention of a person who is likely to give material evidence concerning an offence referred to in Part III of Schedule 2 of the Criminal Procedure Act. There is no reason why the provisions of section 184 should not also be applicable to a witness who is likely to give material evidence concerning an offence referred to in Part III of Schedule 2 of the Criminal Procedure Act, since it is not always necessary to detain a witness pending the relevant proceedings as is envisaged in terms of section 185 of the Criminal Procedure Act. This amendment will ensure a less invasive process to ensure the availability of a witness to give evidence in proceedings involving an offence referred to in Part III of Schedule 2 to the Criminal Procedure Act. This amendment emanates from a request of the National Prosecuting Authority.

2.10.1 **Clause 10** inserts section 194A in the Criminal Procedure Act. Section 194 of the Criminal Procedure Act provides that no person shall be competent to give evidence while he or she is suffering from a mental illness or is under the influence of a substance which has the effect of depriving him or her "of the proper use of his reason". In terms of section 193 of the Criminal Procedure Act, the court in which criminal proceedings are conducted shall decide any question concerning the competency or compellability of any witness to give evidence.

2.10.2 In ***S v Katoo*** 2005 (1) SACR 522 (SCA) ([2006] 4 All SA 348), at paragraph [11] the court held that both requirements set out in section 194 must be satisfied: Firstly, it must appear to the trial court or be proved that the witness suffers from (a) mental illness or (b) that he or she labours under imbecility of the mind due to intoxication or drugs, or the like. Secondly, it must also be established that, as a direct result of such mental illness or imbecility, the witness is deprived of the proper use of his or her reason. Those two requirements must be collectively satisfied before a witness can be disqualified from testifying on the basis of incompetence. The court further held, at

[1] Part III sets out serious offences such as sedition, public violence, arson, murder, kidnapping, childstealing, offences referred to in sections 4, 5 and 7 of the Sexual Offences Act, robbery, housebreaking and treason, among others.

paragraph [13] that a court has a duty to properly investigate the cause of a witness's mental disorder, if this is alleged, before concluding that he or she is incompetent. This might be done either by way of an inquiry, whereby medical evidence on the mental state of the witness is led, or by allowing the witness to testify so that the court can observe the witness and form its own opinion on his or her ability to testify. In **S v Dladla** 2011 (1) SACR 80 (KZP) at paragraph [19], the court held that: "It is trite that a court cannot reach a decision that a witness is not suffering from mental illness without hearing evidence by a psychiatrist. See S v Mahlinga supra at 417. When the question of mental faculties arises, medical evidence is usually adduced and the potential witness is to be questioned not only by the court, but also by the parties to the action. See R v Creinhold 1926 OPD 151 at 154.".

2.10.3 A practice has developed to refer witnesses to psychiatrists or clinical psychologists for an evaluation and to report to the court. There is no provision in the Criminal Procedure Act which explicitly provides for such referrals. Any compensation which is paid to a medical practitioner, psychiatrist or clinical psychologist is further regarded as unauthorised expenditure.

2.10.4 **Clause 10** proposes the insertion of section 194A in the Criminal Procedure Act, to provide that whenever a court is required, in terms of section 193, to decide on the competency or incompetency due to state of mind of a witness, as contemplated in section 194, the court may, when he or she deems it in the interest of justice and with due consideration of the circumstances of a witness, and on such terms and conditions as the court may decide, order that a witness be examined by a medical practitioner, a psychiatrist or clinical psychologist designated by the court. Clause 10 further provides that a medical practitioner, psychiatrist or clinical psychologist designated by the court to enquire into the incompetency due to state of mind of a witness and who is not in the full-time service of the State, must be compensated for his or her services from public funds in accordance with a tariff determined by the Minister in consultation with the Cabinet member responsible for national financial matters.

2.11 **Clause 11** repeals section 242 of the Criminal Procedure Act. This amendment is discussed under **clause 44** below, dealing with the repeal of the common law crime of defamation. Section 242 deals with evidence on a criminal charge of defamation.

2.12 **Clause 12** seeks to substitute the heading to Part III of Schedule 2 of the Criminal Procedure Act by omitting the reference to section 61 of the Criminal Procedure Act, in the heading. Section 61 of the Criminal Procedure Act was repealed by section 4 of the Criminal Procedure Second Amendment Act, 1995 (Act No. 75 of 1995). The deletion of the reference to section 184 of the Criminal Procedure Act is a consequential amendment as a result of **clause 9** of the Bill (**see paragraph 2.9**).

2.13 Section 48 of the Trafficking Act amended Schedule 5 to the Criminal Procedure Act by the substitution for the item "any trafficking-related offence" of the item "Offences as provided for in section 4, 5, 7 and 9(1) and involvement in these offences as provided for in section 10 of the Prevention and Combating of Trafficking in Persons Act, 2013." (the current item). Schedule 5 to the Criminal Procedure Act is applicable to bail proceedings. If a person is charged with a Schedule 5 offence, the accused must, in terms of section 60(11)(*b*) of the Criminal Procedure Act, adduce evidence which satisfies the court that the interests of justice permit his or her release. The reference to offences provided for in section 4 and 9(1) in the current item is incorrect. The offences provided for in section 4 (the offences of trafficking in persons) are punishable in terms of section 13 of the Trafficking, with a fine not exceeding R100 million or imprisonment, including imprisonment for life, or such imprisonment without the option of a fine or both (see discussion in paragraph 2.14). The offence provided for in section 9 (liability of public carriers who transport victims of trafficking) is punishable with a fine or imprisonment for a period not exceeding five years or both such fine or imprisonment. **Clause 13** of the Bill seeks to substitute the current item for the following item: "Any offence referred to in sections 5, 6, 7, 8(1) and 23 and involvement in these offences as provided for in section 10 of the Prevention and Combating of Trafficking in Persons Act, 2013.". In terms of section 13 of the Trafficking Act, the court may impose sentences of a fine or imprisonment ranging from 10 to 15 years or both such fine or imprisonment for any contravention of sections 5, 6, 7, 8(1) and 23 of the Trafficking Act.

2.14 Schedule 6 to the Criminal Procedure Act was amended by section 48 of the Trafficking Act by the substitution for the item “Trafficking in persons”, of the item “Offences as provided for in section 4, 5 and 7 and involvement in these offences as provided for in section 10 of the Prevention and Combating of Trafficking in Persons Act, 2013.” (the current item). If a person is charged with a Schedule 6 offence, the accused must, in terms of section 60(11)(*a*) of the Criminal Procedure Act, adduce evidence which satisfies the court that exceptional circumstances exist which, in the interests of justice permit his or her release. As pointed out in paragraph 2.13, above, the offences contemplated in sections 5 and 7, are of a less serious nature and should therefore not have been included in the current item and are now included in Schedule 5 as indicated above. **Clause 14** of the Bill therefore substitutes the current item for the following item: "Any offence referred to in section 4 and involvement in these offences as provided for in section 10 of the Prevention and Combating of Trafficking in Persons Act, 2013.".

2.15 Section 3(1)(j) of the Attorneys Act, 1979 (Act No. 53 of 1979), provides that a candidate attorney may only be engaged or retained by a person practising the profession of attorney if he or she is an attorney who has practised as a professional assistant in a firm of attorneys or at a professional company for a period of five years within the preceding six years. If an attorney who has practised as a professional assistant for more than five years, engages a candidate attorney while being a professional assistant and is, during the service period of the candidate attorney, promoted to a director or partner, that attorney, in terms of the current wording of section 3 of the Attorneys Act, 1979, becomes disqualified from engaging or retaining that candidate attorney. The contract of articles of clerkship of the candidate attorney can be ceded to a qualified principal as allowed by the Act. However, if cession is not possible, the candidate attorney may land up having to interrupt his or her articles of clerkship and enter into a new contract of articles of clerkship with a new principal. This results in undue hardship and it is suggested that section 3 of the Attorneys Act, 1979, be amended to address this. **Clause 15** is intended to remedy this situation.

2.16 Section 25 of the Small Claims Courts Act, 1984 (Act No. 61 of 1984), provides that the Cabinet member responsible for the administration of justice, may make rules, regulating, among others—

(*a*) the practice and procedure, including the procedure when proceedings are reviewed;

(*b*) fees and costs;

(*c*) the duties and powers of officers of the court;

(*d*) the establishment, duties and powers of one or more boards to advise the Minister on the functioning of courts;

(*e*) any other matter which he may consider necessary or expedient to prescribe for carrying out the provisions of the Act or the attainment of its objects.

In terms of section 25, rules regulating matters relating to small claims courts, were published on 30 August 1985. These rules were amended once on 19 April 1991. With the increase in the number of small claims courts and the increased use of these courts by members of the public which provide affordable access to justice, there is a need to further regulate various aspects referred to in paragraphs (*a*) to (*e*) above, by means of rules in terms of section 25. The Small Claims Courts Act was enacted in 1984, before the enactment of the Rules Board for Courts of Law Act in 1985, which is probably why the Cabinet member responsible for the administration of justice was made the responsible functionary. The Rules Board for Courts of Law (the Rules Board) is composed of various persons who have the necessary expertise to deal with aspects relating to the administration of justice and functioning of courts. The Rules Board may, in terms of section 6 of the Act, with a view to the efficient, expeditious and uniform administration of justice in the superior courts and the lower courts, from time to time on a regular basis review existing rules of court and, subject to the approval of the Minister, make, amend or repeal rules for the superior courts and the lower courts regulating various aspects in such courts. In terms of section 2 of the Rules Board for Courts of Law Act, the Rules Board has the powers and duties conferred or imposed upon it by the Rules Board for Courts of Law Act or any other law, which could include the Small Claims Court Act, if section 25 of the Small Claims Courts Act, is amended accordingly. **Clause 16** of the Bill seeks to amend section 25 of the Small Claims Courts Act in order to provide that the Rules Board, may, subject to the approval of the Minister, make,

amend or repeal rules regulating the aspects referred to in paragraphs (*a*) to (*e*), above, in respect of small claims courts.

2.17 **Clause 17** amends section 3 of the Rules Board for Courts of Law Act, 1985 (Act No. 107 of 1985). This amendment is discussed under paragraph 2.6 above in respect of **clause 6**.

2.18.1 In terms of section 2(1) of the Sheriffs Act, 1986 (Act No. 90 of 1986), the Minister may appoint in the prescribed manner for a lower or superior court a person as sheriff of that court. In terms of section 2(2) of the Sheriffs Act, the same person may be appointed as sheriff of both a lower and a superior court and two or more persons may be appointed as sheriffs of the same court. The manner for appointing sheriffs is set out in regulations made in terms of section 62 of the Sheriffs Act (published as Government Notice No. R. 411 of 12 March 1990), which, among others, require that if there is a vacancy in the office of a sheriff, such vacancy needs to be advertised (regulation 2A), a person must apply to be appointed as a sheriff (regulation 2B), an advisory committee must evaluate the application against prescribed selection criteria, which must then compile a report for the Cabinet member responsible for the administration of justice, who will appoint the successful candidate as sheriff (regulations 2C and 2D). The appointment of more than one sheriff for a particular area, is in terms of regulation 2F, subject to a similar onerous process referred to above. Chapter 1 of the Sheriffs Act does not provide for the appointment of one sheriff for more than one magisterial district. Section 3(2)(*a*) of the Sheriffs Act provides that the Cabinet member responsible for the administration of justice may describe one or more areas within the area of jurisdiction of a lower or superior court and allocate any such area to a sheriff of that court, only. Although section 6B of the Sheriffs Act provides that the Cabinet member responsible for the administration of justice may appoint a sheriff or acting sheriff to perform the functions of a sheriff in another area, such functions are limited and do not include the service of process of any court or any other document. The Department is currently busy with a complete review of the Sheriffs Act, which may take some time to finalise.

2.18.2 The appointment of sheriffs in terms of the Sheriffs Act, in respect of certain smaller magisterial districts, presents challenges due to the fact that these districts are not economically viable for sheriffs. Vacancies in the office of sheriff are often advertised many times without attracting any suitable candidates. In many instances sheriffs appointed for other, mostly adjacent magisterial districts, are also unwilling to be appointed in a permanent capacity as sheriffs in these vacant offices of sheriff in these magisterial districts which are not economically viable. Even if they are willing to be appointed, this cannot happen unless the vacancy is advertised and the procedures prescribed in the regulations, as set out above, are adhered to. As pointed out in paragraph 2.18.1, it is questionable whether the Sheriffs Act empowers the Cabinet member responsible for the administration of justice to appoint a sheriff for more than one described area.

2.18.3 In terms of Government Notice No. 861 of 31 October 2014, and in terms of section 2(1)(*a*) of the Magistrates' Courts Act, 1944 (Act No. 32 of 1944), new magisterial districts for the Gauteng and Nort West Provinces were demarcated in December 2014. The demarcation of magisterial districts in other provinces is in the process of being finalised. The practical effect of this demarcation is that it influences the areas described in terms of section 3(2)(*a*) of the Sheriffs Act, which were allocated to sheriffs at the time. These described areas may now span over several of the newly created magisterial districts. Although the Cabinet member responsible for the administration of justice may, at any time, alter the description of an area referred to in section 3(2), it may take some time before this is finalised.

2.18.4 In order to address the problem areas discussed in paragraphs 2.18.2 and 2.18.3, the following amendments are proposed to the Sheriffs Act:

(*a*) **Clause 18** of the Bill seeks to amend section 2(3) of the Sheriffs Act by adding a new subsection (3), to provide that where the office of a sheriff in an area remains vacant after the prescribed procedures for recruiting and appointing a fit and proper applicant have been followed, the Cabinet member responsible for the administration of justice may, if he or she deems it necessary to achieve the objectives of effective and sustainable service delivery and in the interests of justice—

(*a*) on request or after consultation with an Advisory Committee; and

(*b*) after consultation with the Board,

in writing, appoint a sheriff of another area to serve as sheriff within such area, subject to written confirmation by the Board that it is prepared to issue a fidelity fund certificate to that sheriff.

(*b*) **Clause 19** of the Bill seeks to amend section 3(2) of the Sheriffs Act, in order to provide that the Cabinet member responsible for the administration of justice may describe one or more areas within the area of jurisdiction of a lower or superior court and allocate any such area to a sheriff of that court or a sheriff of another court after consultation with the Board and if the Board is prepared to issue a fidelity fund certificate to that sheriff.

2.18.5 In a submission by the South African Board for Sheriffs, unclaimed funds in the trust accounts of sheriffs are estimated to be approximately R80 to R100 million. Although these funds belong to judgment debtors or creditors, they have not been claimed from the sheriffs concerned. According to the Board, these funds may, due to various considerations, be at risk and should be protected to ensure that they are available if a judgment debtor or creditor wishes to claim money which belongs to her or him. The Department is currently reviewing the Sheriffs Act in its entirety, which will include aspects relating to funds in trust accounts of sheriffs. It has, however, been suggested that, as an interim arrangement, excess funds in the trust accounts of sheriffs should be placed under the control of the South African Board for Sheriffs. In order to address this state of affairs, **clause 20** of the Bill seeks to amend section 22 of the Sheriffs Act, 1986, by the addition of a subsection which provides—

(*a*) that money held in the trust account of a sheriff in respect of which the identity of the owner is unknown or which is unclaimed after one year, must, after a certain period of time, be paid in the prescribed manner to the Fidelity Fund for Sheriffs; and

(*b*) that the owners of the money retain their entitlement to the moneys which were paid over to the Fidelity Fund.

2.18.6 **Clause 21** effects a technical consequential amendment to section 26(1)*(a)* of the Sheriffs Act, which deals with the Fidelity Fund for Sheriffs.

2.19 **Clause 22** of the Bill seeks to amend section 27(1) of the Sheriffs Act by the addition of paragraph (*h*), in order to provide that money in the Fidelity Fund for Sheriffs may also be utilised for the payment, in deserving cases, of the costs for the enforcement of judgments of small claims courts by execution as contemplated in section 41 of the Small Claims Courts Act, 1984. This amendment is intended to assist successful judgment creditors who are unable to afford such costs. The amendment further provides that persons may only be assisted in the circumstances and subject to the conditions determined by the Board in consultation with the Minister. The Fidelity Fund for Sheriffs has a substantial amount available which can be used for this purpose. This amendment is aimed at assisting impecunious judgment creditors who were successful in the small claims court, with the payment of costs for the execution process as contemplated in section 41 of the Small Claims Courts Act, 1984. While these litigants might ordinarily be successful in the small claims courts, their success is to no avail and justice will not prevail if they cannot enforce the judgments in their favour.

2.20 **Clause 23** of the Bill aims to effect technical amendments to section 3 of the Magistrates Act, 1993 (Act No. 90 of 1993) (hereinafter referred to as “the Magistrates Act”), in order to -

(*a*) substitute in item (i) of subsection (1)(*a*), the out-dated reference to “the Supreme Court of South Africa”, for the reference “a Superior Court as defined in section 1 of the Superior Courts Act, 2013 (Act No. 10 of 2013)”; and

(*b*) substitute item (ix) of subsection (1)(*a*) for the words “the Head: Justice College” of the words “any person designated by the Council of the South African Judicial Education Institute referred to in section 7 of the South African Judicial Education Institute Act, 2008 (Act No. 14 of 2008)”. The amendment is necessary due to the fact that Justice College is no longer involved in the training of magistrates. The training of magistrates is facilitated by the South African Judicial Education Institute and its nominee should therefore be represented on the Magistrates Commission.

In the Constitutional Court judgment in ***Hermanus Frederick Van Rooyen v The State*** (Case CCT 21/01), at paragraph [93] – [94], it was held that the words "in his, her or its

opinion" used in section 3(2) of the Magistrates Act, are objectionable and should be deleted, since they are not compatible with independence, which requires an objective criteria. Clause 22 also seeks to remove the objectionable wording from the Statute Book.

2.21 **Clause 24** of the Bill amends section 8 of the Magistrates Act, by the substitution for subsection (1) of a subsection which substitutes the out-dated reference “the Supreme Court” for that of “a Superior Court”.

2.22 **Clause 25** amends section 13 of the Magistrates Act, so as to extend the age of retirement of magistrates from 65 to 70 years if magistrates so choose. Section 13(1) provides as follows:

> “A magistrate shall vacate his or her office on attaining the age of 65 years: Provided that—
>
> (a) the Minister may, after consultation with the Commission, allow a magistrate—
>
> (i) who, on attaining the age of 65 years wishes to continue to serve in such office; and
>
> (ii) whose mental and physical health enables him or her to do so,
>
> to continue to hold such office for the period that the Minister may determine; and
>
> *(b)* if he or she attains the said age after the first day of any month, he or she shall be deemed to attain that age on the first day of the next ensuing month.”.

To allow magistrates to serve longer without prior approval by the Minister will enable the judiciary to utilise their experience and institutional knowledge. In terms of section 3 of the Judges’ Remuneration and Conditions of Employment Act, 2001 (Act No. 47 of 2001), a judge who has attained the age of 65 years and who has performed active service for a period of 15 years may, on notice to the Minister, be discharged from active service if he or she so chooses. However, judges must be discharged from active service on attaining the age of 70 years. **Clause 25** of the Bill retains the retirement age of 65 years for magistrates but gives them the option to continue in such

office until they attain the age of 70 years. They must exercise this option before attaining the age of 65 years by giving written notice thereof to the Magistrates Commission.

2.23 **Clause 26** seeks to insert section 3A in the Special Investigating Units and Special Tribunals Act, 1996 (Act No. 74 of 1996) (hereinafter referred to as "the SIU Act").

2.23.1 In terms of section 3(5) of the SIU Act, a member of a Special Investigating Unit (the SIU) whose remuneration is–

(*a*) not defrayed from public money, may be paid such remuneration, including allowances for subsistence and travelling expenses incurred by him or her in the performance of his or her functions in terms of the SIU Act, as the Cabinet member responsible for the administration of justice in consultation with the Cabinet member responsible for finance may determine; and

(*b*) defrayed from public money, may be paid such allowances in respect of his or her service as such member, including allowances for subsistence and travelling expenses incurred by him or her in the performance of his or her functions in terms of the SIU Act, as the Cabinet member responsible for the administration of justice in consultation with the Minister of Finance may determine.

2.23.2 While the remuneration and allowances of members of the SIU is regulated by section 3(5) indicated above, various problems are being experienced in determining the salary of a Head of the SIU, since no guidelines are provided for determining his or her salary. The SIU Act also does not adequately regulate the remuneration of an acting Head of the SIU, who may be someone from the SIU itself or an employee in the public service or even a person from the private sector. The aim of **clause 26** of the Bill is to provide for criteria to determine the remuneration, allowances and other terms and conditions of service and service benefits of the Head or Acting Head of the SIU.

2.23.3 Section 3(1) of the SIU Act provides that the President must appoint a person who is a South African citizen and who, with due regard to his or her experience, conscientiousness and integrity, is a fit and proper person to be entrusted with the responsibilities of that office, as the Head or Acting Head of the SIU. The first Head of

the SIU was a judge of the High Court before the Constitutional Court, in ***SAAPIL v Heath and Others*** 2001 (1) SA 883 CC, found that the position of a judge as Head of the SIU is incompatible with judicial office. Persons who were subsequently appointed as Head or Acting Head of the SIU were highly qualified and experienced persons in order to comply with the onerous requirements of section 3(1) of the SIU Act. Furthermore, similar to the judiciary, the terms and conditions of service and service benefits of the Head or Acting Head of a SIU should be protected in light of the nature of the functions of the SIU, which often include the investigation of instances of corruption and maladministration by senior functionaries in the executive.

2.23.4 The proposed new section 3A(1)(*a*) therefore provides that the Head or Acting Head of a SIU must be paid—

(a) an annual salary that may not be less than the salary of a judge as contemplated in section 2(1)(*a*)(i) of the Judges' Remuneration and Conditions of Employment Act, 2001 (Act No. 47 of 2001); and

(b) such allowances and other service benefits,

as determined by the President.

2.23.5 The proposed new section 3A(1)(*b*) provides that the Head or Acting Head holds office on such terms and conditions of service as may be determined by the President which must be in a written contract of employment.

2.23.6 The proposed new section 3A(1)(*c*) provides that the salary, allowance and other service benefits of the Head or Acting Head may not be reduced, nor may the terms and conditions of employment be adversely altered, during his or her term of office.

2.23.7 In the past employees in the public service have been appointed as Head or Acting Heads of the SIU. The SIU Act does not regulate this position adequately. The proposed new section 3A(2), similar to section 17(2) of the National Prosecuting Authority Act, 1998 (Act No. 32 of 1998), aims to protect pre-existing rights, privileges and benefits as a public servant. Section 3A(2) provides that if an official, officer or employee in the public service is appointed as the Head or Acting Head of a Special

Investigating Unit, the period of his or her service as Head or Acting Head shall be reckoned as part of and continuous with his or her employment in the public service, for purposes of leave, pension and any other conditions of service, and the provisions of any pension law applicable to him or her as such an official, officer or employee, or in the event of his or her death, to his or her dependants and which are not inconsistent with this section, shall, with the necessary changes, continue so to apply.

2.24 In terms of section 51(1) of the Criminal Law Amendment Act, 1997 (Act No. 105 of 1997), a regional court or a superior court must, subject to section 51(3) and (6), sentence a person it has convicted of an offence referred to in Part I of Schedule 2 to imprisonment for life. Section 51(3) deals with compelling circumstances which justify the imposition of a lesser sentence than the sentence provided for in section 51(1). Section 51(6), provides that section 51(1) does not apply in respect of an accused person who was under the age of 18 years at the time of the commission of an offence. The offences of rape and compelled rape, which are committed against the following categories of victims are included in Part 1 of Schedule 2 of the Criminal Law Amendment Act:

(a) where the victim is a person under the age of 16 years;
(b) where the victim is a physically disabled person who, due to his or her physical disability, is rendered particularly vulnerable; or
(c) where the victim is a person who is mentally disabled as contemplated in section 1 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act.

The offences of rape and compelled rape on older persons are not specifically provided for in Part 1 of Schedule 2 to the Criminal Law Amendment Act. The prevalence of sexual violence perpetrated against older adults is difficult to quantify. As with many other victims, older adults often do not report sexual abuse or sexual assault. Many older adults need the help of a care provider, and in many cases where an older adult is sexually abused or assaulted, the perpetrator is the caregiver. In a study of older female sexual abuse victims, the abuse was perpetrated in most cases by the victim's primary caregiver. Victims may be afraid of reporting a family member, losing the assistance of their caregivers, losing their independence, or losing their homes. Older adults can experience sexual violence in both institutional and residential settings. The physical and psychological trauma of rape on older persons is, in many instances, significant.

Section 51(1) of the Criminal Law Amendment Act, provides, among others, that a regional court or a superior court must sentence a person that has been convicted of an offence referred to in Part I of Schedule 2 to imprisonment for life. Part 1 of Schedule 2 to the Criminal Law Amendment Act recognises youth and mental and physical disability as particular forms of vulnerability insofar as the crimes of rape and compelled rape are concerned. It is recognised that these offences are committed under circumstances where the vulnerability of the aforementioned three categories of persons is exploited. A fourth category of vulnerability, namely “older persons” (i.e. male persons who are 65 years of age or older and female persons who are 60 years of age or older), has not yet been recognised. **Clause 27** of the Bill therefore seeks to amend Part I of Schedule 2 to the Criminal Law Amendment Act, by the amendment of paragraphs (*b*), of the offences "Rape" and "Compelled rape", respectively, to include the commission of these offences against an older person as defined in section 1 of the Older Persons Act, 2006 (Act No. 13 of 2006).

2.25 Section 6 of the National Prosecuting Authority Act, 1998 (Act No. 32 of 1998), provides that an office for the prosecuting authority must be established at the seat of each High Court in the Republic. No statutory authorisation exists for the establishment of an office at the seat of a local Division of a High Court, which may be established in terms of of section 6(3)(*c*) of the Superior Courts Act. **Clause 28** of the Bill seeks to amend section 6 of the National Prosecuting Authority Act, in order to provide for the establishment of offices for the prosecuting authority at the seat of a Division of a High Court provided for in terms of section 6(1) of the Superior Courts Act, and at the seat of a local Division contemplated in section 6(3)(*c*) of the Superior Courts Act. This amendment emanates from a request of the National Prosecuting Authority.

2.26 **Clause 29** inserts a new section 3A in the Debt Collectors Act, 1998 (Act No. 114 of 1998), in order to provide for the powers and functions of the Council for Debt Collectors, established by section 2 of the Debt Collectors Act. The Council for Debt Collectors requested this amendment in order to enhance its administrative efficiency. For instance, the Council for Debt Collectors is currently leasing property in excess of R100 000 per month while it has the funds to acquire immovable property. The costs for leasing property are increasing on a regular basis and in the long term, it may be more

cost effective to buy property. Provisions of a similar nature exist in numerous Acts which establish statutory bodies, for instance the Sheriffs Act, which gives the South African Board for Sheriffs, similar powers and functions. The proposed section 3A provides that the Council for Debt Collectors may—

(*a*) hire, buy or otherwise acquire such movable or immovable property as it may consider necessary for the performance of its functions and let, sell or otherwise dispose of property so acquired;

(*b*) from time to time raise money by way of a loan for the purpose of performing its functions;

(*c*) hypothecate its immovable property as security for a loan referred to in paragraph (*b*);

(*d*) with a view to promoting its objects, lend money against such security as it may consider adequate;

(*e*) make donations of property (including money) of the Council;

(*f*) by means of insurance provide for cover for the Council against any loss, damage, risk or liability which it may suffer or incur; and

(*g*) in general, perform such acts as may be necessary or expedient for the achievement of its objects.

The question might be raised why an amendment to the Debt Collectors Act, 1998, is being included in this Bill when the Department has on its Legislative Programme a Debt Collectors Amendment Bill which has already been prepared. The Debt Collectors Amendment Bill contains provisions which are likely to be contentious since it seeks to subject attorneys who do debt collection to the jurisdiction of Council for Debt Collectors. This aspect still needs to be taken up with key stakeholders. It is foreseen that the Judicial Matters Amendment Bill under discussion will be able to be introduced into Parliament and disposed of far quicker than is anticipated in the case of the Debt Collectors Amendment Bill. The Council for Debt Collectors is extremely anxious to promote this amendment at the first available opportunity because the lease of the Council's current premises expired at the end of November 2015. The Council has managed to negotiate with the landlord that the lease can continue on a month to month basis but not for an extended period. Hence the urgency of the matter.

2.27 Clauses 30, 31 and 33 of the Bill are discussed under paragraphs 2.2.2, 2.2.3 and 2.2.4, above.

2.28 In section 1 of the Promotion of Equality and Prevention of Unfair Discrimination Act, in paragraph (*a*) of the definition of "prohibited grounds", the following grounds are listed: race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. These are the same grounds listed in section 9(3) of the Constitution of the Republic of South Africa. The Equality Review Committee, established in terms of section 32 of the Promotion of Equality and Prevention of Unfair Discrimination Act, has recommended that HIV/AIDS be added as prohibited ground. Evidence suggests that persons living with HIV/AIDS face discrimination and stigmatization and current legal recourse is often not viable.

The United Nations Commission on Human Rights, at its annual sessions as far back as 1990, adopted numerous resolutions on human rights and HIV which, inter alia, confirm that discrimination on the basis of HIV/AIDS status, actual or presumed, is prohibited by existing international human rights standards and clarify that the term “or other status” used in the non-discrimination clauses of such texts “should be interpreted to include health status, such as HIV/AIDS” (See Commission on Human Rights resolutions 1990/65, 1992/56, 1993/53, 1994/49, 1995/44 and 1996/43 and reports of the Secretary-General submitted to the Commission on Human Rights are E/CN.4/1995/45 and E/CN.4/1996/44 and E/CN.4/1997/37.)

HIV/AIDS status is added as a prohibited ground by **clause 32**. The inclusion of HIV/AIDS status will result in greater access to equality courts, as a claimant would only have to prove that there was discrimination on the basis of HIV/AIDS status. The person accused of discriminating would then have to prove that the discrimination was fair. The explicit acknowledgment of HIV/AIDS status in the Promotion of Equality and Prevention of Unfair Discrimination Act will assist in developing a human rights approach in accordance with international precedents.

2.29 **Clause 34** seeks to amend section 4 of the Institution of Legal Proceedings against certain Organs of State Act, 2002 (Act No. 40 of 2002) (hereinafter referred to

as “the Institution of Legal Proceedings against certain Organs of State Act”). The proposed amendments to this Act emanate from the South African Police Service. It is proposed that section 4(1) of the Act be amended to allow a creditor to serve a notice (letter of demand) in the same manner as required in the Act for process of court referred to in section 5(1)(*b*)(ii)(*bb*) of the Act, namely that a notice may also, in the case of the South African Police Service, be served on the Provincial Commissioner of the province in which the cause of action arose. This will result in the reduction of unnecessary costs and will provide sufficient time for a functionary to apply his or her mind to the merits of a particular claim for compensation.

2.30 **Clause 35** seeks to effect the following amendments to section 5 of the Institution of Legal Proceedings against certain Organs of State Act:

2.30.1 Section 5(1)(*a*) of this Act provides that process must be served “in the manner prescribed by the rules of the court in question for the service of process”. The Rules Board points out that this provision is not consonant with section 2(2) of the State Liability Act, 1957, (as discussed above) which sets out on whom service must be effected, while the Institution of Legal Proceedings against certain Organs of State Act, 2002, leaves it to the rules of court. The Rules Board argues that if the method of service is provided for in primary legislation, the Institution of Legal Proceedings against certain Organs of State Act, 2002, should refer to the primary legislation rather than subordinate legislation, namely the rules of court. **Clause 35** gives effect to this proposal.

2.30.2 The South African Police Service also proposed that section 5(1)(*b*)(ii) be amended. The provision provides that process may be served on either the National Commissioner of the South African Police Service or the Provincial Commissioner concerned. Currently, service of a summons at the office of the State Attorney in terms of the court rules is regarded as valid. However, this is not practical, as summonses served on the State Attorney are not always forwarded to the South African Police Service immediately. Given the size of the Police Service and the volume of summonses, this creates various challenges, such as default judgments and pressure

to meet timeframes as prescribed in terms of the court rules. The South African Police Service suggests that service on the National Commissioner or Provincial Commissioner should be compulsory in order to address the above challenges. **Clause 35** also gives effect to this. While the South African Police Service has requested amendments to section 5(1)(*b*)(ii) to provide for compulsory service on the National and Provincial Commissioners, it is suggested that section 5(1)(*b*)(i) and (iii) be amended accordingly, which deal with legal proceedings against the Minister of State Security and the Minister of Correctional Services, respectively.

2.30.3 Section 5(2) provides that no process may be served before the expiry of a period of 30 days after notice has been given of impending proceedings, as required by section 3(2)(*a*). The purpose of allowing 30 days to investigate a debt is to determine whether the debt should be settled or defended. The period of 30 days allowed to investigate a debt once a notice (letter of demand) has been served on the Service, is problematic, especially taking into account the size of the Police Service. The South African Police Service proposes that the period of 30 days provided for in section 5(2) of the Act, be extended to a period of 90 days. This will, it has been argued, contribute to greater efficiency and will reduce unnecessary legal costs substantially. However, this might impact negatively on the right to access to justice, requiring plaintiffs or applicants having to wait even longer before they are able to enforce their claims in court. We suggest a period of 60 days.

2.30.4 The South African Police Service also propose that a new subsection be inserted in section 5 of the Act. It argues that provision should be made for a summons and any other process of court in terms of which legal proceedings against the State are initiated may only be issued from the court in whose area of jurisdiction the cause of action arose. Provinces such as Western Cape, Eastern Cape, KwaZulu Natal and Free State are dealing with hundreds of claims where summonses have been issued from the North Gauteng High Court or Pretoria Magistrate's Court where the cause of action arose in the said provinces. The issuing of summonses from courts in Pretoria is done on the premise that the Minister of Police is conducting business in the jurisdiction of the said courts and this tactic is used by attorneys in an attempt to have matters settled due to cost implications and also to rely on miscommunications between the State Attorney

and clients in order to secure costs. The effective management of these matters have shown to be extremely problematic and difficult. Long distance litigation places a serious and unreasonable burden on the financial resources of the state.

2.31 The Trafficking Act amended certain sections of the Children's Act, 2005 (Act No. 38 of 2005), in order to remove references to child trafficking and also repealed Chapter 18 of the Children's Act, which deals with child trafficking. Due to the fact that the Trafficking Act aims to deal comprehensively with all matters relating to the trafficking in persons, all other legislation which has a bearing on trafficking of persons should be brought in line with the Act. Section 141(1)(*c*) of the Children's Act still contains provisions which deal with trafficking in children and which is criminalised in terms of section 305(1)(*c*) of the the Children's Act. In terms of these provisions a court which convicts a person for a contravention of section 305(1)(*c*) of the Children's Act may impose a fine or imprisonment for a period not exceeding 10 years or both such fine and imprisonment. In terms of the Trafficking Act a court may, where it convicts a person for a contravention of section 4 of the Act relating to trafficking in persons, impose a fine not exceeding R 100 million or imprisonment, including imprisonment for life or such imprisonment without the option of a fine or both. **Clause 36** proposes that section 141 of the Children's Act be amended by the deletion of paragraph (*c*), which prohibits the use, procuring, offering or employing of a child for trafficking.

2.32 Section 50 of the Sexual Offences Act, among others, requires that the particulars of a person who has been convicted of a sexual offence against a child must be included in the National Register for Sex Offenders. The term "sexual offence" is defined in terms of section 1 of the Act as any offence referred to in Chapters 2, 3 and 4 and sections 55 and 71(1), (2) and (6) of the Act. The phrase "sexual offence against a child" therefore implies that only these sexual offences are applicable. However, section 24B of the Films and Publications Act, 1996 (Act No. 65 of 1996), deals with various offences relating to child pornography. These offences do not fall within the ambit of the phrase "sexual offence against a child" and are therefore not applicable for purposes of including a person's particulars in the National Register for Sex Offenders. **Clause 37** of the Bill aims to amend section 40 of the Sexual Offences Act in order to

clarify that any contravention of section 24B of the Films and Publications Act should be regarded as a “sexual offence against a child”.

2.33 Section 50(5)(*a*), (6) and (7)(*a*) of the Sexual Offences Act sets out the categories of persons whose names must be included in the National Register for Sex Offenders (hereinafter referred to as "the Register"). Section 50(5) requires the National Commissioner of Correctional Services to forward to the Registrar the particulars of every former and current prisoner who has or is serving a custodial sentence for a conviction of a sexual offence against a child or person with a mental disability. Section 50(6) obliges the National Commissioner of the South African Police Service to forward to the Registrar all the particulars of every person who has a previous conviction for a sexual offence against a child or a person with a mental disability. Section 50(7) obliges the Director-General: Health to forward to the Registrar, the particulars of all persons who are subject to a direction in terms of section 77(6) or 78(6) of the Criminal Procedure Act, as the result of an act which constituted a sexual offence against a child or a person who is mentally disabled. Available historical information did not capture sufficient details of the victims of sexual offences in order to determine whether a child or a person with a mental disability was involved. Based on the challenges which are experienced to obtain correct verifiable information, it is proposed that section 50(5)(*a*), (6) and (7)(*a*) of the Sexual Offences Act be amended to follow a similar approach as that adopted in section 120(5) of the Children’s Act. Section 120(5) of the Children’s Act requires that the names of persons who were convicted of certain offences from a date preceding five years from the commencement date of Chapter 7 of that Act, be entered in the National Child Protection Register. Chapter 7 of the Children’s Act, 2005, commenced on 1 April 2010. **Clause 38** gives effect to this approach by proposing amendments to section 50(5)(*a*), (6) and (7)(*a*) of the Sexual Offences Act, requiring that historical information for a period of five years preceding the commencement of Chapter 6 must be forwarded to the Registrar for inclusion in the Register. Chapter 6 of the Sexual Offences Act commenced on 16 June 2008.

2.34 **Clause 39** seeks to substitute section 55A of the Sexual Offences Act to effect the following amendments, which are mainly of a technical nature:

(*a*) It is proposed that the expression “exclusively” which appears in section 55A(1) be deleted. After the enactment of section 55A, concerns were raised that the expression “exclusively” in section 55A(1) gives rise to interpretation problems because it does not empower the Minister to designate a court room but a court. It is therefore argued that if, for example, the regional court, Pretoria is designated, then it will have the effect that that court, despite the provisions of section 89 of the Magistrates’ Courts Act, 1944, cannot hear any offence other than the sexual offences contemplated in section 55A(1). Concerns were also raised that it is not practical to limit the use of well-equipped courts to cases involving sexual offences only. It was argued that court facilities and court-time must be maximised in order to prevent a further backlog in the finalisation of cases. The expression “designation of a court” has been often used in Acts and the view is held that the expression “designation of a court room” would not be in line with legislative practices and should not be used. In order to retain the aim of “exclusively”, the proposed new subsections (7) to (9) have been developed, which are discussed in paragraph (*d*).

(*b*) Amendments to the consultation requirements contained in section 55A(2) have been proposed due to submissions made to the Department in which it is argued that section 8(4)(c) of the Superior Courts Act confines the responsibility of a Judge-President to the co-ordination of the judicial functions of all magistrates’ courts falling within the jurisdiction of that Division. Therefore, regional court presidents should be consulted before a regional court is designated as a sexual offences court as they are responsible for the management of the judicial functions in the regional courts. The same argument applies to district courts.

(*c*) A new subsection (6) is proposed to make it clear that in order to deal appropriately with sexual offences cases in sexual offences courts, certain facilities, measures and services, to be prescribed by the Minister in terms of section 67, must be in place and be complied with.

(*d*) The proposed new subsections (7), (8) and (9) are intended to ensure that sexual offences cases will receive priority in sexual offences courts, in accordance with directives issued by the heads of courts and by requiring the involvement and oversight by the Chief Justice. These amendments seek to ensure that sexual offences cases are dealt with expeditiously.

2.35 **Clause 40** is a consequential amendment to Schedule 1 to the Child Justice Act, 2008 (Act No. 75 of 2008), relating to the repeal of the common law offence of defamation. See discussion under **clause 45** below.

2.36 **Clause 41** of the Bill aims to substitute section 13 of the Trafficking Act, in order to effect the following amendments:

(*a*) Section 13 of the Act is renumbered, the current provisions becoming subsection (1).

(*b*) In terms of section 6 of the Act any person who has in his or her possession or intentionally destroys, confiscates, conceals or tampers with any actual or purported identification document, passport or other travel document of a victim of trafficking in facilitating or promoting trafficking in persons, is guilty of an offence. In terms of section 13(1)(*d*) of the Act, a person who is convicted of an offence referred to in section 6 of the Act, is liable to a fine or imprisonment for a period not exceeding 10 years or both. However, section 49(15) of the Immigration Act was amended by the addition of paragraph (*c*) which provides that any person who has in his or her or its possession or intentionally destroys, confiscates, conceals or tampers with any actual or purported passport, travel document or identity document of another person in furtherance of a crime, shall be guilty of an offence and liable on conviction to imprisonment for a period not exceeding 15 years without the option of a fine. The penalties which can therefore be imposed for a contravention of section 6 of the Act and section 49(15) of the Immigration Act, are not the same. In order to rectify this disparity—

  (i) a new paragraph (*cA*) is inserted in section 13(1) of the Act in order to provide that a person convicted of an offence referred to in section 6 of the Act, is liable to imprisonment for a period not exceeding 15 years without the option of a fine; and

  (ii) the reference to section 6 in paragraph (*d*) of the Act, is deleted.

(*c*) A new subsection (2) is added in order to provide that where a court that has convicted a person of an offence referred to in section 4 (trafficking in persons), 5 (debt bondage), 7 (using services of victims of trafficking) or 8(1) (conduct facilitating trafficking in persons) of the Act or any involvement in these offences

as provided for in section 10, where the offence was committed for purposes of sexual exploitation, the court must, subject to section 50(2)(*c*) of the Sexual Offences Act, order in the presence of that person that his or her particulars be included in the National Register for Sex Offenders, established in terms of section 42 of the Sexual Offences Act, whereafter the provisions of Chapter 6 of that Act apply with the necessary changes required by the context. Section 50(2)(c) of the Sexual Offences Act provides that the particulars of a person, who was a child at the time of the commission of the sexual offence concerned, may only be included in the National Register for Sex Offenders after—

(a) the prosecutor has made an application to the court for such an order;

(b) the court has considered a report by the probation officer referred to in section 71 of the Child Justice Act, 2008, which deals with the probability of the person concerned committing another sexual offence against a child or a person who is mentally disabled, as the case may be, in future; and

(c) the person concerned has been given the opportunity to address the court as to why his or her particulars should not be included in the Register.

The court may, in terms of section 50(2)(*c*) of the Sexual Offences Act only make an order that the person's particulars be included in the Register if the court is satisfied that substantial and compelling circumstances exist based upon the probation officer's report and any other evidence, which justify the making of such an order.

2.37 Section 41 of the Supreme Court Act, 1959 (Act No. 59 of 1959), made provision for the transmission of court process by telegraph, as well as for the service or execution of such a telegraphic copy in the same manner as the original document. This section has since been replaced by section 44 of the Superior Courts Act, 2013 (Act No. 10 of 2013) (which repealed the Supreme Court Act, 1959). Since the use of telegraphic means of communication has long been discontinued and new means of electronic communication are continuously being developed, the new section 44 allows for the transmission of process by facsimile, as well as such other means as allowed in terms of the rules of court. The Rules Board for Courts of Law has, however, drawn attention to the fact that, in some quarters, section 44 is interpreted as allowing for the electronic service of process which, in turn, has led to criticism of the Board for its failure to

develop rules allowing such service. **Clause 42** aims to substitute section 44 in order to make it clear that the electronic transmission of process cannot in itself constitute service (or execution) of such process, and that the transmitted copy of that process must be served or executed in the same manner as would have been the case with the original document.

2.38 **Clause 43** corrects a referencing error in section 6(1)(*b*) of the Legal Aid South Africa Act, 2014 (Act No. 39 of 2014), where reference is incorrectly made to section 7(*d*). The correct reference is a reference to section 7(2)(*e*) of the Act.

2.39 **Clause 44** amends section 9 of the Legal Aid South Africa Act that provides for the term of office of Board members and limits the terms of office of the three managers of Legal Aid South Africa that are appointed to serve on the Board in terms of section 6(1)(*d*). This means that these senior executives responsible for the delivery and support functions and who report to the Legal Aid South Africa's CEO will not be able to serve beyond two terms even if they are still in the employ of Legal Aid South Africa. This is not an advisable situation as they will have to be replaced by managers that do not report to the CEO. The proposed amendment to section 9 will ensure that the managers who are most suited to serve on the Board are able to do so beyond two terms. It will be to the advantage of the Board.

2.40.1 The crime of defamation was defined in ***S v Hoho*** 2009 (1) SACR 279 SCA at para [23] as follows: "*the unlawful and intentional publication of matter concerning another which tends to injure his [or her] reputation.".* The law of defamation balances the freedom of speech and the reputation or good name of a person (***Argus Printing and Publication Co Ltd v Esselen's Estate*** *[1993] ZASCA 205; 1994 (2) SA 1 (A) at 25 B-E*). Defamation is currently a criminal offence in the Republic but also forms the basis of delictual liability. The United Nations as well as foreign authorities have expressed concerns about the 'chilling effect' of such offences, especially on journalists, and propagates the abolition of such laws. In terms of a resolution by the African Commission on Human and Peoples' Rights in 2010, it was stated that: "*criminal defamation laws constitute a serious interference with freedom of expression and impedes on the role of the media as watchdog, prevents journalists and media*

practitioners to practice their profession without fear and good faith", and it called on state parties to abolish criminal defamation. In a Joint Declaration, the authorities responsible for the protection of the right to freedom of expression of the United Nations, the Organisation of American States and the Organisation for Security and Cooperation in Europe stated that: "*Criminal defamation is not a justifiable restriction on freedom of expression; all criminal defamation laws should be abolished and replaced, where necessary, with appropriate civil defamation laws*". The Inter-American Commission on Human Rights has held in respect of defamation that: *"[T]he State's use of its coercive powers to restrict speech lends itself to abuse as a means to silence unpopular ideas and opinions, thereby repressing the debate that is critical to the effective functioning of democratic institutions. Laws that criminalize speech which does not incite lawless violence are incompatible with freedom of expression and though guaranteed in Article 13 [protecting the right to freedom of expression], and with the fundamental purpose of the American Convention of allowing and protecting the pluralistic, democratic way of life*". The European Court of Human Rights has taken a similar approach. In ***Cumpana and Mazare v Romania*** (2004), it held as follows at paras 113-114 in respect of the 'chilling effect': "*Investigative journalists are liable to be inhibited from reporting on matters of general public interest - such as suspected irregularities. In the award of public contracts to commercial entities if they run the risk, as one of the standard sanctions imposable for unjustified attacks on the reputation of private individuals, of being sentenced to imprisonment or to a prohibition on the exercise of their profession. The chilling effect that the fear of such sanction has on the exercise of journalistic freedom of expression is evident*".

2.40.2 The ratio for the repeal of the common law relating to the crime of defamation is that there are well established civil remedies based on delict, in addition to the offence of *crimen iniuri*a. In this regard reference can be made to South African Criminal Law and Procedure: Common-law crimes, by John Milton, at page 520, where it is stated that the "*rationale for criminalising defamation is not persuasive, and the criminalisation of defamation in order to protect public officials possesses an unattractively wide scope of application of freedom of expression and the press. The scope for the prevention of disturbances of the public peace by criminalising defamation, in modern society, is minimal.".* Lastly, reference is made to recent media reports in which there have been

announcements of the intention to repeal the common law offence of defamation by 2016.

2.40.3 In line with the above authorities, **clause 45**(1) of the Bill seeks to repeal the common law relating to the crime of defamation. **Clause 45(2)** provides for a transitional provision relating to criminal proceedings in respect of the crime of defamation that have not been finalised on the date of commencement of subsection (1). **Clause 45(3)** is a restatement that the repeal of the common law relating to the crime of defamation does not affect civil liability in terms of the common law based on defamation.

2.41 **Clause 46** deals with the short title and commencement of the Bill. All the provisions come into operation after the Bill has been assented to by the President and on publication thereof in the *Gazette*, except clauses 20, 21, 25 and 39which require regulations to be promulgated before they can come into operation. It is proposed that clause 26 on the Bill comes into operation on 1 March 2015, in order to make it applicable to the current Acting Head of the SIU, who was appointed with effect from 1 March 2015.

(2) Sections 20, 21, 25 and 39 come into operation on a date fixed by the President by proclamation in the *Gazette*.

(3) Section 26 is deemed to have come into operation on 1 March 2015.