



DISCUSSION PAPER 134

PROJECT 25

STATUTORY LAW REVISION

**REVIEW OF THE LEGISLATION ADMINISTERED BY THE DEPARTMENT OF JUSTICE AND
CONSTITUTIONAL DEVELOPMENT: THE CRIMINAL PROCEDURE ACT 51 OF 1977**

Closing date for comments: 31 July 2015

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INTRODUCTION

The South African Law Reform Commission Act 19 of 1973 established the South African Law Reform Commission (SALRC). The members of the SALRC are –

The Honourable Madam Justice M Maya (Chairperson)
The Honourable Mr Justice JD Kollapen (Vice Chairperson)
Professor Vinodh Jaichand
Mr Irvin Lawrence
Advocate Mahlape Sello
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The Acting Secretary is Mr JB Skosana. The project leader responsible for this investigation is Mr Irvin Lawrence. The researcher assigned to this investigation is Mr AWF J van Vuuren. In July 2009, Ms MS Mabandla, the then Minister of Justice and Constitutional Development, appointed the following additional advisory committee members who assisted the SALRC to develop consultation papers in respect of legislation administered by the Department of Justice:

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PREFACE

This discussion paper reflects information gathered up to the end of October 2014. It has been prepared by Mr AWF J van Vuuren on behalf of the Advisory Committee, and is intended to elicit responses and serve as a basis for the Commission's deliberations, taking into account any responses received. The views, conclusions and recommendations in this paper are accordingly not to be regarded as the Commission's final views. The discussion paper is published in full so as to provide persons and bodies wishing to comment or to make suggestions for the reform of this particular branch of the law with sufficient background information to enable them to place focussed submissions before the Commission.

Respondents are requested to submit **written** comments, representations or requests to the Commission by **31 July 2015** at the address appearing on the previous page. The researcher will endeavour to assist respondents with particular difficulties they may have. Comment already forwarded to the Commission should not be repeated; in such event respondents should merely indicate that they abide by their previous comment, if this is the position. The researcher allocated to this project, who may be contacted for further information, is Mr AWF J van Vuuren.

The Commission will assume that respondents agree to the Commission quoting from or referring to their comments, and that comments will be attributed to the relevant respondent/s. If a respondent does not wish to be quoted or named, the representation must be marked "confidential". Respondents should be aware that the Commission may in any event be required to release information contained in representations, under the Constitution of the Republic of South Africa, Act 108 of 1996.

LIST OF SOURCES

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Cathi Albertyn: *Summary of Equality Jurisprudence and Guidelines for Assessing the SA Statute Book for Constitutionality against Section 9 of the 1996 Constitution*, written for the SALRC in February 2006. Available upon request from pvanwyk@justice.gov.za or the SALRC library.

Etienne Du Toit; Frederik J de Jager; Andrew Paizes; Andrew St Quinton Skeen; Steph Van der Merwel *Commentary on the Criminal Procedure Act Service* 53 Juta 2014

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Law and Transformation Programme of the Centre for Applied Legal Studies of the University of the Witwatersrand: *Feasibility and Implementation Study on the Revision of the Statute Book* April 2001 available upon request from pvanwyk@justice.gov.za or the SALRC library.

SA Law Reform Commission Project 101: *The Application of the Bill of Rights to the criminal procedure, criminal law, the law of evidence and sentencing.2001* RP118/2001 ISBN 0 62131451

LIST OF CASES

National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development and another [2014] JOL 32401 (GP);

President of the Republic of South Africa v Hugo 1997 (1) SA 1 CC

S v Dlamini; S v Dladla & others; S v Joubert; S v Schietekat 1999 (2) SACR 51 (CC);

S v Singo 2002 (2) SACR 160 (CC) & 2002 (4) SA 858 (CC.)

Preliminary recommendations and questions for comments

1. The SALRC has been mandated with the task of revising the South African statute book with a view to identifying and recommending for repeal or amendment any legislation or provisions in legislation that are inconsistent with the equality clause in the Constitution, or which are redundant or obsolete. Pursuant to this mandate, the SALRC has established that there are 2800 Acts in the statute book. Furthermore, the SALRC has identified 180 **statutes (principal Acts and amendment Acts)** that are administered solely by the Department of Justice and Constitutional Development. The Acts administered by the Department have been subdivided for purposes of this investigation, and the Commission elected to adopt an incremental approach. At the beginning of the project, all statutes administered by the Department of Justice and Constitutional Development were thematically divided into nine clusters. These clusters are 1) the legal profession; 2) courts and institutions; 3) criminal procedure and evidence; 4) civil procedure and evidence; 5) substantive criminal law; 6) civil law; 7) family law and marriage; 8) wills, estates and insolvency; and 9) constitutional and political.

2. The Commission's first consultation paper has been completed and dealt with the review of all the clusters except criminal procedure. The second consultation paper dealt with family law and related matters. The third phase of the Commission's investigation deals with the review of the Criminal Procedure Act only, which is the subject matter of this discussion paper. In view of the importance of the Criminal Procedure Act, it was decided to limit the third consultation paper to this Act only, and to deal with the matter of evidence in a separate part of the investigation.

3. The constitutional validity aspect of this project focuses on statutes or provisions in statutes that are clearly inconsistent with the right to equality entrenched in section 9 of the Constitution. In practical terms this means that this leg of the investigation is limited to those statutes or provisions in statutes that:

- Differentiate between people or categories of people in a manner that is not rationally connected to a legitimate government purpose; or
- unfairly discriminate against people or categories of people on one or more grounds listed in section 9(3) of the Constitution; or
- unfairly discriminate on grounds which impair or have the potential to impair a person's fundamental human dignity as a human being.

4. In principle, the statutory law revision project includes the process of repealing statutes that are no longer of practical utility, as well as repealing statutes which are unconstitutional because they infringe the constitutional right to equality. The purpose of the revision process is to modernise and simplify the statute book, thereby reducing its size and saving the time of legal professionals and others who make use of it. This in turn helps to avoid unnecessary costs. It also ensures people are not misled by obsolete laws masquerading as “live” law. If Acts still feature in the statute book and are referred to in text-books, people reasonably enough assume those Acts still serve a purpose. Legislation identified for repeal is selected on the basis that it is no longer of practical utility. Usually this is because these laws no longer have any legal effect on technical grounds – because they are spent, unnecessary or obsolete. But sometimes they are selected because, although strictly speaking they do continue to have legal effect, the purposes for which they were enacted either no longer exist or are currently being met by alternative means.

5. According to the Law Commission for England and Wales, provisions commonly recommended for repeal include the following:¹

- (a) references to bodies, organisations, etc. that have been dissolved or wound up or which have otherwise ceased to serve any purpose;
- (b) references to issues that are no longer relevant as a result of changes in social or economic conditions;
- (c) references to Acts that have been superseded by more modern legislation or by an international convention;
- (d) references to statutory provisions (i.e. sections, schedules, orders, etc.) that have been repealed;
- (e) repealing provisions e.g. “Section 28 is repealed or shall cease to have effect”;
- (f) commencement provisions once the whole of an Act is in force;
- (g) transitional or savings provisions that are spent;
- (h) provisions that are self-evidently spent - e.g. a once-off statutory obligation to do something becomes spent once the required act has duly been done;
- (i) powers that have never been exercised over a period of many years or where any previous exercise is now spent.

6. This discussion paper deals with legislation administered by the Department of Justice and Constitutional Development. The Department administers 300 Acts, and for purposes of this investigation it was decided to divide these Acts into three consultation papers, each of which would

¹ These guidelines appear in *Background Notes on Statute Law Repeals* Law Commission for England and Wales 28 April 2011 Web 28 May 2011 < [http://www.lawcom.gov.uk/docs/background notes.pdf](http://www.lawcom.gov.uk/docs/background%20notes.pdf) >

deal with various Acts grouped together by topic. As mentioned earlier, this discussion paper deals only with the review of the Criminal Procedure Act 51 of 1977. The current chapter deals with the provisions of this Act, and reflects the sections which have been reviewed and the recommendations for amendments to or repeal of specific sections of the Criminal Procedure Act. The review of the Act is discussed in chronological order, followed in each section by the comments received by the Department, and then the Commission's recommendations.

7. The scope of this statutory review is mainly to assess whether the provisions of the Criminal Procedure Act 51 of 1977 (the Act), which is administered by the Department, conform with the anti-discriminatory provisions of section 9 of the Constitution. However, while not an intensive statutory review process *vis-à-vis* the Constitution, the project also included the identification of statutory provisions that have become obsolete or redundant, or which show internal conflicts and discrepancies, or which are outdated although they might not necessarily be obsolete. The SALRC requested comments from the Department of Justice on the consultation paper and the draft Bill that was attached to the paper. The SALRC also resubmitted to the Department its report on Project 101: the Application of the Bill of Rights to Criminal Procedure, Criminal Law, the Law of Evidence and Sentencing ("the report"). The aim of resubmission was to obtain comment from the Department. It should be noted that, in order to comply with the request for comment, the Department (in a memorandum containing its comments) only provided comments where its views differed from the SALRC or where it had alternative suggestions. For purposes of the discussion paper, the Commission's report on Project 101 referred to above was not included; the discussion paper focuses only on provisions of the Act which are in conflict with the equality clause (section 9 of the Constitution).

8. Chapter 2 of this paper is divided into three parts, each of which deals with specific chapters or sections of the Act. The three parts are as follows:

- (i) **Part 1:** this part discusses chapters 1 to 11 of the Act, which include sections 6 to 74 of the Act. The following topics are discussed:
- the powers of the prosecuting authority (chapter 1 of the Act);
 - searches and seizures (chapter 2);
 - procedures for accessing the bodily features of an accused as evidence (chapter 3);
 - methods of securing the attendance of the accused in court (chapter 4);
 - arrest (chapter 5);
 - summons procedures (chapter 6);
 - written notice to appear in court (chapter 7);

- admission of guilt fines (chapter 8);
- bail procedures (chapter 9);
- release on warning (chapter 10); and
- assistance to the accused (chapter 11).

(ii) **Part 2:** this deals with chapters 12 to 22 of the Act (sections 75 to 178), which cover the following topics:

- summary trials;
- mental illness;
- the charge;
- the plea;
- jurisdiction;
- plea of guilty and plea of not guilty;
- pleas in magistrates' courts on charges that are judiciable in superior courts and regional courts;
- preparatory examinations; and
- conduct of proceedings.

(iii) **Part 3:** this deals with chapters 23 to 33 of the Act (sections 199 to 345), which cover the following topics:

- witnesses;
- evidence;
- conversion of trial into enquiry;
- competent verdicts;
- previous convictions;
- sentence;
- compensation and restitution;
- reviews and appeals;
- appeals from proceedings in superior courts;
- mercy and pardon; and
- general provisions.

9. After analysing the Criminal Procedure Act, the SALRC proposes that:

(i) The provisions of the Criminal Procedure Act 51 of 1977 set out in the Criminal Procedure Amendment Bill be amended for the reasons set out in Chapter 2 of this

discussion paper and to the extent outlined in the Bill. The proposed amendments in essence relate to references that conflict with the equality clause because they use male pronouns exclusively (e.g. “he”, “his” and “him” without “she”, “her” and “her”, respectively). Outdated references and spent provisions as identified in the proposals are also recommended for repeal.

10. However, it is possible that some of the provisions recommended for repeal or amendment are still useful and should thus not be repealed. Moreover, it is also possible that some provisions which require repeal or amendment have not been identified in this discussion paper.

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CHAPTER 1

BACKGROUND AND SCOPE OF PROJECT 25

A Introduction

1 *The objects of the South African Law Reform Commission*

1.1 The objects of the SA Law Reform Commission (SALRC) are set out in the South African Law Reform Commission Act 19 of 1973 as follows: to do research with reference to all branches of the law of the Republic, and to study and to investigate all such branches of the law in order to make recommendations for the development, improvement, modernization or reform thereof, including:

- (a) the repeal of obsolete or unnecessary provisions;
- (b) the removal of anomalies;
- (c) the bringing about of uniformity in the law in force in the various parts of the Republic; and
- (d) the consolidation or codification of any branch of the law.

1.2 Thus the SALRC is an advisory statutory body whose aim is the renewal and improvement of the law of South Africa on a continual basis.

2 *History of the investigation*

1.3 Shortly after its establishment in 1973, the SALRC began revising all pre-Union legislation, as part of its Project 7. This investigation resulted in the repeal of approximately 1 200 laws, ordinances, and proclamations of the former colonies and republics. In 1981 the

SALRC finalised a report on the repeal of post-Union statutes as part of its Project 25 on statute law, which aims to establish a permanently simplified, coherent, and generally accessible statute book. This report resulted in Parliament adopting the Repeal of Laws Act, 1981 (Act 94 of 1981), which repealed approximately 790 post-Union statutes.

1.4 Immediately after the advent of constitutional democracy in South Africa in 1994, the legislation enacted prior to that year remained in force. Numerous pre-1994 provisions do not comply with the country's new Constitution, a discrepancy exacerbated by the fact that some of those provisions were enacted to promote and sustain the policy of apartheid.

1.5 In 2003, Cabinet approved that the Minister of Justice and Constitutional Development should coordinate and mandate the SALRC to review provisions in the legislative framework that would result in discrimination, as defined by section 9 of the Constitution. Section 9 prohibits unfair discrimination on the basis of race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, or birth.

1.6 In 2004 the SALRC included in its law reform programme an investigation on statutory law to revise all statutes from 1910 to date. Whereas previous investigations had focused on identifying obsolete and redundant provisions for repeal, the current investigation emphasizes compliance with the Constitution. Redundant and obsolete provisions that are identified in the course of this investigation are also recommended for repeal, but the constitutional inquiry has focused mainly on identifying statutory provisions that blatantly violate the provisions of section 9 (the equality clause) of the Constitution.

1.7 A 2004 provisional audit by the SALRC of national legislation that has remained on the statute book since 1910 established that roughly 2 800 individual statutes exist, comprising principal Acts, amendment Acts, private Acts, additional or supplementary Acts, and partially repealed Acts. A substantial number of Acts on the statute book no longer serve any useful purpose and many others have retained unconstitutional provisions. This situation has already resulted in expensive and sometimes protracted litigation.

B WHAT IS STATUTORY LAW REVISION?

1.8 Statutory law revision ordinarily focuses on the identification and repeal of statutes that are no longer useful in practice. As the Law Reform Commission for England and Wales explains, the purpose of statute revision is to modernise and simplify statutes that need updating, and to reduce the size of the statute book to the benefit of legal professionals and other people who use it.² Revision lessens the chance of people being misled by redundant laws that still appear in the statute book and seem to be relevant or “live”. If statutory provisions appear in the statute book and are referred to in legal textbooks, readers may reasonably assume they still serve a purpose.

1.9 As is the case in other jurisdictions (and will be evident in this review), once legislation is deemed no longer to apply, the question arises whether it should remain in the statute book or be repealed.³ Usually such legislation no longer has any legal effect and is considered obsolete, redundant, or spent. A statutory provision may be identified for repeal because the grounds for which it was passed have lapsed or are presently remedied by another measure or provision.

1.10 In the context of this investigation, the statutory law revision primarily targets statutory provisions that are obviously at odds with the Constitution, particularly section 9.

1.11 The Law Commission for England and Wales lists the following guidelines for identifying statutory provisions that are candidates for repeal:⁴

- (a) references to bodies, organisations, etc. that have been dissolved or wound up or which have otherwise ceased to serve any purpose;
- (b) references to issues that are no longer relevant as a result of changes in social or economic conditions (e.g. legislation about tithes or tin mines);
- (c) references to Acts that have been superseded by more modern (or EU) legislation or by international Convention;

² See the *Background Notes on Statute Law Repeals* compiled by the Law Commission for England and Wales, par 1 accessed on 28 May 2008 (hereinafter referred to as Law Commission for England and Wales *Background Notes on Statute Law Repeals*) <http://lawcommission.justice.gov.uk/docs/backgroundnotes.pdf>

³ See Law Commission for England and Wales *Background Notes on Statute Law Repeals* the *Background*, par 6.

⁴ See Law Commission for England and Wales *Background Notes on Statute Law Repeals*, par 7.

- (d) references to statutory provisions (i.e. sections, schedules, orders, etc.) that have been repealed;
- (e) repealing provisions e.g. “Section 33 is repealed/shall cease to have effect”;
- (f) commencement provisions once the whole of an Act is in force;
- (g) transitional or savings provisions that are spent;
- (h) provisions that are self-evidently spent - e.g. a one-off statutory obligation to do something becomes spent once the required act has duly been done;
- (i) powers that have never been exercised over a period of many years or where any previous exercise is now spent.

1.12 The Law Commission of India notes that in England the terms “expired”, “spent”, “repealed in general terms”, “virtually repealed”, “superseded”, and “obsolete” were defined in memoranda to Statute Law Revision Bills as follows:⁵

- Expired – that is, enactments which having been originally limited to endure only for a specified period by a distinct provision, have not been either perpetuated or kept in force by continuance, or which have merely had as their object the continuance of previous temporary enactments for periods now gone by effluxion of time
- Spent – that is, enactments spent or exhausted in operation by the accomplishment of the purposes for which they were passed, either at the moment of their first taking effect or on the happening of some event or on the doing of some act authorised or required
- Repealed in general terms – that is, repealed by the operation of an enactment expressed only in general terms, as distinguished from an enactment specifying the Acts which it is to operate
- Virtually repealed – where an earlier enactment is inconsistent with, or is rendered nugatory by, a later one
- Superseded – where a later enactment effects the same purposes as an earlier one by repetition of its terms or otherwise
- Obsolete – where the state of things contemplated by the enactment has ceased to exist, or the enactment is of such a nature as to be no longer

⁵ Law Commission of India *Ninety-Sixth Report on Repeal of Certain Obsolete Central Acts* March 1984; p 3 of Chapter 2 (p 6 of 21) accessed from <http://lawcommissionofindia.nic.in/51-100/Report96.pdf> on 28 May 2008.

capable of being put in force, regard being had to the alteration of political or social circumstances.

1.13 Statutory provisions usually become redundant as time passes.⁶ Generally, the redundancy of legislation is not signalled by a single occurrence; rather, legislation is often simply overtaken by social and economic changes. Inevitably some provisions fade away more quickly than others. Relatively short-lived provisions include commencement and transitional provisions and those that confer powers to be exercised during the period between the passing of legislation and its implementation (in some jurisdictions known as “pump-priming” provisions). Provisions that provide for delegated legislation-making powers might also become unnecessary over time, or a committee or board established by a statute might no longer be required.

1.14 Substantial revision of statutory law is possible in South Africa because of the general savings provisions of section 12(2) of the South African Interpretation Act. The South African Interpretation Act 33 of 1957⁷ mirrors section 16(1) of the Interpretation Act of 1978 of England and Wales.⁸ Section 12(2) of the South African Interpretation Act provides that where a law repeals any other law, then unless the contrary intention appears, the repeal shall not:

- (a) revive anything not in force or existing at the time at which the repeal takes effect; or
- (b) affect the previous operation of any law so repealed or anything duly done or suffered under the law so repealed; or
- (c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any law so repealed; or
- (d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any law so repealed; or
- (e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, forfeiture or punishment as is in this subsection mentioned,

⁶ See Law Commission for England and Wales *Background Notes on Statute Law Repeals*, par 9 and 10.

⁷ With the exception of few minor changes, the South African Interpretation Act 5 of 1910 repeated the provisions of the United Kingdom Interpretation Act of 1889 (Interpretation Act 1889 (UK) 52 & 53 Vict c 63).

⁸ See Law Commission for England and Wales *Background Notes on Statute Law Repeals the Background*, par 8.

and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealing law had not been passed.

1.15 The methodology adopted in this investigation is to review the statute book by department; that is, the SALRC identifies a department, reviews the national legislation administered by that department for constitutionality and redundancy, sets out the preliminary findings and proposals in a consultation paper, and consults with that department to verify the SALRC's preliminary findings and proposals. The next step that the SALRC undertakes is the development of a discussion paper in respect of the legislation of each department, and upon its approval by the SALRC it is published for general information and comments. Finally, the SALRC develops a report in respect of each department, which reflects the comments on the discussion paper and contains a draft Bill proposing amending legislation.

C THE INITIAL INVESTIGATION

1.16 In the early 2000s, the SALRC and the German Agency for Technical Cooperation commissioned the Centre for Applied Legal Studies at the University of the Witwatersrand to conduct a preliminary study on law reform. The study examined the feasibility, scope, and operational structure of revising the South African statute book for constitutionality, redundancy, and obsolescence. The Centre for Applied Legal Studies pursued four main avenues of research in this study, which was conducted in 2001; the results were submitted to the SALRC in April 2001.⁹ These four steps are outlined here:

1. A series of interviews was conducted with key role-players drawn from the three governmental tiers, Chapter 9 institutions, the legal profession, academia, and civil society. These interviews revealed a high level of support for a law reform project.
2. All Constitutional Court judgments up to 2001 were analysed. The results were compiled as schedules summarising the nature and outcome of these cases, and the statutes impugned. The three most problematic categories of legislative provisions were identified, and the Constitutional Court's jurisprudence in each

⁹ "Feasibility and Implementation Study on the Revision of the Statute Book" prepared by the Law and Transformation Programme of the Centre for Applied Legal Studies of the University of the Witwatersrand April 2001 available upon request from pvanwyk@justice.gov.za.

category was analysed. The three most problematic categories were reverse onus provisions, discriminatory provisions, and provisions that infringe on the separation of powers. Guidelines summarising the Constitutional Court's jurisprudence were compiled for each category.

3. Sixteen randomly-selected national statutes were tested against the guidelines. The results were compared with the results of a control audit that tested the same statutes against the entire Bill of Rights, excluding socio-economic rights. Comparison of the outcomes showed that a targeted revision of the statute book in accordance with the guidelines had produced highly effective results.
4. A survey of law reform in five other countries (United Kingdom, Germany, Norway, Switzerland, and France) was conducted. Apart from France, all these countries had conducted or were conducting statutory revision exercises. The motivation for the revision and the outcomes of the exercises differed by country.

1.17 The SALRC finalised the following reports, proposing reform of discriminatory areas of the law or the repeal of specific discriminatory provisions:

- (a) the Recognition of Customary Marriages (August 1998);
- (b) the Review of the Marriage Act 25 of 1961 (May 2001);
- (c) the Application of the Bill of Rights to Criminal Procedure, Criminal Law, the Law of Evidence and Sentencing (May 2001);
- (d) Traditional Courts (January 2003);
- (e) the Recognition of Muslim marriages (July 2003);
- (f) the Repeal of the Black Administration Act 38 of 1927 (March 2004);
- (g) Customary Law of Succession (March 2004); and
- (h) Domestic Partnerships (March 2006).

D SCOPE OF THE PROJECT

1.18 The constitutional validity aspect of this project focuses on statutes or provisions in statutes that are clearly inconsistent with the right to equality entrenched in section 9 of the Constitution. In practical terms this means that this leg of the investigation is limited to those statutes or provisions in statutes that:

- Differentiate between people or categories of people, and which are not rationally connected to a legitimate government purpose; or
- unfairly discriminate against people or categories of people on one or more grounds listed in section 9(3) of the Constitution; or
- unfairly discriminate on grounds which impair or have the potential to impair a person's fundamental human dignity as a human being.

1.19 Consequently, a law or a provision in a law which appears on the face of it to be neutral and non-discriminatory, but which has or could have discriminatory effect or consequences, has been left to the judicial process. This investigation focuses on the constitutionality of provisions in statutes of South African law, with special attention paid to consonance with section 9 of the Constitution. The investigation also attends to obsolescence or redundancy of provisions. In 2003, Cabinet directed that the highest priority be given to reviewing provisions that would result in discrimination as defined in section 9 of the Constitution, which prohibits unfair discrimination on the basis of race, gender, sex, pregnancy, marital status, ethnic and social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, or birth. The SALRC agreed that the project should proceed by scrutinising and revising national legislation that discriminates unfairly.¹⁰ However, as explained in the preceding sections of this chapter, even the section 9 inquiry was limited because it dealt primarily with statutory provisions that were blatantly in conflict with section 9 of the Constitution. This delimitation arose mainly from considerations of time and capacity. Nonetheless, during the investigation some other anomalies and obvious inconsistencies with the Constitution were identified, and recommendations have been made on how to address them.

1.20 The practice followed in legislation to use the male term to include the female is sanctioned by section 6(a) of the Interpretation Act No 33 of 1957. This matter was considered by the Constitutional Court in the case of *The President of the Republic of South Africa and Others v Hugo*¹¹. The matter for consideration by the court was a constitutional challenge based on the equality clause in section 8 of the Interim Constitution. At the heart of the matter was a presidential pardon granted in terms of his powers under section 82(1)(k) of the Interim Constitution, where the President and the two Executive Deputy Presidents signed a document styled Presidential Act No. 17 (the "Presidential Act"), in terms of which special remission of sentences was granted to certain categories of prisoners. The category of direct relevance to

¹⁰ Cathi Albertyn prepared a "Summary of Equality Jurisprudence and Guidelines for Assessing the SA Statute Book for Constitutionality against Section 9 of the 1996 Constitution" for the SALRC in February 2006; available on request from pvanwyk@justice.gov.za.

¹¹ Case CCT 11/96 decided on 18 April 1997.

the proceedings was “*all mothers in prison on 10 May 1994, with minor children under the age of twelve (12) years*”. This act was challenged by the respondent in that it was claimed that the respondent would have qualified for remission, but for the fact that he was the father (and not the mother) of his son who was under the age of twelve years at the relevant date. It is important to note the court’s emphasis on equality in the constitutional scheme. The court noted that the South African Constitution is primarily and emphatically an egalitarian constitution. According to the court the supreme laws of comparable constitutional states may underscore other principles and rights. But in the light of our own particular history, and our vision for the future, a constitution was written with equality at its centre. Equality is our Constitution’s focus and organising principle. The importance of equality rights in the Constitution, and the role of the right to equality in our emerging democracy, must both be understood in order to analyse properly whether a violation of the right has occurred.

1.21 The court furthermore noted that the importance of equality is demonstrated by the Constitution’s insistence that discrimination on a specified ground mentioned in section 8(2) shall be presumed unfair until the contrary is established. The court emphasised that in the context of section 8(2) they render a distinction couched in their terms automatically questionable, and section 8(4) reinforces this by presuming that discrimination on a listed ground is unfair. The court indicated that section 8 of the Interim Constitution created a presumption of unfairness once discrimination on the basis of race, sex or gender is showed and unless the contrary is established. This is so because it is conduct that, on the face of it, is out of step with the fundamental values of our new constitutional order. The Constitution created a democratic constitutional state in which there is *equality between men and women and people of all races* so that all citizens shall be able to enjoy and exercise their fundamental rights and freedoms. Most importantly the court noted that true as it may be that our society **currently exhibits deeply entrenched patterns of inequality, these cannot justify a perpetuation of inequality. A statute or conduct that presupposes these patterns is unlikely to be vindicated by relying on them.** (emphasis added) It is submitted that the practice of using the masculine term in legislation discriminates against woman on the basis of gender alone and perpetuates the inequality of the status of women compared to men,

1.22 The Court considered the justification for the Presidential Act with reference to the equality clause of the Interim Constitution in the following terms:¹²

[73] A point that should also be stressed is that the question is not whether we find that the objective of the Act was praiseworthy or its likely effect beneficial to some. Both are

12. *President of the Republic of South Africa v Hugo* 1997 (1) SA 1 CC see paragraph 67 – from page 67 and further.

common cause on the papers. The crisp question is whether the Act, regardless of its impressive provenance and charitable appearance, complies with the demands of s 8(2). The criteria are prescribed by the Constitution; so too their application to a given piece of legislation or a specific executive act. The immediate focus is on s 8(2), read with and fortified by s 8(4); but the wider context is also important. **Discrimination founded on gender or sex was manifestly a serious concern of the drafters of the Constitution. That is made plain by the Preamble (first main paragraph); the Postscript (first paragraph); the ranking of sex/gender discrimination immediately after racial discrimination in the enumeration of specifically prohibited bases for discriminating in s 8(2); in ss 119 and 120, especially 119(3), providing for the creation of a Commission on Gender Equality; and the repeated use of both sexes throughout the Constitution in emphasis of the break with the former mind set and statutory drafting style (sanctified by s 6(a) of the Interpretation Act No 33 of 1957) which used the masculine gender only.** (emphasis added)

[74] The importance of equality in the constitutional scheme bears repetition. The South African Constitution is primarily and emphatically an egalitarian constitution. The supreme laws of comparable constitutional states may underscore other principles and rights. But in the light of our own particular history, and our vision for the future, a constitution was written with equality at its centre. Equality is our Constitution's focus and organising principle. The importance of equality rights in the Constitution, and the role of the right to equality in our emerging democracy, must both be understood in order to analyse properly whether a violation of the right has occurred.

[75] The importance of equality is demonstrated by the Constitution's insistence that discrimination on a specified s 8(2) basis be presumed unfair until the contrary is established. The insistence on such rebuttal is not new to this Court. A burden of "justification" was placed on the President by s 8(4) read with s 8(2). The latter states that

"[n]o person shall be unfairly discriminated against, directly or indirectly, and, without derogating from the generality of this provision, on one or more of the following grounds in particular: race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language."

Section 8(4) then continues,

"[p]rima facie proof of discrimination on any of the grounds specified in subsection (2) shall be presumed to be sufficient proof of unfair discrimination as contemplated in that subsection, until the contrary is established."

Although s 8(2) expressly makes the possible grounds for discrimination open ended, both provisions give special treatment to the listed grounds of distinction. **In the context of s 8(2) they render a distinction couched in their terms automatically questionable, and s 8(4) reinforces this by presuming that discrimination on a listed ground is unfair.** (emphasis added) Discrimination on the basis of a s 8(2) category must be regarded as unfair unless and until a persuasive rebuttal is established to vindicate it. For it is conduct that, on the face of it, is out of step with the fundamental values of our new constitutional order. This is particularly the case where discrimination on the basis of race, sex or gender is concerned. Although the Constitution does not establish levels of scrutiny in the manner of the American Constitution, it is nevertheless worth noting that race and sex/gender are given special

mention in the Preamble⁶ and head the list of s 8(2) categories. The drafters of the Constitution could hardly have established a presumption of unfairness in s 8(4) only to have the burden of rebuttal under the section discharged with relative ease.

[76] Therefore, in terms of s 8(4), read both textually and contextually, unless and “until the contrary is established”, a distinction drawn on the basis of gender or sex, such as the one here, must be found to be unfair. If no rebuttal is apparent, that is the end of the matter - the presumption of unfairness, which entails unconstitutionality under s 8(2), stands.⁷

6. The first paragraph of the Preamble expresses the need to

“ . . . create a new order in which all South Africans will be entitled to a common South African citizenship in a sovereign and democratic constitutional state in which there is *equality between men and women and people of all races* so that all citizens shall be able to enjoy and exercise their fundamental rights and freedoms” (emphasis added)

7. My colleague Mokgoro J has concluded that although the Act is in conflict with s 8, it is a “law of general application” within the meaning of s 33(1) and is saved by its provisions. I cannot agree with the second of those propositions and the third therefore does not arise. The exercise by the President of the powers afforded by s 82(1)(k) - even in the general manner he chose in this instance - does not make “law”, nor can it be said to be “of general application”. The exercise of such power is non-recurrent and specific, intended to benefit particular persons or classes of persons, to do so once only, and is given effect by an executive order directed to specific state officials. I respectfully suggest that one cannot by a process of linguistic interpretation fit such an executive/presidential/administrative decision and order into the purview of s 33(1). That savings clause is not there for the preservation of executive acts of government but to allow certain rules of law to be saved. Where some rebuttal is proffered, one must examine it to see whether it indeed “establishes” (ie proves) the fairness of the distinction.

[77] What kinds of facts are likely to discharge the burden of rebuttal imposed on the President by s 8(4)? I would make three observations here. First, the fact that discrimination is unintended or in good faith does not render it fair. Once the subject action or legislation is found to create adverse effects on a discriminatory basis, there is no further requirement, eg of bad faith or malice. My second observation is that the “rebutting” factors can seldom, if ever, in themselves be discriminatory or otherwise objectionable. True as it may be that our society currently exhibits deeply entrenched patterns of inequality, these cannot justify a perpetuation of inequality. A statute or conduct that presupposes these patterns is unlikely to be vindicated by relying on them. One that not only presupposes them but is likely to promote their continuation, is even less likely to pass muster. Third, factors that would or could justify interference with the right to equality in a section 33(1) analysis, are to be distinguished from those relevant to the enquiry under section 8(4). The one is concerned with justification, possibly notwithstanding unfairness; the other is concerned with fairness and with nothing else. I turn from these general comments to the case at hand.

[78] In my respectful view, the majority errs on all three counts. First, my colleagues base their finding of fairness in part on the good faith of the President. Second, the Act is upheld despite the fact that it relies on a generalisation regarding parental roles which is the result of disadvantage and discrimination. Third, in invoking factors such as public reactions to the release of many prisoners and administrative efficiency, the majority applies a section 33(1) analysis at the point of looking for a rebuttal of unfairness.

E CONSULTATION WITH STAKEHOLDERS

1.23 In 2004, Cabinet endorsed the proposal that government departments should be requested to participate in and contribute to this investigation. In certain instances, legal researchers cannot decide whether to recommend a provision for repeal unless they have access to factual information that might be considered “inside” knowledge – of the type usually accessible within a specific department or organisation. Examples include savings or transitional provisions that are instituted to preserve the status quo until an office-holder ceases to hold office or until a loan has been repaid. In such cases, the consultation paper drafted by the SALRC invited the department or organisation being consulted to supply the necessary information. The aim of publishing discussion papers in this investigation is likewise to determine whether departments and stakeholders agree with and support the proposed findings and legislative amendment or repeal proposals. The SALRC relies on the assistance of departments and stakeholders. This process is intended to ensure that all relevant provisions are identified during the review and are dealt with responsively, without creating unintended negative consequences.

F CONSULTATION WITH THE DEPARTMENT OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT

1.24 The methodology adopted in this investigation is to review the statute book by reviewing all national legislation administered by the different departments. In other words the SALRC identifies the Department, reviews the national legislation administered by that Department for constitutionality and redundancy, sets out the preliminary findings and proposals in a consultation paper and consults with that particular Department to verify the SALRC’s preliminary findings and proposals. In the next step the SALRC undertakes the development of a discussion paper in respect of the legislation of each Department, and upon its approval by the SALRC, it is published for general information and comment. Finally, the SALRC develops a report in respect of each Department that reflects the comment on the discussion paper and contains a draft Bill proposing amending legislation

1.25 For purposes of reviewing the legislation administered by the Department of Justice and Constitutional Development, the legislation has been grouped together according to themes. It was agreed that the statutes should be divided according to the following themes:

- Legal profession;
- Courts and institutions;
- Criminal procedure and evidence;
- Civil procedure and evidence;
- Substantive criminal law;
- Civil law;
- Family law and marriage;
- Wills, estates and insolvency; and
- Constitutional and political.

1.26 Because the Department of Justice and Constitutional Development administers a high volume of legislation, namely 180 Acts,¹³ the SALRC decided to prepare three consultation papers in which certain themes are grouped together. The third such consultation paper, which was submitted to the Department of Justice and Constitutional Development for comment, dealt with national legislation dealing with the Criminal Procedure Act. The purpose of this paper – Consultation Paper 3 – was to consult with the Department of Justice and Constitutional Development on the SALRC’s preliminary findings and proposals, as presented in the paper. The Department was asked to comment on the Commission’s provisional recommendations, and to state whether or not it had any objections to the provisional recommendations for repeal and amendments to existing legislation. Comment was duly obtained from the Department and is included in this discussion paper, for the purpose of general consultation with stakeholders.

¹³ The number of Acts administered by the department was determined in an audit conducted by the SALRC in July 2004.

CHAPTER 2

SCOPE OF DISCUSSION PAPER

A INTRODUCTION

2.1 On 21 June 2011, the SALRC submitted a consultation paper containing its preliminary findings and proposals to the Department of Justice and Constitutional Development (DOJCD). On 24 February 2012, the Department submitted its comments on the consultation paper to the SALRC. The SALRC then commenced developing the discussion paper.

2.2 This discussion paper deals with legislation administered by the DOJCD (the Department). The Department administers 180 Acts, and, as explained in the previous chapter, for this large investigation we divided the Acts administered by the Department into three groups. Each group would have its own consultation paper. The groupings were determined by theme or topic, with related Acts being grouped together. The current discussion paper deals with the review of the Criminal Procedure Act 51 of 1977; and this chapter deals with specific provisions of this Act. It reflects the various sections which have been reviewed, and the recommendations for amendment or repeal of sections of the Act. The review of the Act is discussed in chronological order. In each section, the comments received by the Department, as well as the Commission's recommendations, are presented.

2.3 In this discussion paper, the Commission's point of departure is briefly summarized. In essence the statutory law revision project entails repealing all statutes that are no longer of practical utility, as well as statutes which are unconstitutional because they infringe the constitutional right to equality. As discussed in the opening pages of this paper (see paragraphs 4 and 5 on pages vi and vii), the revision process is intended to modernise and simplify the statute book. Legislation is generally identified for repeal on the basis that it is no longer of practical utility.

2.4 In the context of this investigation, the statutory law revision process also targets statutory provisions that are obviously at odds with the Constitution, particularly section 9. With

reference to section 9 the discussion paper places particular emphasis on the use of gender selective terms in the Criminal Procedure Act as outlined in chapter 1.

B THE REVIEW OF THE CRIMINAL PROCEDURE ACT 51 OF 1977

PURPOSE OF THE CRIMINAL PROCEDURE ACT

2.5 The Criminal Procedure Act is the principal criminal procedure statute in South Africa. It provides the core theoretical framework on which South African criminal procedure is based. The purpose of the Act is to set out the procedures, rules, conditions, requirements and structures of South African criminal procedure. For purposes of this review, the Act is divided into three parts. This part of the review (Chapter 2) is confined to the terms of reference in Project 25 as outlined in paragraphs 2.1 to 2.4 above.

2.6 In 2001, the Commission completed an investigation which reviewed the constitutionality of the Criminal Procedure Act in general.¹⁴ This investigation arose from a request by the Minister of Justice during his budget vote speech to the National Assembly and the Senate in 1994, when he mentioned a number of issues that needed to be addressed. He stated, among other things, that he believed the judicial system needed fundamental changes to make it more accessible to the public. Legal procedures should be simplified; terminology should be less technical; and the judicial system should serve the community, and should reflect the thinking of the community.

2.7 The Minister had also expressed concern about the unprecedented crime wave in South Africa. He stated that we needed innovative thinking and a new approach to solve this problem. He asked the Commission to give urgent attention to the problems arising from the application of the Bill of Rights to criminal law, criminal procedure and sentencing. A new investigation was consequently included in the Commission's programme as Project 101: "The application of the Bill of Rights to the criminal law, criminal procedure and sentencing".¹⁵ In this investigation, the

¹⁴ SA Law Reform Commission, Project 101, *The Application of the Bill of Rights to the criminal procedure, criminal law, the law of evidence and sentencing*. RP118/2001 ISBN 0 62131451.

¹⁵ See note 12 above.

Commission's point of departure was that it should focus only on sections which are clearly unconstitutional. A discussion paper was published in January 2000 for general information and comment. The closing date for comments was 31 March 2000, extended until 30 April 2000. The Commission's report was finalised in 2001 and was submitted to the Minister of Justice during April 2001.

2.8 However, since publication of the Commission's report, the Department has not yet promoted any legislation based on the recommendations in the report. The legislative programme for 2010 indicated that such legislation will be promoted when circumstances permit.

2.9 The Commission was of the view that the current investigation should incorporate the Commission's earlier work for Project 101. This decision was based on two considerations: 1) an investigation on the constitutionality of the provisions of the Criminal Procedure Act 51 of 1977 had already been completed; and 2) legislation has not yet been passed following the Commission's earlier recommendations on this Act. It therefore seems appropriate to include the Commission's earlier recommendations regarding the constitutionality of the provisions of the Criminal Procedure Act in the current Project 25 investigation.

2.110 The Commission's recommendations in Project 101¹⁶ were therefore attached as Annexure A to the consultation paper. This was done to elicit the Department's views on the issues previously raised; and if need be, to make recommendations about provisions of the Criminal Procedure Act which are unconstitutional for reasons other than infringement of the equality clause (section 9 of the Constitution). However, because the review of the Criminal Procedure Act for constitutionality has already been concluded and because the scope of the current investigation is limited (to focus on infringements of the equality clause in section 9 of the Constitution), the Commission's recommendations arising from Project 101 are not repeated in this discussion paper.

2.111 Chapters 1 to 11 of the Act, which include sections 6 to 74, form the terms of reference of Part 1 of the analysis in this chapter. They include the following topics:

- the powers of the prosecuting authority (chapter 1);
- searches and seizures (chapter 2);
- procedures for accessing the bodily features of an accused as evidence (chapter 3);
- methods of securing the attendance of the accused in court (chapter 4);

¹⁶ See note 12 above.

- arrest (chapter 5);
- summons procedures (chapter 6);
- written notice to appear in court (chapter 7);
- admission of guilt fines (chapter 8);
- bail procedures (chapter 9);
- release on warning (chapter 10); and
- assistance to the accused (chapter 11).

2.12 Chapters 12 to 22 (sections 75 to 178) of the Act deal with the following issues, which are dealt with in Part 2 of this paper:

- summary trials;
- mental illness;
- the charge;
- jurisdiction;
- the plea, including a plea of “guilty” or “not guilty”;
- pleas in magistrates’ courts on charges judiciable in a superior court and regional court;
- preparatory examinations; and
- conduct of proceedings.

2.113 Chapters 23 to 33 (sections 199 to 345) of the Act deal with the following issues, which are discussed in Part 3 of this paper:

- witnesses;
- evidence;
- conversion of trial into enquiry;
- competent verdicts;
- previous convictions;
- sentencing;
- compensation and restitution;
- reviews and appeals;
- appeals from proceedings in superior courts;
- mercy and pardon; and
- general provisions.

AMENDMENTS TO THE CRIMINAL PROCEDURE ACT

2.14 The Act has been amended and substituted more than 63 times. The amendments and substitutions which are relevant include the following:

- 1) Criminal Procedure Amendment Act 56 of 1979;
- 2) Criminal Procedure Amendment Act 64 of 1982;
- 3) Criminal Law amendment Act 59 of 1983;
- 4) Criminal Procedure Amendment Act 33 of 1986;
- 5) Criminal Procedure Amendment Act 26 of 1987;
- 6) Criminal Procedure Amendment Act 5 of 1991;
- 7) Correctional Services and Supervision Matters Amendment Act 122 of 1991;
- 8) Criminal Law Amendment Act 4 of 1992;
- 9) Prevention and Treatment of Drug Dependency Act 20 of 1992;
- 10) Attorney-General Act 92 of 1992;
- 11) Criminal Law Second Amendment Act 126 of 1992;
- 12) General Law Amendment Act 139 of 1992;
- 13) General Law Third Amendment Act 129 of 1993;
- 14) Criminal Procedure Second Amendment Act 75 of 1995;
- 15) Justice Laws Rationalisation Act 18 of 1996;
- 16) Criminal Procedure Amendment Act 86 of 1996;
- 17) General Law Amendment Act 49 of 1996;
- 18) Criminal Procedure Second Amendment Act 85 of 1997;
- 19) Criminal Law Amendment Act 105 of 1997;
- 20) National Prosecuting Authority Act 32 of 1998;
- 21) Judicial Matters Amendment Act 34 of 1998;
- 22) Witness Protection Act 112 of 1998;
- 23) Domestic Violence Act 116 of 1998;
- 24) Judicial Matters Second Amendment Act 122 of 1998;
- 25) Judicial Matters Amendment Act 62 of 2000;
- 26) Judicial Matters Amendment Act 42 of 2001;
- 27) Judicial Matters Second Amendment Act 55 of 2003;
- 28) Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007;
- 29) Criminal Procedure Amendment Act 65 of 2008;
- 30) Judicial Matters Amendment Act 66 of 2008;
- 31) Child Justice Act 75 of 2008 (operational from 01/04/2010);
- 32) Criminal Procedure Amendment Act 9 of 2012;

- 33) Criminal Law (Forensic Procedures) Amendment Act 6 of 2012;
- 34) Criminal Procedure Amendment Act 8 of 2013;
- 35) Prevention and Combating of Torture of Persons Act 13 of 2013; and
- 36) the Judicial Matters Amendment Act 42 of 2013.

2.115 The numerous amendments and substitutions that have recently been made to the Criminal Procedure Act have largely brought the Act into compliance with the Constitution. Only a few subsections of the reviewed sections have been rendered outdated by other legislation.

2.16 As mentioned earlier, the scope of this statutory review is mainly to assess whether the provisions of the Criminal Procedure Act 51 of 1977 (the Act), which is administered by DOCD, conform with the anti-discriminatory provisions of section 9 of the Constitution. Although the project is not an intensive statutory review process *vis-à-vis* the Constitution, it does include the identification of statutory provisions that have become obsolete, redundant or outdated (though not necessarily obsolete); or which conflict with each other.

2.17 The SALRC requested comments from the DOJCD on the consultation paper and the draft Bill attached to that paper. The SALRC also resubmitted its Report on Project 101: “The Application of the Bill of Rights to Criminal Procedure, Criminal Law, the Law of Evidence and Sentencing” (the Report) to obtain comment from the Department. In complying with our request for comment, the Department (in its memorandum of comments to the SALRC) provided comments only where these differed from the SALRC’s, or where the Department offered alternative suggestions. This discussion paper retains the format of the consultation paper, with comments by the DOJCD being inserted where relevant after the initial recommendations as contained in the consultation paper. These comments are followed by the final recommendations of the SALRC. The discussion paper has been prepared for circulation and public comment.¹⁷

¹⁷ As explained earlier, this paper does not include the recommendations of Project 101, *The Application of the Bill of Rights to the criminal procedure, criminal law, the law of evidence and sentencing* RP118/2001 ISBN 0 62131451.

PART 1: Chapters 1 to 11 of the Criminal Procedure Act 51 of 1977

2.18 The sections of the Act which are reviewed in this part are currently in force. They include the definitions clause and sections 6 through to 74. The recommendations of the SALRC review are set out below.

(a) Section 1: The definitions clause

2.19 The definition of “correctional supervision” must be edited to remove the references to “he” and “his”, which are in conflict with section 9 of the Constitution and must be replaced by “he or she” and “his or her”. Secondly, some references have been superseded by new legislation and should be amended accordingly; for example, the definition of “local division” must be amended to read “local division of the High Court” instead of “local division of the Supreme Court”. “Minister of Justice” must be replaced by “Minister of Justice and Constitutional Development”. “Provincial division of the Supreme Court” must be replaced by “provincial division of the High Court”. The word “Supreme Court” must also be substituted by “High Court” in the definition of “superior court”.

(i) Recommendations in the Consultation Paper

2.20 The SALRC recommended that the following definitions in section 1 of the Act be amended as follows:

1. Section 1 of the Criminal Procedure Act 51 of 1977 (hereinafter referred to as the Principal Act) is hereby amended by the substitution for the section of the following section:

...

“correctional supervision” means a community based sentence to which a person is subject in accordance with Chapter V and VI of the Correctional Service Act, 1998, and the regulations made under that Act if-

- (a) he or she has been placed under that section 6 (1) (c);
- (b) it has been imposed on him or her under section 276 (1) (h) or (i) and he or she, in the latter case, has been placed under that;
- (c) his or her sentence has been converted into that under section 276A (3) (e) (ii), 286B (4) (b) (ii) or 287 (4) (b) or he or she has been placed under that section 286B (5) (iii) or 287 (4) (a);
- (d) it is a condition on which the passing of his or her sentence has been postponed and he or she has been released under section 297 (1) (a) (i) (ccA); or
- (e) it is a condition on which the operation of-
 - (i) the whole or any part; or
 - (ii) any part,
 of his or her sentence has been suspended under section 297 (1) (b) or (4), respectively;

“**local division**” means a local division of the [**Supreme**]High Court established under the Supreme Court Act, 1959 (Act 59 of 1959)

“**Minister**” means the Minister of Justice and Constitutional Development;

“**provincial division**” means a provincial division of the [**Supreme**] High Court established under the Supreme Court Act, 1959 (Act 59 of 1959).

(ii) Comment by the Department

2.21 The Department proposes a number of additions and amendments. The Department recommends the following:

Ad paragraph 2.14 of Consultation Paper: Three definitions in section 1 are identified that must be amended:

The definition of "aggravating circumstances" must be refined to delete the repealed subparagraph (a).

The definition of "bank" must be amended to delete references to the Land and Agricultural Bank of South Africa referred to in section 3 of the Land Bank Act, 1944 (Act 13 of 1944), and a mutual building society as defined in section 1 of the Mutual Building Societies Act, 1965 (Act 24 of 1965). The latter two Acts were repealed. The Land Bank Act was replaced by the Land and Agricultural Development Bank Act, 2002 (Act 15 of 2002) and also contains a definition of "bank", which should be included here.

The definition of "Commissioner" seems to be incorrect. The definition of "Commissioner" was deleted in the Correctional Services Act, 1998 (Act 111 of 1998), and substituted by a definition for "National Commissioner".

Regarding the definition of "correctional supervision" it must be pointed out that Chapter V of the Correctional Services Act, 1998 (Act 111 of 1998), pertains to unsentenced

offenders, and it must be considered why reference is made to this Chapter in the definition. The Correctional Services Act, 1998, defines "correctional supervision" as "a form of community corrections contemplated in Chapter VI".

3.2.2.5 The words "law", "province", "provincial administration", "Republic", "special superior court", "State" and "territory" should be deleted as these definitions were deleted.

3.2.2.6 It is proposed that the definitions of "local division" and "provincial division" be deleted so that the definition only refers to a High Court. However, it needs to be borne in mind that the Superior Courts Bill which was introduced into Parliament in 2011 will change the formation of our superior courts. The provisions of this Bill should possibly be looked at.

(iii) Evaluation and recommendations

2.22 The SALRC agrees with the comments of the Department, and the proposed amendments are shown below. The words "law", "province", "provincial administration", "Republic", "special superior court", "State" and "territory" were deleted in 1996 and 2000 as recommended. However, with reference to the definitions of Divisions of the Supreme Court, we suggest that the definitions should be retained and adjusted in line with the provisions of the Superior Courts Act of 2013 which was passed by Parliament since the comment provided by the Department. The term "local division" should therefore be defined as outlined below, and the term "Provincial Division" should be replaced with a definition of "Division" as provided for in the new Superior Courts Act of 2013. In addition, section 51(1)(a) of the Correctional Services Act provides that persons subject to community corrections are, *inter alia*, those placed under correctional supervision in terms of section 6(1)(c) of the Criminal Procedure Act. There is, however, no section 6(1)(c) in the Criminal Procedure Act and section 6 of the Act does not deal with a sentence of correctional supervision. The section deals with the power of the Director of Public Prosecutions to withdraw charges and to stop prosecutions. The imposition of a sentence of correctional supervision is dealt with in chapter 28, section 276 of the Criminal Procedure Act, and the conversion of a sentence to correctional supervision is dealt with in sections 276A, 286B and 287 of the Act. The reference to section 6(1)(c) in paragraph (a) of the definition clause is therefore incorrect and should be deleted. A similar amendment should be made to section 51 of the Correctional Services Act. The Commission proposes that paragraph (b) in the definition of correctional supervision be deleted. Furthermore, in paragraph (c) the insertion of the words "in terms of" after the words "has been placed under that" is necessary to clarify the sentence. Similarly, for purposes of clarification, the Commission proposes that the

wording “correctional supervision” be inserted in the beginning and end of paragraphs (b) and (d) respectively to replace the words “it” and “that”. The SALRC recommends that the following definitions in section 1 of the Act be amended as follows:

1 Definitions

...

“**bank**” means a bank defined in section 1 of the Banks Act, 1990 (Act 94 of 1990), and includes a bank as defined by the Land and Agricultural Development Bank Act, 2002 (Act 15 of 2002) [the Land and Agricultural Bank of South Africa referred to in section 3 of the Land Bank Act, 1944 (Act 13 of 1944), and a mutual building society as defined in section 1 of the Mutual Building Societies Act, 1965 (Act 24 of 1965)];

...

“**Division**” means a division of the High Court established under section 6(1) of the Superior Courts Act 10 of 2013;

“**Commissioner**” means the National Commissioner of Correctional Services as defined in section 1 of the Correctional Services Act, 1998, or a person authorized by him or her;

...

“**correctional supervision**” means a community based sentence to which a person is subject in accordance with Chapter **[V and]** VI of the Correctional Service Act, 1998, and the regulations made under that Act if–

[(a) he or she has been placed under that section 6 (1) (c)];

(b) correctional supervision [it] has been imposed on him or her under section 276 (1)(h) or (i) and he or she, in the latter case, has been placed under **[that] correctional supervision** ;

(c) his or her sentence has been converted into correctional supervision **[that]** under section 276A (3) (e) (ii), 286B (4) (b) (ii) or 287 (4) (b) or he or she has been placed under **[that] correctional supervision in terms of sections 286B (5) (iii) or 287 (4) (a)**;

(d) correctional supervision [it] is a condition on which the passing of his or her sentence has been postponed and he or she has been released under section 297 (1) (a) (i) (ccA); or

(e) it is a condition on which the operation of–

(i) the whole or any part; or

(ii) any part, of his or her sentence has been suspended under section 297 (1) (b) or (4), respectively;

...

“local division” means a local [d]Division of the [Supreme Court established under the Supreme Court Act, 1959 (Act 59 of 1959)] High Court established under the Superior Courts Act 10 of 2013;

...

“Minister” means the Minister of Justice and Correctional Services;

...

[“provincial division” means a provincial division of the Supreme Court established under the Supreme Court Act, 1959 (Act 59 of 1959);] **“Division”** means a division of the High Court established under section 6(1) of the Superior Courts Act 10 of 2013;

...

“superior court” means a [provincial] Division or local [d]Division of the [Supreme Court] High Court established under the [Supreme Court Act, 1959 (Act 59 of 1959)] Superior Courts Act 10 of 2013;

“supreme court” means the [Supreme] High Court of South Africa established under the [Supreme Court Act, 1959 (Act 59 of 1959)] Superior Courts Act 10 of 2013;

(b) Chapter 1, Sections 6 to 18: Prosecuting Authority

(i) Sections 6 to 18: Prosecuting Authority

2.23 Sections 2 through 5 of chapter 1 of the Act set out the structure and hierarchy of the prosecuting authority. These sections have been repealed by the National Prosecuting Authority Act 32 of 1998, which necessitates amendments to the Criminal Procedure Act. Section 6 of the Criminal Procedure Act, which defines the attorney-general’s power to charge or stop a prosecution, complies with section 9 of the Constitution. However, the term “attorney-general” must be amended to read “director of public prosecutions”. Section 7, which sets out the requirements for a private prosecution, also complies with section 9 of the Constitution. The term “attorney-general” in section 7(2)(a) and 2(b) must be replaced by “director of public prosecutions”. Section 7(1)(d) contains the word “lunatic” which is outdated and should be replaced with a reference to The Mental Health Care Act 17 of 2002, The whole of section 7(1) has been substituted by section 99(1) of the Child Justice Act 75 of 2008, which came into

operation on 1 April 2010 and will render section 7(1) compliant with the Constitution. The word “he” in section 7(2)(b) must be replaced by “he or she”, to bring it into line with section 9 of the Constitution. Sections 8, 9, 10, 11, 12, 13, 14, 15, 16 and 17, which outline the procedures and costs of a private prosecution, are unconstitutional to the extent that it contains male-centric language (the exclusive use of masculine pronouns).in conflict with section 9 of the Constitution. Sections 8 to 17 also contain numerous references to “attorney-general” and the use of the pronoun “he” for this office, which office has been superseded by new legislation. These sections therefore require careful editing. The prescription of a right to institute prosecution, as outlined in section 18, has been amended by the Criminal Law (Sexual Offences and Related Matters) Act 32 of 2007, and currently complies with section 9 of the Constitution.

(aa) Recommendations in the Consultation paper

2.24 The SALRC recommended that the following sections be amended as outlined below:

6 Power to withdraw charge or stop prosecution

A[n attorney-general] Director of Public Prosecutions or any person conducting a prosecution at the instance of the State or any body or person conducting a prosecution under section 8, may—

- (a) before an accused pleads to a charge, withdraw that charge, in which event the accused shall not be entitled to a verdict of acquittal in respect of that charge;
- (b) at any time after an accused has pleaded, but before conviction, stop the prosecution in respect of that charge, in which event the court trying the accused shall acquit the accused in respect of that charge: Provided that where a prosecution is conducted by a person other than a[n attorney-general] Director of Public Prosecutions or a body or person referred to in section 8, the prosecution shall not be stopped unless the [attorney-general] Director of Public Prosecutions or any person authorized thereto by the [attorney-general] Director of Public Prosecutions, whether in general or in any particular case, has consented thereto.

7 Private prosecution on certificate nolle prosequi

(1) In any case in which a[n attorney-general] Director of Public Prosecutions declines to prosecute for an alleged offence—

- (a) any private person who proves some substantial and peculiar interest in the issue of the trial arising out of some injury which he or she individually suffered in consequence of the commission of the said offence;

- (b) a husband, if the said offence was committed in respect of his or her wife;
- (c) the wife or child or, if there is no wife or child, any of the next of kin of any deceased person, if the death of such person is alleged to have been caused by the said offence; or

the legal guardian or curator of a minor or **[lunatic]**, mental health care user as defined in section 1 of the Mental Health Care Act, 2002 if the said offence was committed against his or her ward,

may, subject to the provisions of section 9 and section 59(2) of the Child Justice Act, 2008,, either in person or by a legal representative, institute and conduct a prosecution in respect of such offence in any court competent to try that offence.

- (2) (a) No private prosecutor under this section shall obtain the process of any court for summoning any person to answer any charge unless such private prosecutor produces to the officer authorized by law to issue such process a certificate signed by the **[attorney-general]** Director of Public Prosecutions that he or she has seen the statements or affidavits on which the charge is based and that he or she declines to prosecute at the instance of the State.
- (b) The **[attorney-general]** Director of Public Prosecutions shall, in any case in which he or she declines to prosecute, at the request of the person intending to prosecute, grant the certificate referred to in paragraph (a).
- (c) ...

8 Private prosecution under statutory right

(1) Anybody upon which or person upon whom the right to prosecute in respect of any offence is expressly conferred by law, may institute and conduct a prosecution in respect of such offence in any court competent to try that offence.

(2) A body which or a person who intends exercising a right of prosecution under subsection (1), shall exercise such right only after consultation with the **[attorney-general]** Director of Public Prosecutions concerned and after the **[attorney-general]** Director of Public Prosecutions has withdrawn his or her right of prosecution in respect of any specified offence or any specified class or category of offences with reference to which such body or person may by law exercise such right of prosecution.

(3) A **[n attorney-general]** Director of Public Prosecutions may, under subsection (2), withdraw his or her right of prosecution on such conditions as he or she may deem fit, including a condition that the appointment by such body or person of a prosecutor to conduct the prosecution in question shall be subject to the approval of the **[attorney-general]** Director of Public Prosecutions, and that the **[attorney-general]** Director of Public Prosecutions may at any time exercise with reference to any such prosecution any power which he or she might have exercised if he or she had not withdrawn his or her right of prosecution.

9 Security by private prosecutor

(1) No private prosecutor referred to in section 7 shall take out or issue any process commencing the private prosecution unless he or she deposits with the magistrate's court in whose area of jurisdiction the offence was committed—

- (a) the amount* the Minister may from time to time determine by notice in the Gazette as security that he or she will prosecute the charge against the accused to a conclusion without undue delay; and
- (b) the amount such court may determine as security for the costs which may be incurred in respect of the accused's defence to the charge.

(2) The accused may, when he or she is called upon to plead to the charge, apply to the court hearing the charge to review the amount determined under subsection (1) (b), whereupon the court may, before the accused pleads—

- (a) require the private prosecutor to deposit such additional amount as the court may determine with the magistrate's court in which the said amount was deposited; or
- (b) direct that the private prosecutor enter into a recognizance, with or without sureties, in such additional amount as the court may determine.

(3) Where a private prosecutor fails to prosecute a charge against an accused to a conclusion without undue delay or where a charge is dismissed under section 11, the amount referred to in subsection (1) (a) shall be forfeited to the State.

11 Failure of private prosecutor to appear

(1) If the private prosecutor does not appear on the day set down for the appearance of the accused in the magistrate's court or for the trial of the accused, the charge against the accused shall be dismissed unless the court has reason to believe that the private prosecutor was prevented from being present by circumstances beyond his or her control, in which event the court may adjourn the case to a later date.

(2) Where the charge is so dismissed, the accused shall forthwith be discharged from custody and may not in respect of that charge be prosecuted privately again but the **[attorney-general]** Director of Public Prosecutions or a public prosecutor with the consent of the **[attorney-general]** Director of Public Prosecutions may at the instance of the State prosecute the accused in respect of that charge.

12 Mode of conducting private prosecution

(1) A private prosecution shall, subject to the provisions of this Act, be proceeded with in the same manner as if it were a prosecution at the instance of the State: Provided that the person in respect of whom the private prosecution is instituted shall be brought before the court only by way of summons in the case of a lower court, or an indictment in the case of a superior court, except where he or she is under arrest in respect of an offence with regard to which a right of private prosecution is vested in any body or person under section 8.

(2) Where the prosecution is instituted under section 7 (1) and the accused pleads guilty to the charge, the prosecution shall be continued at the instance of the State.

13 [Attorney-general] Director of Public Prosecutions may intervene in private prosecution

A[n attorney-general Director of Public Prosecutions or a local public prosecutor acting on the instructions of the [attorney-general]Director of Public Prosecutions, may in respect of any private prosecution apply by motion to the court before which the private prosecution is pending to stop all further proceedings in the case in order that a prosecution for the offence in question may be instituted or, as the case may be, continued at the instance of the State, and the court shall make such an order.

16 Costs of accused in private prosecution

(1) Where in a private prosecution, other than a prosecution contemplated in section 8, the charge against the accused is dismissed or the accused is acquitted or a decision in favour of the accused is given on appeal, the court dismissing the charge or acquitting the accused or deciding in favour of the accused on appeal, may order the private prosecutor to pay to such accused the whole or any part of the costs and expenses incurred in connection with the prosecution or, as the case may be, the appeal.

(2) Where the court is of the opinion that a private prosecution was unfounded and vexatious, it shall award to the accused at his or her request such costs and expenses incurred in connection with the prosecution, as it may deem fit.

(bb) Comments by the Department

2.25 The Department recommended the following:

It is proposed that reference should be made in section 17(2) of the Act to the Jurisdiction of Regional Courts Jurisdiction Amendment Act, 2008 (Act 31 of 2008).

It is proposed that, with reference to section 18(h) of the Act, cognizance should be taken to the Prevention and Combating of Trafficking in Persons Bill (B7 of 2010), and the possible addition thereof when the Bill becomes an Act.

The SALRC must take cognizance of the draft Second Judicial Matters Amendment Bill, 2011, which will be introduced into Parliament ... This Bill proposes amendments to sections 7, 9 and 15 of the Act.

2.26 In *National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development and another*,¹⁸ the applicant (the National Council of Societies for the Prevention of Cruelty to Animals) launched a constitutional challenge to section 7(1)(a) of

¹⁸ [2014] JOL 32401 (GP).

the Criminal Procedure Act 51 of 1977. The applicant challenged this section for not permitting juristic persons to institute private prosecutions as it did private persons. The constitutional challenge was premised on the lack of any apparent rational basis for treating juristic persons differently from natural persons. The result would be that juristic persons effectively did not enjoy equal protection under the law and did not obtain equal benefits under the law. It was argued that the differentiation between juristic and natural persons, in this instance, failed to serve a legitimate governmental purpose and was therefore irrational and unconstitutional.

2.27 The court had to decide whether the exclusion of juristic persons from the operations of section 7(1)(a) of the Criminal Procedure Act was justified or not. Confirming that section 7(1)(a) of the Criminal Procedure Act did contain a differentiation between natural and juristic persons, the court then considered whether the differentiation amounted to discrimination. As a differentiation usually does imply discrimination, the next question was whether the discrimination was unfair or not. Section 9 of the Constitution prohibits only unfair discrimination. The court found that allowing all persons to undertake a private prosecution would be contrary to the constitutional imperative, and would effectively create an alternative prosecuting system. It found that the right of private prosecution must be strictly controlled, in terms of both section 7 and section 8 of the Criminal Procedure Act, for the following reasons: 1) to ensure proper statutory control; 2) to achieve criminal justice; and 3) to comply with the constitutional imperative with regard to a single National Prosecuting Authority. The court's conclusion was that the differentiation was not unfair and therefore not unconstitutional.

(cc) Evaluation and recommendations

2.28 The Commission is of the view that an amendment to section 17(2) of the Act is not required to make specific reference to the jurisdiction of Regional Courts, where the Act deals with costs. The rationale for this view is that a reference to "court" in terms of the Magistrate's Court Act includes a regional court.

2.29 We submit that the question of whether to include a reference to the Prevention and Combatting of Trafficking in Persons Act 7 of 2013 in section 18(h) of the Criminal Procedure Act, which deals with prescription in respect of trafficking in persons for sexual purposes, falls outside the scope of this investigation. Furthermore, it does not raise an issue of infringement of equality. Until such time as amendments to the Criminal Procedure Act are approved by Parliament, it is premature to include such amendments in the current investigation. In any

event, if such amendments are already under consideration and may be approved by Parliament, it is unnecessary to duplicate such recommendations here.

2.30 The SALRC recommends that the following sections of the Criminal Procedure Act be amended as outlined below:

6 Power to withdraw charge or stop prosecution

A[n attorney-general] Director of Public Prosecutions or any person conducting a prosecution at the instance of the State or anybody or person conducting a prosecution under section 8, may—

- (a) before an accused pleads to a charge, withdraw that charge, in which event the accused shall not be entitled to a verdict of acquittal in respect of that charge;
- (b) at any time after an accused has pleaded, but before conviction, stop the prosecution in respect of that charge, in which event the court trying the accused shall acquit the accused in respect of that charge: Provided that where a prosecution is conducted by a person other than a[n attorney-general] Director of Public Prosecutions or a body or person referred to in section 8, the prosecution shall not be stopped unless the [attorney-general] Director of Public Prosecutions or any person authorized thereto by the [attorney-general] Director of Public Prosecutions, whether in general or in any particular case, has consented thereto.

7 Private prosecution on certificate nolle prosequi

(1) In any case in which a[n attorney-general] Director of Public Prosecutions declines to prosecute for an alleged offence—

- (a) any private person who proves some substantial and peculiar interest in the issue of the trial arising out of some injury which he or she individually suffered in consequence of the commission of the said offence;
- (b) a husband, if the said offence was committed in respect of his wife;
- (c) the wife or child or, if there is no wife or child, any of the next of kin of any deceased person, if the death of such person is alleged to have been caused by the said offence; or
- (d) the legal guardian or curator of a minor or [lunatic] mental health care user as defined in section 1 of the Mental Health Care Act, 2002, if the said offence was committed against his or her ward,

may, subject to the provisions of section 9 and section 59(2) of the Child Justice Act, 2008, either in person or by a legal representative, institute and conduct a prosecution in respect of such offence in any court competent to try that offence.

- (2) (a) No private prosecutor under this section shall obtain the process of any court for summoning any person to answer any charge unless such private prosecutor produces to the officer authorized by law to issue such process a certificate signed by the **[attorney-general]Director of Public Prosecutions** that he or she has seen the statements or affidavits on which the charge is based and that he or she declines to prosecute at the instance of the State.
- (b) The **[attorney-general]Director of Public Prosecutions** shall, in any case in which he or she declines to prosecute, at the request of the person intending to prosecute, grant the certificate referred to in paragraph (a).
- (c) ...

8 Private prosecution under statutory right

- (1) ...
- (2) A body which or a person who intends exercising a right of prosecution under subsection (1), shall exercise such right only after consultation with the **[attorney-general]Director of Public Prosecutions** concerned and after the **[attorney-general]Director of Public Prosecutions** has withdrawn his or her right of prosecution in respect of any specified offence or any specified class or category of offences with reference to which such body or person may by law exercise such right of prosecution.
- (3) A **[n attorney-general] Director of Public Prosecutions** may, under subsection (2), withdraw his or her right of prosecution on such conditions as he or she may deem fit, including a condition that the appointment by such body or person of a prosecutor to conduct the prosecution in question shall be subject to the approval of the **[attorney-general]Director of Public Prosecutions**, and that the **[attorney-general]Director of Public Prosecutions** may at any time exercise with reference to any such prosecution any power which he or she might have exercised if he or she had not withdrawn his or her right of prosecution.

9 Security by private prosecutor

- (1) No private prosecutor referred to in section 7 shall take out or issue any process commencing the private prosecution unless he or she deposits with the magistrate's court in whose area of jurisdiction the offence was committed—
- (a) the amount* the Minister may from time to time determine by notice in the Gazette as security that he or she will prosecute the charge against the accused to a conclusion without undue delay; and
- (b) ...
- (2) The accused may, when he or she is called upon to plead to the charge, apply to the court hearing the charge to review the amount determined under subsection (1) (b), whereupon the court may, before the accused pleads—
- (a) ...

11 Failure of private prosecutor to appear

(1) If the private prosecutor does not appear on the day set down for the appearance of the accused in the magistrate's court or for the trial of the accused, the charge against the accused shall be dismissed unless the court has reason to believe that the private prosecutor was prevented from being present by circumstances beyond his or her control, in which event the court may adjourn the case to a later date.

(2) Where the charge is so dismissed, the accused shall forthwith be discharged from custody and may not in respect of that charge be prosecuted privately again, but the **[attorney-general]**Director of Public Prosecutions or a public prosecutor with the consent of the **[attorney-general]**Director of Public Prosecutions may at the instance of the State prosecute the accused in respect of that charge.

12 Mode of conducting private prosecution

(1) A private prosecution shall, subject to the provisions of this Act, be proceeded with in the same manner as if it were a prosecution at the instance of the State: Provided that the person in respect of whom the private prosecution is instituted shall be brought before the court only by way of summons in the case of a lower court, or an indictment in the case of a superior court, except where he or she is under arrest in respect of an offence with regard to which a right of private prosecution is vested in any body or person under section 8.

(2) ...

13 [Attorney-general]Director of Public Prosecutions may intervene in private prosecution

A[n **attorney-general** Director of Public Prosecutions or a local public prosecutor acting on the instructions of the **[attorney-general]**Director of Public Prosecutions, may in respect of any private prosecution apply by motion to the court before which the private prosecution is pending to stop all further proceedings in the case in order that a prosecution for the offence in question may be instituted or, as the case may be, continued at the instance of the State, and the court shall make such an order.

...

16 Costs of accused in private prosecution

(1) ...

(2) Where the court is of the opinion that a private prosecution was unfounded and vexatious, it shall award to the accused at his or her request such costs and expenses incurred in connection with the prosecution, as it may deem fit.

(c) Chapter 2: Sections 19 to 36: Entry, searches, seizures, disposal and forfeiture of the property consequences of crime

(i) *Entry, searches and seizures: Sections 19 to 29*

2.31 The powers to enter premises and to seize, forfeit and dispose of property connected with offences, as set out in sections 19 to 36, may be said to be an infringement of an individual's right to personal privacy, dignity, freedom, security and ownership. Therefore, these powers must be exercised carefully and are to be interpreted restrictively and in favour of the individual. For this reason, the wording of these sections is always qualified by the term "reasonableness". In addition a limitation of the rights referred to can be justified in terms of the limitation clause in the Constitution and it falls outside the scope of the current investigation. Sections 19 through 29, which define the powers of reasonable entry and seizure, are unconstitutional to the extent that it contains male-centric language (the exclusive use of masculine pronouns).in conflict with section 9 of the Constitution. These sections contain many references to solely male pronouns ("he", "his", "him" and "himself") and must be amended to include the female pronouns. The affected sections are section 21(1)(a) and (4); section 22(b)(i); section 23(1)(a)(b) and (2); section 24; section 25(1)(a)(b) and (3); section 26; and section 27(1). Section 29 refers to searches of a "woman" by another "woman" or by a designated "female" officer. These sections are further qualified by the National Prosecuting Authority Act 32 of 1998 and the Prevention of Organised Crime Act 121 of 1998, and must be read together with these statutes.

(aa) *Recommendation in Consultation Paper*

2.32 The SALRC recommended that the following sections be amended as outlined below:

21 Article to be seized under search warrant

(1) Subject to the provisions of sections 22, 24 and 25, an article referred to in section 20 shall be seized only by virtue of a search warrant issued—

(a) by a magistrate or justice, if it appears to such magistrate or justice from information on oath that there are reasonable grounds for believing that any

such article is in the possession or under the control of or upon any person or upon or at any premises within his or her area of jurisdiction; or

...

(4) A police official executing a warrant under this section or section 25 shall, after such execution, upon demand of any person whose rights in respect of any search or article seized under the warrant have been affected, hand to him or her the warrant.

22 Circumstances in which article may be seized without search warrant

A police official may without a search warrant search any person or container or premises for the purpose of seizing any article referred to in section 20—

- (a) if the person concerned consents to the search for and the seizure of the article in question, or if the person who may consent to the search of the container or premises consents to such search and the seizure of the article in question; or
- (b) if he or she on reasonable grounds believes—
 - (i) that a search warrant will be issued to him or her under paragraph (a) of section 21 (1) if he or she applies for such warrant; and

23 Search of arrested person and seizure of article

- (1) On the arrest of any person, the person making the arrest may—
 - (a) if he or she is a peace officer, search the person arrested and seize any article referred to in section 20 which is found in the possession of or in the custody or under the control of the person arrested, and where such peace officer is not a police official, he or she shall forthwith deliver any such article to a police official; or
 - (b) if he or she is not a peace officer, seize any article referred to in section 20 which is in the possession of or in the custody or under the control of the person arrested and shall forthwith deliver any such article to a police official.
- (2) On the arrest of any person, the person making the arrest may place in safe custody any object found on the person arrested and which may be used to cause bodily harm to him or herself or others.

24 Search of premises

Any person who is lawfully in charge or occupation of any premises and who reasonably suspects that stolen stock or produce, as defined in any law relating to the theft of stock or produce, is on or in the premises concerned, or that any article has been placed thereon or therein or is in the custody or possession of any person upon or in such premises in contravention of any law relating to intoxicating liquor, dependence-producing drugs, arms and ammunition or explosives, may at any time, if a police official is not readily available, enter such premises for the purpose of searching such premises and any person thereon or therein, and if any such stock, produce or article is found, he or she shall take possession thereof and forthwith deliver it to a police official.

25 Power of police to enter premises in connection with State security or any offence

(1) If it appears to a magistrate or justice from information on oath that there are reasonable grounds for believing—

(a) that the internal security of the Republic or the maintenance of law and order is likely to be endangered by or in consequence of any meeting which is being held or is to be held in or upon any premises within his or her area of jurisdiction; or

(b) that an offence has been or is being or is likely to be committed or that preparations or arrangements for the commission of any offence are being or are likely to be made in or upon any premises within his or her area of jurisdiction,

he or she may issue a warrant authorizing a police official to enter the premises in question at any reasonable time for the purpose—

...

(3) A police official may without warrant act under subparagraphs (i), (ii) and (iii) of subsection (1) if he or she on reasonable grounds believes—

(a) that a warrant will be issued to him or her under paragraph (a) or (b) of subsection (1) if he or she applies for such warrant; and

(b) ...

26 Entering of premises for purposes of obtaining evidence

Where a police official in the investigation of an offence or alleged offence reasonably suspects that a person who may furnish information with reference to any such offence is on any premises, such police official may without warrant enter such premises for the purpose of interrogating such person and obtaining a statement from him or her: Provided that such police official shall not enter any private dwelling without the consent of the occupier thereof.

27 Resistance against entry or search

(1) A police official who may lawfully search any person or any premises or who may enter any premises under section 26, may use such force as may be reasonably necessary to overcome any resistance against such search or against entry of the premises, including the breaking of any door or window of such premises: Provided that such police official shall first audibly demand admission to the premises and notify the purpose for which he or she seeks to enter such premises.

(2)

(bb) Comment by the Department

2.33 The Department submitted that section 28(1) of the Act refers to a fine in specific monetary terms or, alternatively, imprisonment. The Department proposed that this subsection be amended in keeping with many other current penalty provisions, by deleting the monetary value so that the provision refers only to a fine or imprisonment for a certain period. The Adjustment of Fines Act 101 of 1991 will then apply.

2.34 In addition, the Department advised the SALRC to take cognizance of the draft Second Judicial Matters Amendment Bill, 2011, which was to be introduced to Parliament in 2011. The Bill proposes amendments to section 29 of the Act.

(cc) Evaluation and recommendations

2.35 Amendments to the Criminal Procedure Act which are already under consideration by the Department are not repeated in this investigation. The purpose of this investigation is to identify violations of section 9 (the equality clause) of the Constitution. The Commission is of the view that this SALRC investigation does not require an amendment to the wording of the sentence in section 29 of the Act to make it comply with the Adjustment of Fines Act 101 of 1991. The Adjustment of Fines Act was designed to address all instances that justify an adjustment of fines, having regard to the alternative of imprisonment and for this purpose certain rules spelled out in the Act which would apply to all acts without the need to amend the penalty clauses. Therefore, this does not require a scanning of all laws that create offences so that such laws will be amended in line with the provisions of the Act. If one starts amending these individual provisions in any specific Act, it would require an amendment of all legislation that creates offences. We submit that this challenge is in fact why the Adjustment of Fines Act is worded in a particular manner, to allow for an adjustment without requiring amendment to all the legislation. Sections 21, 22, 23, 24, 25, 26 and 27 are unconstitutional to the extent that it contains male-centric language (the exclusive use of masculine pronouns) in conflict with section 9 of the Constitution.

2.36 The SALRC recommends that the following sections be amended as outlined below:

21 Article to be seized under search warrant

(1) Subject to the provisions of sections 22, 24 and 25, an article referred to in section 20 shall be seized only by virtue of a search warrant issued—

(a) by a magistrate or justice, if it appears to such magistrate or justice from information on oath that there are reasonable grounds for believing that any such article is in the possession or under the control of or upon any person or upon or at any premises within his or her area of jurisdiction; or

...

(4) A police official executing a warrant under this section or section 25 shall, after such execution, upon demand of any person whose rights in respect of any search or article seized under the warrant have been affected, hand to him or her the warrant.

22 Circumstances in which article may be seized without search warrant

A police official may without a search warrant search any person or container or premises for the purpose of seizing any article referred to in section 20—

(a) ...

(b) if he or she on reasonable grounds believes—

(i) that a search warrant will be issued to him or her under paragraph (a) of section 21 (1) if he or she applies for such warrant; and

... 23 Search of arrested person and seizure of article

(1) On the arrest of any person, the person making the arrest may—

(a) if he or she is a peace officer, search the person arrested and seize any article referred to in section 20 which is found in the possession of or in the custody or under the control of the person arrested, and where such peace officer is not a police official, he or she shall forthwith deliver any such article to a police official; or

(b) if he or she is not a peace officer, seize any article referred to in section 20 which is in the possession of or in the custody or under the control of the person arrested and shall forthwith deliver any such article to a police official.

(2) On the arrest of any person, the person making the arrest may place in safe custody any object found on the person arrested and which may be used to cause bodily harm to him or herself or others.

24 Search of premises

Any person who is lawfully in charge or occupation of any premises and who reasonably suspects that stolen stock or produce, as defined in any law relating to the theft of stock or produce, is on or in the premises concerned, or that any article has been placed thereon or therein or is in the custody or possession of any person upon or in such premises in contravention of any law relating to intoxicating liquor, dependence-producing drugs, arms and ammunition or explosives, may at any time, if a police official

is not readily available, enter such premises for the purpose of searching such premises and any person thereon or therein, and if any such stock, produce or article is found, he or she shall take possession thereof and forthwith deliver it to a police official.

25 Power of police to enter premises in connection with State security or any offence

(1) If it appears to a magistrate or justice from information on oath that there are reasonable grounds for believing—

(a) that the internal security of the Republic or the maintenance of law and order is likely to be endangered by or in consequence of any meeting which is being held or is to be held in or upon any premises within his or her area of jurisdiction; or

(b) that an offence has been or is being or is likely to be committed or that preparations or arrangements for the commission of any offence are being or are likely to be made in or upon any premises within his area of jurisdiction,

he or she may issue a warrant authorizing a police official to enter the premises in question at any reasonable time for the purpose—

(i) ...

(3) A police official may without warrant act under subparagraphs (i), (ii) and (iii) of subsection (1) if he or she on reasonable grounds believes—

(a) that a warrant will be issued to him or her under paragraph (a) or

(b) of subsection (1) if he or she applies for such warrant; and

(c) that the delay in obtaining such warrant would defeat the object thereof.

26 Entering of premises for purposes of obtaining evidence

Where a police official in the investigation of an offence or alleged offence reasonably suspects that a person who may furnish information with reference to any such offence is on any premises, such police official may without warrant enter such premises for the purpose of interrogating such person and obtaining a statement from him or her: Provided that such police official shall not enter any private dwelling without the consent of the occupier thereof.

27 Resistance against entry or search

(1) A police official who may lawfully search any person or any premises or who may enter any premises under section 26, may use such force as may be reasonably necessary to overcome any resistance against such search or against entry of the premises, including the breaking of any door or window of such premises: Provided that such police official shall first audibly demand admission to the premises and notify the purpose for which he or she seeks to enter such premises.

(2) ...

(ii) Disposal and forfeiture: sections 30 to 36

2.37 Sections 30 to 36 are unconstitutional to the extent that it contains male-centric language (the exclusive use of masculine pronouns).in conflict with section 9 of the Constitution. They require editing to add feminine pronouns to the masculine pronouns (i.e. references to “he”, “him” and “his”) to bring the wording in line with the equality clause. The affected sections are section 31(2); section 32(1); section 34(3); and section 35(1), (4)(a)(ii) and (4)(a)(ii)(aa).

2.38 Section 31(1)(a), which defines the procedure for returning a seized article to its lawful owner (where the article is not required for trial), creates a reverse onus. It places the burden of proof on the applicant to prove, on a balance of probabilities, that no criminal proceedings have been instituted and that there is no reasonable likelihood of such proceedings in the foreseeable future. Section 31(1)(a) may well be unconstitutional, as it places an unfair burden on the applicant. This matter is discussed in the Commission’s final report in its investigation into *The Application of the Bill of Rights to Criminal Procedure*.¹⁹ This report has already been finalized by the Commission and the discussion is not repeated here.

(aa) Recommendation in Consultation Paper

2.39 The SALRC recommended that the sections outlined below be amended as indicated:

31 Disposal of article where no criminal proceedings are instituted or where it is not required for criminal proceedings

(1) (a) ...

(2) The person who may lawfully possess the article in question shall be notified by registered post at his or her last-known address that he or she may take possession of the article and if such person fails to take delivery of the article within thirty days from the date of such notification, the article shall be forfeited to the State.

32 Disposal of article where criminal proceedings are instituted and admission of guilt fine is paid

(1) If criminal proceedings are instituted in connection with any article referred to in section 30 (c) and the accused admits his or her guilt in accordance with the provisions

¹⁹ SA Law Reform Commission, Project 101, *The Application of the Bill of Rights to the criminal procedure, criminal law, the law of evidence and sentencing*. RP118/2001 ISBN 0 62131451.

of section 57, the article shall be returned to the person from whom it was seized, if such person may lawfully possess such article, or, if such person may not lawfully possess such article, to the person who may lawfully possess such article, or, if such person may not lawfully possess such article, to the person who may lawfully possess it, whereupon the provisions of section 31 (2) shall apply with reference to any such person.

(2) ...

34 Disposal of article after commencement of criminal proceedings

(1) ...

(3) If the judge or judicial officer concerned does not, at the conclusion of the relevant proceedings, make an order under subsection (1), such judge or judicial officer or, if he or she is not available, any other judge or judicial officer of the court in question, may at any time after the conclusion of the proceedings make any such order, and for that purpose hear such additional evidence, whether by affidavit or orally, as he or she may deem fit.

(4) ...

35 Forfeiture of article to State

(1) A court which convicts an accused of any offence may, without notice to any person, declare—

(a) any weapon, instrument or other article by means whereof the offence in question was committed or which was used in the commission of such offence; or

(b) if the conviction is in respect of an offence referred to in Part 1 of Schedule 2, any vehicle, container or other article which was used for the purpose of or in connection with the commission of the offence in question or for the conveyance or removal of the stolen property,

and which was seized under the provisions of this Act, forfeited to the State: Provided that such forfeiture shall not affect any right referred to in subparagraph (i) or (ii) of subsection (4) (a) if it is proved that the person who claims such right did not know that such weapon, instrument, vehicle, container or other article was being used or would be used for the purpose of or in connection with the commission of the offence in question or, as the case may be, for the conveyance or removal of the stolen property in question, or that he or she could not prevent such use, and that he or she may lawfully possess such weapon, instrument, vehicle, container or other article, as the case may be.

(4) (a) The court in question or, if the judge or judicial officer concerned is not available, any judge or judicial officer of the court in question, may at any time within a period of three years with effect from the date of declaration of forfeiture, upon the application of any person, other than the accused, who claims that any right referred to in subparagraph (i) or (ii) of this paragraph is vested in him or her, inquire into and determine any such right, and if the court finds that the weapon, instrument, vehicle, container or other article in question—

(i) ...

(ii) was sold to the accused in pursuance of a contract under which he or she becomes the owner of such weapon, instrument, vehicle, container or other article, as the case may be, upon the payment of a stipulated price, whether by instalments or otherwise, and under which the seller becomes entitled to the return of such weapon, instrument, vehicle, container or other article upon default of payment of the stipulated price or any part thereof-

(aa) the court shall direct that the weapon, instrument, vehicle, container or other article in question be sold by public auction and that the said seller be paid out of the proceeds of the sale an amount equal to the value of his or her rights under the contract to the weapon, instrument, vehicle, container or other article, but not exceeding the proceeds of the sale; or

(bb) if the State has disposed of the weapon, instrument, vehicle, container or other article in question, the court shall direct that the said seller be likewise compensated.

(b) If a determination by the court under paragraph (a) is adverse to the applicant, he or she may appeal therefrom as if it were a conviction by the court making the determination, and such appeal may be heard either separately or jointly with an appeal against the conviction as a result whereof the declaration of forfeiture was made, or against a sentence imposed as a result of such conviction.

(c) ...

(bb) Comment by the Department

2.40 The DOJCD commented that section 34(1) and (3) of the Act refer to "judicial officer". This term is not defined, and in other sections the word "magistrate" is used. The DOJCD suggested that consideration should be given to the use of uniform terminology in this respect.

2.41 The Commission is of the view that the wording is not confusing and can refer to both a magistrate and a regional court magistrate. We believe there is no need to identify the precise nature of the occupation of the presiding officer, since the section refer to the "court in question or, if the judge or judicial officer concerned" and provides for alternatives depending on the circumstances.

2.42 The DOJCD commented that the SALRC must take cognizance of the draft Second Judicial Matters Amendment Bill, 2011, which will be introduced into Parliament. This Bill proposes amendments to section 36 of the Act. However, the current paper does not include

the proposed amendments to section 36 of the Act, because the Bill had not yet been passed by Parliament at the time of writing.

(cc) Evaluation and recommendations

2.43 The SALRC recommends that the sections outlined below be amended as indicated:

31 Disposal of article where no criminal proceedings are instituted or where it is not required for criminal proceedings

(1) ...

(2) The person who may lawfully possess the article in question shall be notified by registered post at his or her last-known address that he or she may take possession of the article and if such person fails to take delivery of the article within thirty days from the date of such notification, the article shall be forfeited to the State.

32 Disposal of article where criminal proceedings are instituted and admission of guilt fine is paid

(1) If criminal proceedings are instituted in connection with any article referred to in section 30 (c) and the accused admits his or her guilt in accordance with the provisions of section 57, the article shall be returned to the person from whom it was seized, if such person may lawfully possess such article, or, if such person may not lawfully possess such article, to the person who may lawfully possess such article, or, if such person may not lawfully possess such article, to the person who may lawfully possess it, whereupon the provisions of section 31 (2) shall apply with reference to any such person.

(2) ...

34 Disposal of article after commencement of criminal proceedings

(1) ...

(3) If the judge or judicial officer concerned does not, at the conclusion of the relevant proceedings, make an order under subsection (1), such judge or judicial officer or, if he or she is not available, any other judge or judicial officer of the court in question, may at any time after the conclusion of the proceedings make any such order, and for that purpose hear such additional evidence, whether by affidavit or orally, as he or she may deem fit.

(4) ...

35 Forfeiture of article to State

(1) A court which convicts an accused of any offence may, without notice to any person, declare-

(a) any weapon, instrument or other article by means whereof the offence in question was committed or which was used in the commission of such offence; or

(b) if the conviction is in respect of an offence referred to in Part 1 of Schedule 2, any vehicle, container or other article which was used for the purpose of or in connection with the commission of the offence in question or for the conveyance or removal of the stolen property,

and which was seized under the provisions of this Act, forfeited to the State: Provided that such forfeiture shall not affect any right referred to in subparagraph (i) or (ii) of subsection (4) (a) if it is proved that the person who claims such right did not know that such weapon, instrument, vehicle, container or other article was being used or would be used for the purpose of or in connection with the commission of the offence in question or, as the case may be, for the conveyance or removal of the stolen property in question, or that he or she could not prevent such use, and that he or she may lawfully possess such weapon, instrument, vehicle, container or other article, as the case may be.

(4) (a) The court in question or, if the judge or judicial officer concerned is not available, any judge or judicial officer of the court in question, may at any time within a period of three years with effect from the date of declaration of forfeiture, upon the application of any person, other than the accused, who claims that any right referred to in subparagraph (i) or (ii) of this paragraph is vested in him or her, inquire into and determine any such right, and if the court finds that the weapon, instrument, vehicle, container or other article in question-

(i) ...

(ii) was sold to the accused in pursuance of a contract under which he or she becomes the owner of such weapon, instrument, vehicle, container or other article, as the case may be, upon the payment of a stipulated price, whether by instalments or otherwise, and under which the seller becomes entitled to the return of such weapon, instrument, vehicle, container or other article upon default of payment of the stipulated price or any part thereof-

(aa) the court shall direct that the weapon, instrument, vehicle, container or other article in question be sold by public auction and that the said seller be paid out of the proceeds of the sale an amount equal to the value of his or her rights under the contract to the weapon, instrument, vehicle, container or other article, but not exceeding the proceeds of the sale; or

(bb) if the State has disposed of the weapon, instrument, vehicle, container or other article in question, the court shall direct that the said seller be likewise compensated.

(b) If a determination by the court under paragraph (a) is adverse to the applicant, he or she may appeal therefrom as if it were a conviction by

the court making the determination, and such appeal may be heard either separately or jointly with an appeal against the conviction as a result whereof the declaration of forfeiture was made, or against a sentence imposed as a result of such conviction.

(c)

(d) Chapter 3: Section 37: Ascertainment of bodily features of accused

(i) Section 37: Ascertainment of bodily features of accused

2.44 Section 37 contains a serious infringement of a person's right to dignity, bodily and psychological integrity, and not to be treated in a cruel inhuman and degrading manner. However, it also sets out a fundamentally necessary methodology for crime investigation. For this reason section 37 must always be read subject to section 36 (the limitation clause) of the Constitution. The constitutionality of section 37 was considered in the Commission's Project 101; the Commission concluded that the section is not blatantly unconstitutional. Section 37 is unconstitutional to the extent that it contains male-centric language (the exclusive use of masculine pronouns).in conflict with section 9 of the Constitution in section 37(5). Note that section 37(1)(c) makes provision for a "female" officer to take bodily samples from a "female" suspect.

(aa) Recommendation in Consultation Paper

2.45 The SALRC recommended that sections 37(1)(c) and (5) be amended as follows:

37 Powers in respect of prints and bodily appearance of accused

(1) Any police official may-

...

(c) take such steps as he or she may deem necessary in order to ascertain whether the body of any person referred to in paragraph (a) (i) or (ii) has any mark, characteristic or distinguishing feature or shows any condition or

appearance; Provided that no police official shall take any blood sample of the person concerned nor shall a police official make any examination of the body of the person concerned where that person is a female and the police official concerned is not a female.

...

(5) Finger-prints, palm-prints or foot-prints, photographs and the record of steps taken under this section shall be destroyed if the person concerned is found not guilty at his trial or if his conviction is set aside by a superior court or if he or she is discharged at a preparatory examination or if no criminal proceedings with reference to which such prints or photographs were taken or such record was made are instituted against the person concerned in any court or if the prosecution declines to prosecute such person.

(bb) Comment by the Department

2.46 The Department comments that the SALRC must take cognisance of the proposed insertion of a section 37A into the Act, in respect of obtaining handwriting specimens from an accused. This insertion is proposed in the draft Second Judicial Matters Amendment Bill, 2011.

(cc) Evaluation and recommendations

2.47 The Commission is of the view that until such time as legislation has been passed, it cannot be considered for amendment. We recommend that sections 37(1)(c) and (5) be amended as follows:

37 Powers in respect of prints and bodily appearance of accused

(1) Any police official may-

...

(c) take such steps as he or she may deem necessary in order to ascertain whether the body of any person referred to in paragraph (a) (i) or (ii) has any mark, characteristic or distinguishing feature or shows any condition or appearance; Provided that no police official shall take any blood sample of the person concerned nor shall a police official make any examination of the body of the person concerned where that person is a female and the police official concerned is not a female.

...

(5) Finger-prints, palm-prints or foot-prints, photographs and the record of steps taken under this section shall be destroyed if the person concerned is found not guilty at

his or her trial or if his or her conviction is set aside by a superior court or if he or she is discharged at a preparatory examination or if no criminal proceedings with reference to which such prints or photographs were taken or such record was made are instituted against the person concerned in any court or if the prosecution declines to prosecute such person.

(e) Chapter 4: Section 38: Methods of securing attendance of the accused in court

(i) Section 38: Methods of securing attendance of the accused in court

2.48 Section 38 is unconstitutional to the extent that it contains male-centric language (the exclusive use of masculine pronouns).in conflict with section 9 of the Constitution.

(aa) Recommendation in the Consultation Paper

2.49 The SALRC recommended that section 38 be amended as follows:

38 Methods of securing attendance of accused in court

The methods of securing the attendance of accused in court for the purposes of his or her trial shall be arrest, summons, written notice and indictment in accordance with the relevant provisions of this Act.

(bb) Comment by the Department

2.50 The Department states that the version of section 38 of the Act as quoted in the consultation paper is incorrect. The SALRC must furthermore take cognisance of the proposed amendment of section 38(1) of the Act by the Judicial Matters Amendment Bill, 2011, by the insertion of the number of the Child Justice Act, 2008 (Act No. 75 of 2008). The Bill was introduced into Parliament in 2013.

(cc) Evaluation and recommendations

2.51 Section 38(1) and (2) of the Act has already been amended by Act 42 of 2013, and no further amendment to 38(1) is required. The provisions now read –

38 Methods of securing attendance of accused in court

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

(2) The methods of securing the attendance of an accused who is under the age of eighteen years at a preliminary inquiry or child justice court are those contemplated in section 17 of the Child Justice Act, 2008.

(f) Chapter 5: Sections 39 to 53: Arrest

2.52 An arrest constitutes a serious infringement of a suspect's constitutional rights to freedom of movement, dignity and privacy. An arrest should only be made if there is a reasonable likelihood that a summons (chapter 6) or a written notice to appear in court (chapter 7) would be ineffective. Contact with the suspect is a necessary function of a valid arrest, but physical touching of a suspect can be avoided if the suspect clearly submits to being arrested. The arrest procedures in chapter 5 are also directly the concern of section 35 of the Constitution and only indirectly that of section 9.

(i) Section 39: Arrest procedures

2.53 Section 39, which sets out the manner and effect of arrest, complies with section 9 of the Constitution. However, sections 39(1), (2) and (3) must be amended to neutralise the gender pronouns. Sections 40 to 48, which set out the procedures for the arrest of a suspect, all comply with section 9 of the Constitution. However, the use of exclusively male gender pronouns must be corrected in section 40(1)(a)(d)(j) and (k); section 41(1)(a) and (c); section 42(1); and section 48 since these are in conflict with section 9 of the Constitution..

2.54 Section 45, which refers to arrest on “telegraphic authority”, is outdated. The wording must be amended to include not only telegraphic, written or printed arrest communications, but also arrest communications in the form of digital data and data messages as defined in the Electronic Communications and Transactions Act 25 of 2002. The section also contains the phrase “attorney-general”, which has been superseded by new legislation and requires amendment.

(aa) Recommendation in the Consultation Paper

2.55 The SALRC recommended that sections 39, 40, 41, 42, 45 and 48 be amended as follows:

39 Manner and effect of arrest

(1) An arrest shall be effected with or without a warrant and, unless the person to be arrested submits to custody, by actually touching his body or, if the circumstances so require, by forcibly confining his or her body.

(2) The person effecting an arrest shall, at the time of effecting the arrest or immediately after effecting the arrest, inform the arrested person of the cause of the arrest or, in the case of an arrest effected by virtue of a warrant, upon demand of the person arrested hand him or her a copy of the warrant.

(3) The effect of an arrest shall be that the person arrested shall be in lawful custody and that he or she shall be detained in custody until he or she is lawfully discharged or released from custody.

40 Arrest by peace officer without warrant

(1) A peace officer may without warrant arrest any person-

(a) who commits or attempts to commit any offence in his or her presence;

(b) whom he or she reasonably suspects of having committed an offence referred to in Schedule 1, other than the offence of escaping from lawful custody;

(c) who has escaped or who attempts to escape from lawful custody;

(d) who has in his or her possession any implement of housebreaking or carbreaking as contemplated in section 82 of the General Law Third Amendment Act, 1993, and who is unable to account for such possession to the satisfaction of the peace officer;

...

(j) who wilfully obstructs him or her in the execution of his or her duty;

(k) who has been concerned in or against whom a reasonable complaint has been made or credible information has been received or a reasonable suspicion exists that he or she has been concerned in any act committed outside the Republic which, if committed in the Republic, would have been punishable as an

offence, and for which he or she is, under any law relating to extradition or fugitive offenders, liable to be arrested or detained in custody in the Republic;

41 Name and address of certain persons and power of arrest by peace officer without warrant

(1) A peace officer may call upon any person-

(a) whom he or she has power to arrest;

...

(c) who, in the opinion of the peace officer, may be able to give evidence in regard to the commission or suspected commission of any offence,

to furnish such peace officer with his full name and address, and if such person fails to furnish his or her full name and address, the peace officer may forthwith and without warrant arrest him or her, or, if such person furnishes to the peace officer a name or address which the peace officer reasonably suspects to be false, the peace officer may arrest him or her without warrant and detain him or her for a period not exceeding twelve hours until such name or address has been verified.

42 Arrest by private person without warrant

(1) Any private person may without warrant arrest any person-

(a) who commits or attempts to commit in his or her presence or whom he or she reasonably suspects of having committed an offence referred to in Schedule 1;

(b) whom he or she reasonably believes to have committed any offence and to be escaping from and to be freshly pursued by a person whom such private person reasonably believes to have authority to arrest that person for that offence;

(c) whom he or she is by any law authorized to arrest without warrant in respect of any offence specified in that law;

(d) whom he or she sees engaged in an affray.

43 Warrant of arrest may be issued by magistrate or justice

(1) Any magistrate or justice may issue a warrant for the arrest of any person upon the written application of a [**n attorney-general**] Director of Public Prosecutions, a public prosecutor or a commissioned officer of police-

...

45 Arrest on telegraphic or electronic communication authority

(1) A telegraphic or similar written or printed communication or an electronic communication as contemplated in section 1 and in compliance with the provisions of the Electronic Communications Transactions Act, 25 of 2002, from any magistrate, justice or peace officer stating that a warrant has been issued for the arrest of any

person, shall be sufficient authority to any peace officer for the arrest and detention of that person.

48 Breaking open premises for purpose of arrest

Any person who may lawfully arrest another in respect of any offence and who knows or reasonably suspects such other person to be on any premises, may, if he or she first audibly demands entry into such premises and notifies the purpose for which he or she seeks entry and fails to gain entry, break open, enter and search such premises for the purpose of effecting the arrest.

(bb) Comment by the Department

2.56 The Department advised the SALRC to take note of the draft Second Judicial Matters Amendment Bill, 2011, which will be introduced into Parliament. This Bill proposes amendments to section 39 of the Act. The SALRC was also advised that in the SALRC's proposed amendment to section 45 of the Act, the title of Act 25 of 2002 is given incorrectly; it should be "The Electronic Communications and Transactions Act". In addition, the need to use gender-neutral pronouns in sections 43(2) and 46(1) of the Act (which currently refer only to "he") were not indicated in the consultation paper.

2.57 Section 47(2) of the Act refers to a fine in specific monetary terms, or alternatively imprisonment. The Department proposes that this subsection be amended in keeping with many other current penalty provisions, by deleting the monetary value. The provision would then refer only to a fine or imprisonment for a certain period. The Adjustment of Fines Act 101 of 1991 will then apply. The Department again alerted the SALRC to the draft Second Judicial Matters Amendment Bill, 2011, which was to be introduced to Parliament.. This Bill proposes amendments to section 47 of the Act.

(cc) Evaluation and recommendations

2.58 The Commission is of the view that amendments by an amendment Act can only be considered once the amendment Bill has been passed into legislation. With reference to the recommendation to adjust the sentence in section 47(2), the view has already been expressed above that an amendment in this regard is not called for, as the Adjustment of Fines Act provides for an adjustment which does not need to be included in every sentencing option contained in legislation.

2.59 References to “he” and “his” in sections 39, 40, 42 and 48 are unconstitutional to the extent that it contains male-centric language (the exclusive use of masculine pronouns).in conflict with section 9 of the Constitution. These should be amended to add “she and “her”, and outdated references to terminology such as “attorney-general” should be replaced by current terminology. The SALRC recommends that sections 39, 40, 41, 42, 45 and 48 be amended as follows:

39 Manner and effect of arrest

(1) An arrest shall be effected with or without a warrant and, unless the person to be arrested submits to custody, by actually touching his body or, if the circumstances so require, by forcibly confining his or her body.

(2) The person effecting an arrest shall, at the time of effecting the arrest or immediately after effecting the arrest, inform the arrested person of the cause of the arrest or, in the case of an arrest effected by virtue of a warrant, upon demand of the person arrested hand him or her a copy of the warrant.

(3) The effect of an arrest shall be that the person arrested shall be in lawful custody and that he or she shall be detained in custody until he or she is lawfully discharged or released from custody.

40 Arrest by peace officer without warrant

(1) A peace officer may without warrant arrest any person-

(a) who commits or attempts to commit any offence in his or her presence;

(b) whom he or she reasonably suspects of having committed an offence referred to in Schedule 1, other than the offence of escaping from lawful custody;

(c) who has escaped or who attempts to escape from lawful custody;

(d) who has in his or her possession any implement of housebreaking or carbreaking as contemplated in section 82 of the General Law Third Amendment Act, 1993, and who is unable to account for such possession to the satisfaction of the peace officer;

...

(j) who wilfully obstructs him or her in the execution of his or her duty;

(k) who has been concerned in or against whom a reasonable complaint has been made or credible information has been received or a reasonable suspicion exists that he or she has been concerned in any act committed outside the Republic which, if committed in the Republic, would have been punishable as an offence, and for which he or she is, under any law relating to extradition or fugitive offenders, liable to be arrested or detained in custody in the Republic;

41 Name and address of certain persons and power of arrest by peace officer without warrant

- (1) A peace officer may call upon any person-
- (a) whom he or she has power to arrest;
 - ...
 - (c) who, in the opinion of the peace officer, may be able to give evidence in regard to the commission or suspected commission of any offence,

to furnish such peace officer with his full name and address, and if such person fails to furnish his or her full name and address, the peace officer may forthwith and without warrant arrest him or her, or, if such person furnishes to the peace officer a name or address which the peace officer reasonably suspects to be false, the peace officer may arrest him or her without warrant and detain him or her for a period not exceeding twelve hours until such name or address has been verified.

42 Arrest by private person without warrant

- (1) Any private person may without warrant arrest any person-
- (a) who commits or attempts to commit in his or her presence or whom he or she reasonably suspects of having committed an offence referred to in Schedule 1;
 - (b) whom he or she reasonably believes to have committed any offence and to be escaping from and to be freshly pursued by a person whom such private person reasonably believes to have authority to arrest that person for that offence;
 - (c) whom he or she is by any law authorized to arrest without warrant in respect of any offence specified in that law;
 - (d) whom he or she sees engaged in an affray.

43 Warrant of arrest may be issued by magistrate or justice

- (1) Any magistrate or justice may issue a warrant for the arrest of any person upon the written application of a[n **attorney-general**] Director of Public Prosecutions, a public prosecutor or a commissioned officer of police-
- ...

45 Arrest on telegraphic or electronic communication authority

- (1) A telegraphic or similar written or printed communication, or an electronic communication as contemplated in section 1 and in compliance with the provisions of the Electronic Communications and Transactions Act 25 of 2002, which is received from any magistrate, justice or peace officer stating that a warrant has been issued for the arrest of any person, shall be sufficient authority to any peace officer for the arrest and detention of that person.
- ...

48 Breaking open premises for purpose of arrest

Any person who may lawfully arrest another in respect of any offence and who knows or reasonably suspects such other person to be on any premises, may, if he or she first audibly demands entry into such premises and notifies the purpose for which he or she seeks entry and fails to gain entry, break open, enter and search such premises for the purpose of effecting the arrest.

(ii) Section 49: Use of force in effecting arrest

2.60 The lawful use of force to effect an arrest as defined in section 49(1), and the power to kill a person who resists arrest or takes flight as defined in section 49(2), were the subject of critical and adverse constitutional scrutiny in two relatively recent cases: *Govender v Minister of Safety & Security* 2001 (2) SACR 197 (SCA) and *Ex Parte Minister of Safety & Security: In re S v Walters* 2002 (2) SACR 105 (CC). The result of these cases was the substitution of section 49 by the Judicial Matters Second Amendment Act 122 of 1998, which became operational on 18 July 2003.

2.61 Section 49 complies with section 9 of the Constitution. The then Minister of Police, N Mthethwa, and his deputy, F Mbalula, with the support of President Zuma considered an amendment to section 49 to allow the police more flexibility and leeway in exercising their powers of arrest. An amendment to section 49 was effected in 2012, and no further amendment is recommended.

(iii) Sections 50 and 51: Procedures after arrest

2.62 Section 50 has been amended by the Criminal Procedure Second Amendment Act 85 of 1997, the Judicial Matters Amendment Act 34 of 1998, and the Judicial Matters Amendment Act 62 of 2000. All subsections of section 50 comply with section 9 of the Constitution. Subsection 50(5) has been deleted by section 99 (1) of the Child Justice Act 75 of 2008, a provision which came into operation on 1 April 2010. Therefore, although the gender pronoun “he” is used exclusively in subsection (5), the SALRC does not recommend an amendment to this section as it has been repealed.

2.63 Section 51 complies with section 9 of the Constitution.

(g) Chapter 6: Summons and chapter 7: Section 54 Written notice to appear in court

(i) Section 54: Written notice to appear in court

2.64 Section 54(1) sets out the procedure for summoning an accused person to appear before a magistrate's court. This subsection has been substituted by section 99 of the Child Justice Act 75 of 2008, which came into operation on 1 April 2010, and it complies with section 9 of the Constitution. However, the word "he" is used exclusively in section 54(2)(a). The gendered pronouns ("him" and "he") must be similarly amended in sections 55(2), (2)(b) and 3(a). Section 55 (2A)(a) has been substituted by section 5 of the Judicial Matters Amendment Act 66 of 2008, the pertinent sections of which will be proclaimed on an as-yet unspecified future date. In section 56 (written notice to appear before a magistrate's court) once again, the gendered pronouns need altering in sections 56(1)(c) and (d) and in subsection (2). These sections are unconstitutional to the extent that it contains male-centric language (the exclusive use of masculine pronouns).in conflict with section 9 of the Constitution.

(aa) Recommendation in Consultation Paper

2.65 The SALRC recommended that sections 55(2), 55(2)(a), 55(2)(b), 55(3)(a), 56(1)(c) and (d) be amended as follows:

55 Failure of accused to appear on summons

...

(2) The court may, if satisfied from the return of service referred to in paragraph (b) of section 54 (2) that the summons was served on the accused in terms of paragraph (a) of that section and that the accused has failed to appear at the place and on the date and at the time specified in the summons, or if satisfied that the accused has failed to remain in attendance at the proceedings in question, issue a warrant for his or her arrest and, when he or she is brought before the court, in a summary manner enquire into his failure so to appear or so to remain in attendance and unless the accused satisfies the court that his failure was not due to any fault on his or her part, convict him

or her of the offence referred to in subsection (1) and sentence him or her to a fine not exceeding R300 or to imprisonment for a period not exceeding three months: Provided that where a warrant is issued for the arrest of an accused who has failed to appear in answer to the summons, the person executing the warrant-

- (a) may, where it appears to him or her that the accused received the summons in question and that the accused will appear in court in accordance with a warning under section 72; or
- (b) shall, where it appears to him or her that the accused did not receive the summons in question or that the accused has paid an admission of guilt fine in terms of section 57 or that there are other grounds on which it appears that the failure of the accused to appear on the summons was not due to any fault on the part of the accused, for which purpose he or she may require the accused to furnish an affidavit or affirmation, release the accused on warning under section 72 in respect of the offence of failing to appear in answer to the summons, whereupon the provisions of that section shall mutatis mutandis apply with reference to the said offence.

...

- (3) (a) If, in any case in which a warrant of arrest is issued, it was permissible for the accused in terms of section 57 to admit his or her guilt in respect of the summons on which he or she failed to appear and to pay a fine in respect thereof without appearing in court, and the accused is arrested under such warrant in the area of jurisdiction of a magistrate's court other than the magistrate's court which issued the warrant of arrest, such other magistrate's court may, notwithstanding any provision of this Act or any other law to the contrary, and if satisfied that the accused has, since the date on which he or she failed to appear on the summons in question, admitted his guilt in respect of that summons and has paid a fine in respect thereof without appearing in court, in a summary manner enquire into his or her failure to appear on such summons and, unless the accused satisfies the court that his or her failure was not due to any fault on his or her part, convict him of the offence referred to in subsection (1) and sentence him or her to a fine not exceeding R300 or to imprisonment for a period not exceeding three months.

...

(bb) Comment by the Department

2.66 The Department pointed out that the SALRC had not identified for amendment the exclusive use of male pronouns in section 54(1)(a) ("him") and subsection (3) ("he"). Similarly, in the SALRC's references to sections 55(2), (2A)(a)(ii), (3) and 56(2), the exclusive use of male pronouns ("he", "him" and "his") had not been indicated for amendment.

2.67 The SALRC must take cognisance of the proposed amendment of section 55 of the Act

by the draft Second Judicial Matters Amendment Bill, 2011. In the proposed amendment, subsection (2A)(a) will be replaced by the following paragraph: "(a)If the court issues a warrant of arrest in terms of subsection (2) in respect of a summons which is endorsed in accordance with section 57 **[(3)] (1)(a)** ...". The Bill is to be introduced into Parliament. The SALRC must similarly take cognisance of the proposed amendment of section 56 of the Act by the draft Second Judicial Matters Amendment Bill, 2011.

(cc) Evaluation and recommendations

2.68 The SALRC agrees with the comments by the Department, and the omissions and additions are included in the recommendations below. Amendments to legislation referred to by the Department have not yet been enacted, and are therefore not included in our recommendations.

54. Summons as method of securing attendance of accused in magistrate's court

(1) Where the prosecution intends prosecuting an accused in respect of any offence and the accused is not in custody in respect of that offence and no warrant has been or is to be issued for the arrest of the accused for that offence, the prosecutor may secure the attendance of the accused for a summary trial in a lower court having jurisdiction by drawing up the relevant charge and handing such charge, together with information relating to the name and, where known and where applicable, the residential address and occupation or status of the accused, to the clerk of the court who shall -

- (a) issue a summons containing the charge and the information handed to him or her by the prosecutor, and specifying the place, date and time for the appearance of the accused in court on such charge; and
 - (b) deliver such summons, together with so many copies thereof as there are accused to be summoned, to a person empowered to serve a summons in criminal proceedings.
- (2) (a) Except where otherwise expressly provided by any law, the summons shall be served by a person referred to in subsection (1) (b) by delivering it to the person named therein or, if he or she cannot be found, by delivering it at his or her residence or place of employment or business to a person apparently over the age of sixteen years and apparently residing or employed there.
- (b) A return by the person who served the summons that the service thereof has been effected in terms of paragraph (a), may, upon the failure of the person concerned to attend the relevant proceedings, be handed in at such proceedings and shall be prima facie proof of such service.

(3) A summons under this section shall be served on an accused so that he or she is in possession thereof at least fourteen days (Sundays and public holidays excluded) before the date appointed for the trial.

55 Failure of accused to appear on summons

...

(2) The court may, if satisfied from the return of service referred to in paragraph (b) of section 54 (2) that the summons was served on the accused in terms of paragraph (a) of that section and that the accused has failed to appear at the place and on the date and at the time specified in the summons, or if satisfied that the accused has failed to remain in attendance at the proceedings in question, issue a warrant for his or her arrest and, when he or she is brought before the court, in a summary manner enquire into his or her failure so to appear or so to remain in attendance and unless the accused satisfies the court that his or her failure was not due to any fault on his or her part, convict him or her of the offence referred to in subsection (1) and sentence him or her to a fine not exceeding R300 or to imprisonment for a period not exceeding three months: Provided that where a warrant is issued for the arrest of an accused who has failed to appear in answer to the summons, the person executing the warrant-

(a) may, where it appears to him or her that the accused received the summons in question and that the accused will appear in court in accordance with a warning under section 72; or

(b) shall, where it appears to him or her that the accused did not receive the summons in question or that the accused has paid an admission of guilt fine in terms of section 57 or that there are other grounds on which it appears that the failure of the accused to appear on the summons was not due to any fault on the part of the accused, for which purpose he or she may require the accused to furnish an affidavit or affirmation, release the accused on warning under section 72 in respect of the offence of failing to appear in answer to the summons, whereupon the provisions of that section shall mutatis mutandis apply with reference to the said offence.

...

(3) (a) If, in any case in which a warrant of arrest is issued, it was permissible for the accused in terms of section 57 to admit **[his]** guilt in respect of the summons on which he or she failed to appear and to pay a fine in respect thereof without appearing in court, and the accused is arrested under such warrant in the area of jurisdiction of a magistrate's court other than the magistrate's court which issued the warrant of arrest, such other magistrate's court may, notwithstanding any provision of this Act or any other law to the contrary, and if satisfied that the accused has, since the date on which he or her failed to appear on the summons in question, admitted his guilt in respect of that summons and has paid a fine in respect thereof without appearing in court, in a summary manner enquire into his or her failure to appear on such summons and, unless the accused satisfies the court that his or her failure was not due to any fault on his or her part, convict him or her of the offence referred to in subsection (1) and sentence him or her to a fine not exceeding R300 or to imprisonment for a period not exceeding three months.

...

(h) Chapter 8: Sections 57 to 57A: Admission of guilt fines

(i) Sections 57 to 57A: Admission of guilt fines

2.69 The purpose of sections 57 and 57A is to avoid an unnecessary court appearance where the accused is prepared to pay an admission-of-guilt fine in respect of a trivial charge. Section 57(1) has been substituted by section 7 of the Judicial Matters Amendment Act 66 of 2008 (the pertinent sections of which have yet to be proclaimed) Section 57A(1) and 57(4) have been substituted, respectively, by section 8(a) and 8(b) of the Judicial Matters Amendment Act 66 of 2008. These sections are, however, unconstitutional to the extent that they contain male-centric language (the exclusive use of masculine pronouns).in conflict with section 9 of the Constitution and therefore require the addition of suitable feminine pronouns to comply with section 9 of the Constitution.

(aa) Recommendation in the Consultation Paper

2.70 The SALRC recommended that section 57 be amended as follows:

57 Admission of guilt and payment of fine without appearance in court

(1) Where-

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

the accused may, without appearing in court, admit his or her guilt in respect of the offence in question by paying the fine stipulated (in this section referred to as the admission of guilt fine) either to the clerk of the magistrate's court which has jurisdiction

or at any police station within the area of jurisdiction of that court or, if the summons or written notice in question is endorsed to the effect that the fine may be paid at a specified local authority, at such local authority.

...

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

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

(aa) ...

(bb) ...

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

...

(c) Notwithstanding the provisions of subsection (1), an accused referred to in paragraph (a) (iii) may pay the admission of guilt fine in question to the clerk of the court where he or she appears in consequence of such warrant, and if the said clerk of the court is not the clerk of the magistrate's court referred to in subsection (1), he or she shall transfer such admission of guilt fine to the latter clerk of the magistrate's court.

(4) ...

(5) ...

(6) ...

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

(bb) Comment by the Department

2.71 The Department proposes that section 57 of the Act be amended by altering all the pronouns to reflect both male and female genders. . In addition, the SALRC must take cognisance of the proposed amendment of sections 57 and 57A of the Act by the draft Second

Judicial Matters Amendment Bill, 2011. been passed.

(cc) Evaluation and recommendations

2.72 The proposal to amend section 57 to include both male and female genders in all instances is agreed to. The proposals referred to in the draft amendment Bill are not included in the discussion since it has not yet been enacted.

2.73 The SALRC recommends that section 57 be amended as follows:

57 Admission of guilt and payment of fine without appearance in court

(1) Where-

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

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

...

- (3) (a) (i) Subject to the provisions of subparagraphs (ii) and (iii), an accused who intends to pay an admission of guilt fine in terms of subsection (1), shall surrender the summons or the written notice, as the case may be, at the time of the payment of the fine.
 - (ii) If the summons or written notice, as the case may be, is lost or is not available and the copy thereof known as the control document-
 - (cc) ...
 - (dd) ...

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

...

(c) Notwithstanding the provisions of subsection (1), an accused referred to in paragraph (a) (iii) may pay the admission of guilt fine in question to the clerk of the court where he or she appears in consequence of such warrant, and if the said clerk of the court is not the clerk of the magistrate's court referred to in subsection (1), he or she shall transfer such admission of guilt fine to the latter clerk of the magistrate's court.

(4) ...

(5) ...

(6) ...

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

(i) Chapter 9: Bail

2.74 The purpose of bail, which is inherently non-penal in character, is to strike a reasonable balance between the interests of society and the rights of an accused person. The interests of society require that there should be no interference with the administration of justice, and that the accused must appear at the trial. The rights of an accused person include that, pending trial, the person is presumed innocent and is thus entitled to liberty.

2.75 Chapter 9 of the Criminal Procedure Act has been extensively revised by the Criminal Procedure Amendment Act 75 of 1995 and the Criminal Procedure Second Amendment Act 85 of 1997. The primary and most constitutionally controversial component of chapter 9 of the principal Act is section 60. This section has been extensively revised by the above two Acts as well as the Judicial Matters Amendment Act 62 of 2000, the Judicial Matters Second

Amendment Act 55 of 2003, and the Judicial Matters Amendment Act 66 of 2008. As a result of these amendments, chapter 9 now almost entirely complies with section 9 of the Constitution.

2.76 However, chapter 9 – especially section 60 read with section 50(6)(b), (c) and (d) – makes no provision for an afterhours bail application by a detainee. The detainee has only the limited option of police bail (section 59 for trivial offences) or prosecutorial bail (section 59A limited to schedule 7 offences); otherwise the detainee must wait for the first possible court date on which to apply for bail. This scenario may well be an infringement of the detainee’s right to be released on bail, based on the presumption of innocence; and the right to be released from custody as soon as possible (in terms of section 12 and section 35(1)(f) of the Constitution). By contrast, for example, in Namibia a detainee is entitled to an afterhours bail application in court if there are real grounds of urgency.

2.77 However, the possible unconstitutionality of the provisions discussed in the previous paragraph falls outside the scope of the current review. Therefore, the SALRC does not propose any amendments to allow for an afterhours bail application. We advise the Department of Justice to consider the constitutionality of these provisions.

(i) Section 58: Effect of bail; police bail and prosecutorial bail

2.78 Section 58, which describes the effect of bail, complies with section 9 of the Constitution. However, the exclusive use of masculine pronouns requires the addition of feminine pronouns. Section 59, on police bail, also complies with section 9 of the Constitution. Section 59A, which authorizes release on bail by the director of public prosecutions or a prosecutor, is also compliant with section 9 of the Constitution; however, the term “attorney-general” has been superseded by new legislation, and must be replaced by “director of public prosecutions”.

(aa) Recommendation

2.79 The SALRC recommends that sections 58 and 59A be amended as follows:

58. Effect of bail

The effect of bail granted in terms of the succeeding provisions is that an accused who is in custody shall be released from custody upon payment of, or the furnishing of a

guarantee to pay, the sum of money determined for his bail, and that he or she shall appear at the place and on the date and at the time appointed for his or her trial or to which the proceedings relating to the offence in respect of which the accused is released on bail are adjourned, and that the release shall, unless sooner terminated under the said provisions, endure until a verdict is given by a court in respect of the charge to which the offence in question relates, or, where sentence is not imposed forthwith after verdict and the court in question extends bail, until sentence is imposed: Provided that where a court convicts an accused of an offence contemplated in Schedule 5 or 6, the court shall, in considering the question whether the accused's bail should be extended, apply the provisions of section 60 (11) (a) or (b), as the case may be, and the court shall take into account -

- (a) the fact that the accused has been convicted of that offence; and
- (b) the likely sentence which the court might impose.

59A [Attorney-general] Director of Public Prosecutions may authorise release on bail

(1) **[An attorney-general]** A Director of Public Prosecutions, or a prosecutor authorised thereto in writing by the **[attorney-general]** Director of Public Prosecutions concerned, may, in respect of the offences referred to in Schedule 7 and in consultation with the police official charged with the investigation, authorise the release of an accused on bail.

(2) For the purposes of exercising the functions contemplated in subsections (1) and (3) a **[n attorney-general]** Director of Public Prosecutions may, after consultation with the Minister, issue directives.

(3) ...

(a) ...

(b) subject to reasonable conditions imposed by the **[attorney-general]** Director of Public Prosecutions or prosecutor concerned; or

(c) ...

(4) An accused released in terms of subsection (3) shall appear on the first court day at the court and at the time determined by the **[attorney-general]** Director of Public Prosecutions or prosecutor concerned and the release shall endure until he or she so appears before the court on the first court day.

(ii) Section 60: Requirements and conditions of a bail application

2.80 Section 60 has been the subject of extensive analysis by the Constitutional Court in the following case: *S v Dlamini; S v Dladla & others; S v Joubert; and S v Schietekat* 1999 (2)

SACR 51 (CC). The court held that section 60(2)(c) was to be interpreted as a mere procedural rule of convenience and not as a proper reverse onus.²⁰ Sections 60(4) through section 60(9) were found to be constitutionally sound and did not infringe the judiciary’s constitutional right to determine questions of bail; nor did these subsections infringe the principle of separation of powers.²¹ Section 60(4)(e) and section 60(8A) could be interpreted as a reasonable and justifiable limitation of the accused’s right to bail in terms of the limitation clause (section 36).²² Although section 60(11)(a) and section 60(11B)(c) do place a reverse onus on the accused at a bail application hearing, these subsections could be read as a constitutionally necessary limitation on the accused’s right to bail and were saved by section 36 of the Constitution.²³ Section 60(14), which seeks to protect the prosecutions blanket docket privilege in certain circumstances, could be read restrictively, and was therefore not unconstitutional.²⁴ All these subsections are compliant with section 9 of the Constitution. The same is true of those subsections not directly mentioned in the *Dlamini* decision, namely sections 60(1), (3), (10), (12) and (13). However, section 60(11A) must be amended by removing the two references to the title “attorney-general”.

2.81 Section 61 has been repealed by section 4 of the Criminal Procedure Second Amendment Act 75 of 1995. Section 62, which permits a court to impose further conditions of bail on application by a prosecutor, is unconstitutional to the extent that it contains male-centric language (the exclusive use of masculine pronouns).in conflict with section 9 of the Constitution. The exclusive use of masculine pronouns needs to be altered by adding feminine pronouns. .

(aa) Recommendation

2.82 The SALRC recommends that sections 60(11A) and 62 (d) be amended as follows:

60 Bail application of accused in court

...

(11A) (a) If the **[attorney-general]** Director of Public Prosecutions intends charging any person with an offence referred to in Schedule 5 or 6 the **[attorney-general]** Director of Public Prosecutions may, irrespective of what charge is noted on the

²⁰ at para 49

²¹ at paras 42-44 and 101

²² at paras 55-57

²³ at paras 65, 75-77, 80, 85, 99-101.

²⁴ at para 85.

charge sheet, at any time before such person pleads to the charge, issue a written confirmation to the effect that he or she intends to charge the accused with an offence referred to in Schedule 5 or 6.

62. Court may add further conditions of bail

Any court before which a charge is pending in respect of which bail has been granted, may at any stage, whether the bail was granted by that court or any other court, on application by the prosecutor, add any further condition of bail -

- (a) ...
- (d) with regard to the place at which any document may be served on him or her under this Act;

...

(iii) Section 63: Amendments of conditions and recording of bail

(aa) Section 63: Amendments of conditions and recording of bail

2.83 Section 63, which allows the court to amend conditions of bail upon application by the prosecutor or accused, complies with section 9 of the Constitution. Section 63A is a unique section which allows for the amendment to the conditions of bail or release of a detained accused on account of adverse conditions in prison; it was inserted by section 6 of the Judicial Matters Amendment Act 42 of 2001, and is compliant with section 9 of the Constitution. Section 64 provides for the recording of all bail proceedings, and complies with section 9 of the Constitution.

(bb) Comments by the Department

2.84 The Department of Justice, however points out that the consultation paper did not make reference to section 63A of the Act which refers to "Head of Prison". This is incorrect since the term was replaced by "Head of the Correctional Centre" by the Correctional Services Amendment Act 25 of 2008. Similarly, the word "prison" was replaced by "correctional centre", and the term "Commissioner of Correctional Services" was replaced by "National Commissioner".

(cc) Evaluation and recommendations

2.85 Section 63A is a unique section which allows for the amendment to the conditions of bail or release of a detained accused on account of adverse conditions in prison and was inserted by section 6 of the Judicial Matters Amendment Act 42 of 2001 and is compliant with section 9 of the Constitution. Section 64 provides for the recording of all bail proceedings and is also compliant with section 9 of the Constitution. The SALRC agrees with the Department's comments that section 63A contains references to out dated terms which were amended by new legislation and the consequential amendments that are recommended. It is recommended that section 63A be amended as follows:

63A. Release or amendment of bail conditions of accused on account of prison conditions

(1) If a Head of **[Prison] Correctional Centre** contemplated in the Correctional Services Act, 1998 (Act No. 111 of 1998), is satisfied that the **[prison] correctional centre** population of a particular **[prison] correctional centre** is reaching such proportions that it constitutes a material and imminent threat to the human dignity, physical health or safety of an accused-

(a) ...

(c) who is not also in detention in respect of any other offence falling outside the category of offences referred to in paragraph (a), that Head of **[Prison] Correctional Centre** may apply to the said court for the-

- (aa) release of the accused on warning in lieu of bail; or
- (bb) amendment of the bail conditions imposed by that court on the accused.

(2) (a) An application contemplated in subsection (1) must be lodged in writing with the clerk of the court, and must-

(i) contain an affidavit or affirmation by the Head of **[Prison] Correctional Centre** to the effect that he or she is satisfied that the **[prison] correctional centre** population of the **[prison] correctional centre** concerned is reaching such proportions that it constitutes a material and imminent threat to the human dignity, physical health or safety of the accused concerned; and

(ii) ...

(3) (a) ...

(b) If the accused is absent when an order referred to in paragraph (a)(i) is made or when bail conditions are amended in terms of paragraph (a)(ii), a correctional official duly authorised by the Head of the **[prison] correctional centre** where the accused is in custody must-

- (i) .
- (4) (a) The National Director of Public Prosecutions may, in consultation with the National Commissioner of Correctional Services, issue directives regarding-
 - (i) the establishment of monitoring and consultative mechanisms for bringing an application contemplated in subsection (1); and
 - (ii) the procedure to be followed by a Head of **[Prison] Correctional Centre** and a Director of Public Prosecutions whenever it appears that it is necessary to bring an application contemplated in subsection (1).
- (b) ...

(iv) Section 65: Bail appeals

2.86 Section 65, allows for an appeal to a superior court with regard to bail, The masculine pronouns (“himself” and “his” respectively) in sections 65(1)(a) and(4) needed to be altered to include the feminine. These are unconstitutional to the extent that they contain male-centric language (the exclusive use of masculine pronouns).in conflict with section 9 of the Constitution. In addition, section 65(1)(c) requires the deletion of the term “local division of the Supreme Court”, which must be replaced by “local division of the High Court”. The title “attorney-general” must be replaced by “Director of Public Prosecutions” in section 65(3). Similarly, section 65A, which allows a Director of Public Prosecutions to appeal against a court’s decision to grant bail to an accused, complies with section 9 of the Constitution. However, the term "attorney-general" must be replaced by “Director of Public Prosecutions” throughout this section. Also, “Appellate Division” must be changed to “Supreme Court of Appeal” in section 65A(2)(a).

(aa) Recommendation in the Consultation Paper

2.87 The SALRC recommended that sections 65(1)(a) and (c), section 65(3) and (4); and section 65A be amended as follows:

65 Appeal to superior court with regard to bail

- (1) (a) An accused who considers him or herself aggrieved by the refusal by a lower court to admit him or her to bail or by the imposition by such court of a condition of

bail, including a condition relating to the amount of bail money and including an amendment or supplementation of a condition of bail, may appeal against such refusal or the imposition of such condition to the superior court having jurisdiction or to any judge of that court if the court is not then sitting.

(b) The appeal may be heard by a single judge.

(c) A local division of the **[Supreme Court] High Court** shall have jurisdiction to hear an appeal under paragraph (a) if the area of jurisdiction of the lower court in question or any part thereof falls within the area of jurisdiction of such local division.

...

(3) The accused shall serve a copy of the notice of appeal on the **[attorney-general] Director of Public Prosecutions** and on the magistrate or, as the case may be, the regional magistrate, and the magistrate or regional magistrate shall forthwith furnish the reasons for his or her decision to the court or judge, as the case may be.

(4) The court or judge hearing the appeal shall not set aside the decision against which the appeal is brought, unless such court or judge is satisfied that the decision was wrong, in which event the court or judge shall give the decision which in its or his or her opinion the lower court should have given.

65A Appeal by **[attorney-general] Director of Public Prosecutions against decision of court to release accused on bail**

(1) (a) The **[attorney-general] Director of Public Prosecutions** may appeal to the superior court having jurisdiction, against the decision of a lower court to release an accused on bail or against the imposition of a condition of bail as contemplated in section 65 (1) (a).

(b) The provisions of section 310A in respect of an application or appeal referred to in that section by an **[attorney-general] Director of Public Prosecutions**, and the provisions of section 65 (1) (b) and (c) and (2), (3) and (4) in respect of an appeal referred to in that section by an accused, shall apply mutatis mutandis with reference to a case in which the attorney-general appeals in terms of paragraph (a) of this subsection.

(2) (a) The **[attorney-general] Director of Public Prosecutions** may appeal to the **[Appellate Division] Supreme Court of Appeal** against a decision of a **[superior court] High Court** to release an accused on bail.

(b) The provisions of section 316 in respect of an application or appeal referred to in that section by an accused, shall apply mutatis mutandis with reference to a case in which the **[attorney-general] Director of Public Prosecutions** appeals in terms of paragraph (a) of this subsection.

(c) Upon an appeal in terms of paragraph (a) or an application referred to in paragraph (b) brought by an **[attorney-general] Director of Public Prosecutions**, the court may order that the State pay the accused concerned the whole or any part of the costs to which the accused may have been put in opposing the appeal or application, taxed according to the scale in civil cases of that court.

(3) If the appeal of the **[attorney-general]** Director of Public Prosecutions in terms of subsection (1) (a) or (2) (a) is successful, the court hearing the appeal shall issue a warrant for the arrest of the accused.

(bb) Comments by the Department

2.88 The Department proposed that references in section 65 of the Act to a "local division" be deleted, so that the section refers only to a "High Court". However, it needs to be kept in mind that the Superior Courts Act was introduced into Parliament in 2011 and passed in 2013, and changed the formation of the superior courts. The provisions of the Criminal Procedure Act should be aligned with the Superior Courts Act.

(cc) Evaluation and recommendations

2.89 The SALRC notes that the Superior Courts Act of 2013 has established a new structure for the High Courts. However, the Act retains the concept of local divisions and provides for the name change of the Supreme Court to High Court. Other than these amendments, the Act does not change the existing appeal procedure to the High Court. We therefore recommend that sections 65 (1)(a), (c), section 65(3) and (4), and section 65A be amended to reflect the name changes referred to above. In addition we recommend amendments to the exclusive male pronouns to include both genders. The recommended changes are as follows:

65 Appeal to superior court with regard to bail

- (1) (a) An accused who **[considers himself]** is aggrieved by the refusal by a lower court to admit him or her to bail or by the imposition by such court of a condition of bail, including a condition relating to the amount of bail money and including an amendment or supplementation of a condition of bail, may appeal against such refusal or the imposition of such condition to the superior court having jurisdiction or to any judge of that court if the court is not then sitting.
- (b) The appeal may be heard by a single judge.
- (c) A local division of the **[Supreme Court]** High Court as defined in section (6)(3) of the Superior Courts Act, 2013 shall have jurisdiction to hear an appeal under paragraph (a) if the area of jurisdiction of the lower court in question or any part thereof falls within the area of jurisdiction of such local division.

...

(3) The accused shall serve a copy of the notice of appeal on the **[attorney-general] Director of Public Prosecutions** and on the magistrate or, as the case may be, the regional magistrate, and the magistrate or regional magistrate shall forthwith furnish the reasons for his or her decision to the court or judge, as the case may be.

(4) The court or judge hearing the appeal shall not set aside the decision against which the appeal is brought, unless such court or judge is satisfied that the decision was wrong, in which event the court or judge shall give the decision which in its or his or her opinion the lower court should have given.

65A Appeal by **[attorney-general] Director of Public Prosecutions against decision of court to release accused on bail**

(1) (a) The **[attorney-general] Director of Public Prosecutions** may appeal to the superior court having jurisdiction, against the decision of a lower court to release an accused on bail or against the imposition of a condition of bail as contemplated in section 65 (1) (a).

(b) The provisions of section 310A in respect of an application or appeal referred to in that section by an **[attorney-general] Director of Public Prosecutions**, and the provisions of section 65 (1) (b) and (c) and (2), (3) and (4) in respect of an appeal referred to in that section by an accused, shall apply mutatis mutandis with reference to a case in which the **[attorney-general] Director of Public Prosecutions** appeals in terms of paragraph (a) of this subsection.

(2) (a) The **[attorney-general] Director of Public Prosecutions** may appeal to the **[Appellate Division] Supreme Court of Appeal** against a decision of a **[superior court] High Court** to release an accused on bail.

(b) The provisions of section 316 in respect of an application or appeal referred to in that section by an accused, shall apply mutatis mutandis with reference to a case in which the **[attorney-general] Director of Public Prosecutions** appeals in terms of paragraph (a) of this subsection.

(c) Upon an appeal in terms of paragraph (a) or an application referred to in paragraph (b) brought by an **[attorney-general] Director of Public Prosecutions**, the court may order that the State pay the accused concerned the whole or any part of the costs to which the accused may have been put in opposing the appeal or application, taxed according to the scale in civil cases of that court.

(3) If the appeal of the **[attorney-general] Director of Public Prosecutions** in terms of subsection (1) (a) or (2) (a) is successful, the court hearing the appeal shall issue a warrant for the arrest of the accused.

(v) Section 66: Failure to observe bail conditions and cancellation of bail

(aa) Section 66: Failure to observe bail conditions and cancellation of bail

2.90 Section 66 allows the court, on application by a prosecutor, to amend or revoke bail when an accused has failed to adhere to the bail conditions. This section is unconstitutional to the extent that they contain male-centric language (the exclusive use of masculine pronouns).in conflict with section 9 of the Constitution. The pronouns need to be changed to include female as well as male pronouns in sections 66(2) and (3) ("he" and "his" respectively). Section 67 sets out the consequences of a failure by the accused to appear at the trial, and contains a reverse onus in section 67(2) which is unconstitutional; this provision must be amended to place only a burden of rebuttal on the accused that a failure to appear at trial was the fault of the accused. Section 67A and sections 68 and 68A cancellation of bail are compliant with section 9 of the Constitution. The reverse onus was considered in the Commission's investigation in Project 101: *The Application of the Bill of Rights to the criminal procedure, criminal law, the law of evidence and sentencing*,²⁵ and the discussion is not duplicated here.

(bb) Comment by the Department

2.91 The Department proposes that the reference to "prison" in section 68(2) of the Act to is obsolete.

(cc) Evaluation and recommendations

2.92 Section 66 allows the court, on application by a prosecutor, to amend or revoke bail when an accused has failed to adhere to the bail conditions. This section is unconstitutional to

²⁵ RP118/2001 ISBN 0 62131451.

the extent that they contain male-centric language (the exclusive use of masculine pronouns).in conflict with section 9 of the Constitution. The pronouns “he” and “his” in sections 66(2) and (3) respectively must be expanded to include the feminine pronouns The Department proposes that the reference to “prison” in section 68(2) be altered to refer to “correctional centre”, and the SALRC agrees with this proposal. Section 67 sets out the consequences of a failure by the accused to appear at trial, and contains a reverse onus in section 67(2) which is unconstitutional; this provision must be amended to place only a burden of rebuttal on the accused that a failure to appear at trial was the fault of the accused. Section 67A and sections 68 and 68A (cancellation of bail) comply with section 9 of the Constitution. The reverse onus was considered and recommended in the Commission’s Project 101²⁶ and the discussion is not duplicated here.

2.93 The SALRC recommends that sections 66, 67 and 68 of the Act be amended as follows:

66. Failure by accused to observe condition of bail

(1) ...

(2) If the accused is not present when the prosecutor applies to the court under subsection (1), the court may issue a warrant for the arrest of the accused, and shall, when the accused appears before the court and denies that he or she failed to comply with the condition in question or that his or her failure to comply with such condition was due to fault on his or her part, proceed to hear such evidence as the prosecutor and the accused may place before it.

(3) If the accused admits that he or she failed to comply with the condition in question or if the court finds that he or she failed to comply with such condition, the court may, if it finds that the failure by the accused was due to fault on his or her part, cancel the bail and declare the bail money forfeited to the State.

(4) ...

67. Failure of accused on bail to appear

(1) If an accused who is released on bail -

(a) fails to appear at the place and on the date and at the time -

(i) appointed for his or her trial; or

(ii) to which the proceedings relating to the offence in respect of which the accused is released on bail are adjourned; or

(b) ...

(2) (a) If the accused appears before court within fourteen days of the issue under subsection (1) of the warrant of arrest, the court shall

²⁶

RP118/2001 ISBN 0 62131451.

confirm the provisional cancellation of the bail and the provisional forfeiture of the bail money, unless the accused satisfies the court that his or her failure under subsection (1) to appear or to remain in attendance was not due to fault on his or her part.

- (b) If the accused satisfies the court that his or her failure was not due to fault on his or her part, the provisional cancellation of the bail and the provisional forfeiture of the bail money shall lapse.
- (c)

68. Cancellation of bail

(1) Any court before which a charge is pending in respect of which bail has been granted may, whether the accused has been released or not, upon information on oath that -

- (a) the accused is about to evade justice or is about to abscond in order to evade justice;
- (b) ...
- (g) it is in the interests of justice to do so,

issue a warrant for the arrest of the accused and make such order as it may deem proper, including an order that the bail be cancelled and that the accused be committed to **[prison]** a correctional centre until the conclusion of the relevant criminal proceedings.

(2) Any magistrate may, in circumstances in which it is not practicable to obtain a warrant of arrest under subsection (1), upon the application of any peace officer and upon a written statement on oath by such officer that -

- (a) he or she has reason to believe that -
 - (i) ...
- (d) it is in the interests of justice to do so,

issue a warrant for the arrest of the accused, and may, if satisfied that the ends of justice may be defeated if the accused is not placed in custody, cancel the bail and commit the accused to **[prison]** a correctional centre, which committal shall remain of force until the conclusion of the relevant criminal proceedings unless the court before which the proceedings are pending sooner reinstates the bail.

(vi) Section 69: Payment of bail by a third person and juveniles

2.94 Section 69 (payment of bail by a third party) and section 70 (remission of bail money) comply with section 9 of the Constitution. Section 71, which allows a juvenile to be placed in

detention in lieu of bail, has been repealed by section 99 of the Child Justice Act 75 of 2008, which came into effect on 1 April 2010. The Child Justice Act complies with section 9 of the Constitution.

(j) Chapter 10: Section 72: Release on warning

(i) Section 72: Release on warning

2.95 The purpose of section 72 is to allow a court or police official to release an accused in custody on a warning instead of bail, in respect of minor offences. Sections 72(1)(b) and (3)(b) are unconstitutional to the extent that they contain male-centric language (the exclusive use of masculine pronouns) in conflict with section 9 of the Constitution. The gender pronouns (“him” and “he” respectively) need to be amended in section 72(1)(b) and section 72(3)(b).

2.96 The summary procedure set out in section 72(4) was found to be “inquisitorial and inherently punitive and unfair” in *S v Singo* 2002 (1) SACR 576 (V) at 586 A-C. The court held that the specific words “unless such accused or such person satisfies the court that his failure was not due to fault on his part” in section 72(4) was inconsistent with the Constitution, and needed to be amended. Section 72A (the cancellation of release on warning) complies with section 9 of the Constitution.

(aa) Recommendation in Consultation Paper

2.97 The SALRC recommended that sections 72(1)(b) and 72(3)(b) be amended as follows:

72 Accused may be released on warning in lieu of bail

(1) If an accused is in custody in respect of any offence and a police official or a court may in respect of such offence release the accused on bail under section 59 or 60, as the case may be, such police official or such court, as the case may be, may, in lieu of bail and if the offence is not, in the case of such police official, an offence referred to in Part II or Part III of Schedule 2-

(a) release the accused from custody and warn him or her to appear before a specified court at a specified time on a specified date in connection with such offence or, as the case may be, to remain in attendance at the proceedings relating to the offence in question, and the said court may, at the time of such

release or at any time thereafter, impose any condition referred to in section 62 in connection with such release;

(b) in the case of an accused under the age of eighteen years who is released under paragraph (a), place the accused in the care of the person in whose custody he or she is, and warn such person to bring the accused or cause the accused to be brought before a specified court at a specified time on a specified date and to have the accused remain in attendance at the proceedings relating to the offence in question and, if a condition has been imposed in terms of paragraph (a), to see to it that the accused complies with that condition.

(2) ...

(3)...

(b) A court which releases an accused under subsection (1) shall, at the time of releasing the accused, record or cause the relevant proceedings to be recorded in full, and where such court is a magistrate's court or a regional court, any document purporting to be an extract from the record of proceedings of that court and purporting to be certified as correct by the clerk of the court and which sets out the warning relating to the court before which, the time at which and the date on which the accused is to appear or the conditions on which he or she was released, shall, on its mere production in any court in which the relevant charge is pending, be prima facie proof of such warning.

(bb) Comment by the Department

2.98 The Department proposes that in *S v Singo 2002 (2) SACR 160 (CC) & 2002 (4) SA 858 (CC)*, the Court held that certain wording of section 72(4) of the Act was inconsistent with the Constitution and must be amended. In paragraph 2.38 of the consultation paper, however, the SALRC had recommended that the subsection remain unchanged.

2.99 The Department drew attention to a notice in terms of rule 4(8) of the Rules of the Constitutional Court made by the President of the Constitutional Court in consultation with the Chief Justice under section 171 of the Constitution of the Republic of South Africa, 1996; and to section 16 of the Constitutional Court Complementary Act of 1995 published as Government Notice No. R. 888 in *Gazette 23535 (28 June 2002)*. This legislation provides that the omission from section 72(4) of the Act of the phrase "there is a reasonable possibility that" between the words "that" and "his failure" has been declared inconsistent with the Constitution. Section 72(4) of the Act is therefore to be read as if it contains the following phrase: "that there is a reasonable possibility that his failure...". The SALRC recommends that the section be amended accordingly.

2.100 Section 72(4) of the Act refers to a fine in specific monetary terms or alternatively imprisonment. In this regard, the Department proposes that this subsection be amended in keeping with many other current penalty provisions, by deleting the monetary value so that the provision refers to a fine or imprisonment for a certain period. The Adjustment of Fines Act 101 of 1991 will then apply. The Department also proposes that the SALRC take cognisance of the proposed amendment of section 72(4) of the Act by the draft Second Judicial Matters Amendment Bill, 2011.

(cc) Evaluation and recommendations

2.101 The Commission notes the intended amendment by the Department, and excludes this issue from the current investigation. With regard to the finding of the Constitutional Court, the Commission recommends that section 72(4) be amended to reflect the judgment of the Court.

2.102 The Commission is of the view that it is unnecessary to amend section 72 in line with the Adjustment of Fines Act 101 of 1991. The Adjustment of Fines Act was worded to provide for the adjustment of fines without changing the provisions in specific Acts. The implementation of the Adjustment of Fines Act affected all penalty clauses in existing legislation, without these clauses having to be amended individually. An amendment of the penalty clause in section 72 would necessitate a review and amendment of all penalty clauses in all other legislation.

2.103 However, there are exclusive references to “he” and “him” in section 72. This gendered language infringes section 9 of the Constitution, and we recommend the inclusion of feminine pronouns. The Commission recommends that section 72 be amended as follows:

72 Accused may be released on warning in lieu of bail

(1) If an accused is in custody in respect of any offence and a police official or a court may in respect of such offence release the accused on bail under section 59 or 60, as the case may be, such police official or such court, as the case may be, may, in lieu of bail and if the offence is not, in the case of such police official, an offence referred to in Part II or Part III of Schedule 2-

- (a) release the accused from custody and warn him or her to appear before a specified court at a specified time on a specified date in connection with such offence or, as the case may be, to remain in attendance at the proceedings relating to the offence in question, and the said court may, at the time of such release or at any time thereafter, impose any condition referred to in section 62 in connection with such release;

- (b) in the case of an accused under the age of eighteen years who is released under paragraph (a), place the accused in the care of the person in whose custody he or she is, and warn such person to bring the accused or cause the accused to be brought before a specified court at a specified time on a specified date and to have the accused remain in attendance at the proceedings relating to the offence in question and, if a condition has been imposed in terms of paragraph (a), to see to it that the accused complies with that condition.

(2) ...

(3)...

- (b) A court which releases an accused under subsection (1) shall, at the time of releasing the accused, record or cause the relevant proceedings to be recorded in full, and where such court is a magistrate's court or a regional court, any document purporting to be an extract from the record of proceedings of that court and purporting to be certified as correct by the clerk of the court and which sets out the warning relating to the court before which, the time at which and the date on which the accused is to appear or the conditions on which he or she was released, shall, on its mere production in any court in which the relevant charge is pending, be prima facie proof of such warning.

(4) The court may, if satisfied that an accused referred to in subsection (2) (a) or a person referred to in subsection (2) (b), was duly warned in terms of paragraph (a) or, as the case may be, paragraph (b) of subsection (1), and that such accused or such person has failed to comply with such warning or to comply with a condition imposed, issue a warrant for his or her arrest, and may, when he or she is brought before the court, in a summary manner enquire into his or her failure and, unless such accused or such person satisfies the court that there is a reasonable possibility that his or her failure was not due to fault on his or her part, sentence him or her to a fine not exceeding R300 or to imprisonment for a period not exceeding three months.

(k) Chapter 11: Section 73: Assistance to Accused

(i) Section 73: Assistance to Accused

2.104 Section 73 sets out the accused's right to legal representation. Section 73(2A) ensures that an accused is timeously informed of the right to legal representation; section 73(2B) confirms that an accused is entitled to be given a reasonable opportunity to obtain legal representation; and section 73(2C) allows a court, in certain circumstances, to take steps to secure legal representation on behalf of the accused. Section 73 is unconstitutional to the extent that it contains male-centric language (the exclusive use of masculine pronouns).in conflict with section 9 of the Constitution., apart from the exclusive use of the male pronoun

“his” , (2) and (3). It has also been argued that a parent or guardian acting on behalf of a juvenile accused in terms of section 73(3) should be afforded the right to claim “parent–child privilege” in the interest of the juvenile accused, and that words to this effect should be inserted into section 73(3). Section 74 has been repealed by section 99(1) of the Child Justice Act 75 of 2008, which became operational on 1 April 2010 and complies with section 9 of the Constitution.

(aa) Recommendation in the Consultation Paper

2.105 The SALRC recommended that sections 73(1),(2) and (3) be amended as follows:

73 Accused entitled to assistance after arrest and at criminal proceedings

(1) An accused who is arrested, whether with or without warrant, shall, subject to any law relating to the management of prisons, be entitled to the assistance of his or her legal adviser as from the time of his or her arrest.

(2) An accused shall be entitled to be represented by his or her legal adviser at criminal proceedings, if such legal adviser is not in terms of any law prohibited from appearing at the proceedings in question.

(3) An accused who is under the age of eighteen years may be assisted by his or her parent or guardian at criminal proceedings, and any accused who, in the opinion of the court, requires the assistance of another person at criminal proceedings, may, with the permission of the court, be so assisted at such proceedings.

(bb) Comment by the Department

2.106 The Department comments that section 73(3) as quoted by the SALRC is incorrect, as it has been substituted by the Child Justice Act of 2008. The SALRC must furthermore take cognisance of the proposed amendment of section 73(3) of the Act by the Judicial Matters Amendment Bill, 2011.

(cc) Evaluation and recommendations

2.107 The SALRC recommends that sections 73(1), (2) and (3) be amended according to the Department’s comments. However, for the purpose of this investigation, proposed amendments that have already been drafted and are ready for submission to Parliament must be excluded; in addition, the Commission’s recommendations are limited to legislation that has already been

enacted. Where proposed amendments are under consideration by the Department, such amendments should follow the normal legislative process.

2.108 With regard to the recommendation that section 73(3) should provide for a parent–child privilege, the Commission is of the view that such privilege should be considered. If it is found to be justified, such privilege should be regulated by the Child Justice Act. The Commission is of the view that the absence of a mention of such privilege in section 73(3) of the Criminal Procedure Act does not render the provision blatantly unconstitutional or necessarily imply an infringement of section 9 of the Constitution; a number of considerations come into play. It would appear that assistance by a parent is regulated in the Child Justice Act in a number of sections. Section 73(3) merely provides for assistance by a guardian or appropriate adult if approved by the court. We submit that the existence of a privilege depends on the interpretation of “assistance”, and does not necessarily mean that such a guardian or adult would acquire a role equal to that of a legal representative where a privilege would normally operate. “Assistance” and “representation” are two different concepts, and the same rules do not necessarily apply to both. We request the Department to consider this matter in terms of the Child Justice Act, not as part of the review of the Criminal Procedure Act. It should be noted that section 73(3) was amended by section 5 of Act 42/2013 with effect from 22 January 2014. The amendment clearly indicates that assistance to a juvenile is regulated by the Child Justice Act 75 of 2008 and the assistance regulated in section 73(3) is assistance in addition to the provisions of Child Justice Act. Section 73(2C), which deals with legal assistance, was inserted by section 25 of Act 39/2014 and is effective from 1 March 2015.

2.109 It would appear that section 73 has been amended several times and the provisions as they currently stand is in line with section 9 of the Constitution. The SALRC recommends no amendments to section 73.

PART 2: Criminal Procedure Act 51 of 1977, Chapters 12 to 22

2.110 This part deals with chapters 12 to 22 (sections 75 to 178) only, namely summary trials and preparatory examinations, conduct of proceedings, and witnesses and evidence.

(a) Chapter 12: Sections 75 to 76: Summary trials

(i) Section 75 to 78 (summary trials and court of trial)

2.111 Section 75 is unconstitutional to the extent that it contains male-centric language (the exclusive use of masculine pronouns).in conflict with section 9 of the Constitution . Subsections 1(a), (b) and (c) should be amended because they contain outdated wording such as “attorney general.

(aa) Recommendation in Consultation Paper

2.112 The SALRC recommended that section 75 (1) be amended as follows:

75 Summary trial and court of trial

(1) When an accused is to be tried in a court in respect of an offence, he or she shall, subject to the provisions of sections 119, 122A and 123, be tried at a summary trial in—

(a) a court which has jurisdiction and in which he or she appeared for the first time in respect of such offence in accordance with any method referred to in section 38;

(b) a court which has jurisdiction and to which he or she was referred to under subsection (2); or

(c) any other court which has jurisdiction and which has been designated by the attorney-general or any person authorized thereto by the **[attorney-general] Director of Public Prosecutions**, whether in general or in any particular case, for the purposes of such summary trial.

**(bb) Comments by the Department of Justice and Constitutional Development:
Sections 77 and 78:**

2.113 The Department pointed out that the draft Second Judicial Matters Amendment Bill proposes that in section 77(1A) of the Criminal Procedure Act, reference to the Legal Aid Amendment Act 20 of 1996 should be changed to refer to the Legal Aid Act 22 of 1969.

(cc) Evaluation and recommendations

2.114 It is submitted that the SALRC must take cognisance of the proposed amendments of sections 77 and 78 of the Act by the draft Second Judicial Matters Amendment Bill, 2011. The amendments referred to in sections 77 and 78 follow from the Commission's recommendations in its report on Project 101: *The Application of the Bill of Rights to the criminal procedure, criminal law, the law of evidence and sentencing*²⁷ and are not duplicated here. For purposes of this investigation, the comment by the Department with regard to the incorrect reference to the Legal Aid Amendment Act is accepted. We recommend that section 75 of the Act be amended as outlined in paragraph 2.112 and that section 77 be amended as follows:

77. Capacity of accused to understand proceedings

(1) ...

(1A) At proceedings in terms of sections 77(1) and 78(2) the court may, if it is of the opinion that substantial injustice would otherwise result, order that the accused be provided with the services of a legal practitioner in terms of section 3B of the Legal Aid **[Amendment] Act, [1996 (Act No. 20 of 1996)]** 1969 (Act 22 of 1969).

...

²⁷ RP118/2001 ISBN 0 62131451.

(b) Chapter 14: Sections 80 to 104

(i) Section 85: Objection to charge sheet

(aa) Objection to charge sheet

2.115 Section 85 is in conflict with section 9 of the Constitution because of the exclusive use of masculine pronouns (“he” and “his”) in subsection (1) and the reference to the outdated term “attorney-general” require correction. In the Commission’s report on Project 101: *The application of the Bill of Rights to criminal procedure, criminal law, the law of evidence and sentencing*, the SA Law Reform Commission recommended that section 85 should be amended in the following way:

15. Section 85 of the Principal Act is hereby amended by the substitution for paragraph (d) of subsection (1) of the following paragraph:

85 Objection to charge

(1) An accused may, before pleading to the charge under section 106, object to the charge on the ground-

(a) ...

(d) that the charge does not contain sufficient particulars of any matter alleged in the charge: Provided that such an objection may not be raised to a charge when he or she is required in terms of section 119 or 122A to plead thereto in the magistrate’s court;

(e) ...

Provided that the accused shall give reasonable notice to the prosecution of **[his]** his or her intention to object to the charge and shall state the grounds upon which **[he]** he or she bases **[his]** his or her objection: Provided further that the requirement of such notice may be waived by the **[attorney-general]** Director of Public Prosecutions or the prosecutor, as the case may be, and the court may, on good cause shown, dispense with such notice or adjourn the trial to enable such notice to be given.

(bb) Recommendation in the Consultation Paper

2.116 The SALRC recommended that sections 85(1) (d) of the Act should be amended as shown in Discussion Paper 90 of Project 101. The amendment of section 85(1) and (1)(d)

should be as proposed above. The provisions are unconstitutional and non-compliant with section 9 of the Constitution in that they contain exclusively male pronouns; in addition, they contain out dated terminology which has been amended by subsequent legislation. It is recommended that section 85(1) and 1(d) be amended as follows:

85 Objection to charge

(1) An accused may, before pleading to the charge under section 106, object to the charge on the ground-

...

(d) that the charge does not contain sufficient particulars of any matter alleged in the charge: Provided that such an objection may not be raised to a charge when he or she is required in terms of section 119 or 122A to plead thereto in the magistrate's court;

(e) ...

Provided that the accused shall give reasonable notice to the prosecution of his or her intention to object to the charge and shall state the grounds upon which he or she bases his or her objection: Provided further that the requirement of such notice may be waived by the **[attorney-general]** Director of Public Prosecutions or the prosecutor, as the case may be, and the court may, on good cause shown, dispense with such notice or adjourn the trial to enable such notice to be given.

(cc) Comments by the Department

2.117 The SALRC must take cognisance of the proposed amendment of section 85 of the Act by the draft Second Judicial Matters Amendment Bill.

(dd) Evaluation and recommendations

2.118 The Commission has not included proposals for the amendment of legislation that has been proposed but not yet enacted by the Department, except where such recommendations may overlap with the terms of reference of the current investigation. In such cases the recommendations are repeated in our discussion. It is recommended that section 85(1)(d) be amended as shown in paragraph 2.116 above.

(ii) Sections 86 and 88: Court may order amendment of charge

2.119 The provisions in sections 86 and 88 of the Criminal Procedure Act have been dealt with in the Commission's report on Project 101: *The application of the Bill of Rights to criminal procedure, criminal law, the law of evidence and sentencing*. Although the recommendations are based on the right to a fair trial rather than the right to equality, the recommendations are repeated here for consideration by the Department.

2.120 Section 86 deals with the amendment of a defective charge. Section 86(4) provides that the proceedings are kept valid despite the existence of the defect. As section 86(4) reads at present, it would be contrary to the accused's right to a fair trial, the right to be informed with sufficient particularity of the charge, and the right to adequate time and facilities to prepare a defence, if the accused were to be convicted on a charge from which an essential element is missing. This subsection cannot be justified in terms of the limitations clause of the Constitution. The Commission's report referred to above considered the repeal or amendment of section 86 to comply with the Constitution in conjunction with section 88.

2.121 Section 88 provides that where a charge is defective for the want of an averment which is an essential ingredient of the relevant offence, the defect shall, unless brought to the notice of the court before judgment, be cured by evidence at the trial proving the matter which should have been averred.

2.122 By virtue of section 88, a charge that is defective in the sense that an essential element of the offence charged was omitted, may be automatically cured by evidence. Section 88 has the effect that the accused can be found guilty even though the indictment does not disclose an offence. It thus interferes with an accused's right to a fair trial, as well as his or her right to be informed with sufficient particularity of the charge, and the right to adequate time and facilities to prepare a defence.

2.123 Du Toit et al, in *Commentary on the Criminal Procedure Act*, make the following recommendations:²⁸

Both s 86(4) and s 88 are aimed at validating the proceedings in spite of defective charges that formally remain defective. The type of defect towards which section 88 is directed, namely the omission of a necessary element of the offence that is described in the charge, is also met by section 86(1). Section 86(1) nevertheless authorizes the curing of any defect, which surely includes the omission of a necessary element of the relevant offence. Section 86(4) similarly makes provision for upholding the proceedings

²⁸ Chapter 14, p 29.

irrespective of the fact that a defect, including a defect as described in s 88, was not formally cured by the court. Unlike section 86(4), when read with section 86(1), automatic rectification in accordance with section 88 occurs only if the missing essential element of the offence has been proved by evidence during the trial. Although section 86(4) does not specifically mention the automatic curing of defects by evidence at the trial and while the impression is created instead that the proceedings are kept valid despite the existence of the defect, one could hardly imagine that the proceedings would be regarded as valid in terms of section 86(4), notwithstanding the fact that the evidence did not establish an omitted essential element. It would always be blatantly prejudicial to an accused to convict him on a charge from which an essential element, which the evidence had not substantiated, was missing.

2.124 Kruger²⁹ contends that the difference between the two sections lies in the conditions that are imposed by the one or the other for maintaining the validity of the proceedings. Section 86(4) no longer applies as soon as an application for an amendment of the charge is rejected by the court. By contrast, the application of section 88 is dependent on the defect not being brought to the court's attention. Had the court's attention been drawn to the defect but the court had done nothing about it; that is to say, in the absence of a formal application for amendment and a refusal of such application, the defect would remain, despite remedial evidence, and an appeal could be relied on.

2.125 The difference between section 86(4) and section 88 is so insignificant that the two sections could easily be merged. Section 88 might also be inserted as a further subsection to section 86. Such an amendment would result in the consolidation of the provisions in regard to the amendment of defective charges, rather than – as is now the case – their separation by a section that deals with another subject.

(iii) Section 90: Charge need not specify or negative exception, exemption, proviso, excuse or qualification

2.126 Section 90 provides that:

In criminal proceedings any exception, exemption, proviso, excuse or qualification, whether it does or does not accompany in the same section the description of the offence in the law creating the offence, may be proved by the accused but need not be specified or negated in the charge and, if so specified or negated, need not be proved by the prosecution.

²⁹ In Hiemstra *Criminal Procedure* (2008) at 14–20.

2.127 The South African Law Commission, in its Project 101 report,³⁰ stated as follows:

2.60 Section 90 clearly infringes the presumption of innocence as it permits conviction despite the existence of a reasonable doubt by requiring the accused to prove “any exception, exemption, proviso, excuse or qualification”. This defence-offence dichotomy was rejected by the Constitutional Court in *S v Coetzee*. Although section 90 is prima facie unconstitutional, difficulties arise with regard to the limitations clause. Section 90 could apply to any number of statutory offences and it can be argued that whether it constitutes a justifiable limitation may depend on different considerations depending on the nature of the particular offence. On the other hand it could be found to be unconstitutional because of its over-breadth – i.e. its indiscriminate application to statutory offences. Given the Constitutional Court’s record in striking down reverse onuses which pertain to blameworthiness – very few, if any, applications of section 90 are likely to pass constitutional muster.

(aa) Recommendations in Consultation Paper

2.128 The SALRC recommended that sections 86(4) and 88 need to be redrafted and consolidated; taking into consideration section 86(4) and to make the provisions constitutionally compliant. However, the reasoning for the amendment falls outside the scope of the current investigation. We therefore submit this issue to the Department for comment, without our recommending the specific wording of an amendment.

2.129 With reference to section 90, the Commission in its report on Project 101 made the following provisional, further recommendation:

2.35 It was argued that in the interests of certainty and consistency this provision should be deleted. An infringement of the presumption of innocence requires rigorous justification and it therefore makes sense to require the legislature to make considered choices in imposing reverse onuses. The Commission’s provisional view is that it is not convinced that the section should be amended because of its over-breadth and invites comments on the proposal for amendment.

2.130 The matter is fully discussed in the Commission’s report on Project 101: *The application of the Bill of Rights to criminal procedure, criminal law, sentencing and the law of evidence*, in the section where the recommendations are discussed. For purposes of the current investigation, the SALRC’s view is that in light of the provisions of an accused’s right to a fair trial, and in particular the position of an accused acting in his or her own defence, this section should be amended so that substantial expression can be given to the term “equality of arms”. In other words, exceptions, exemptions, provisos, excuses, or qualifications should be stated fully, especially where they contain incriminating factors, and where they do not form part of the

³⁰ Report, Project 101 *The Application of the Bill of Rights to criminal procedure, criminal law, the law of evidence and sentencing* as attached in Annexure A.

statutory prohibition. This is not an onerous task for the prosecution, as these exceptions can be added to the standard charge sheets (for those offences where section 90 situations can arise). Once the pro forma charge sheets are in place, they can be used in all prosecutions nationwide. The prosecution is in a better position than an indigent or unrepresented accused person to know – and indeed, should know – the exceptions, exemptions, provisos, excuses or qualifications to certain charges. We recommend that the Department take cognizance of the view that the section is unconstitutional because it is non-compliant with the right to a fair trial and the right to be informed with sufficient particularity of the charge, as per the Constitution; and that the section should therefore be amended or deleted.

(bb) Comment by the Department

2.131 With reference to the Commission's proposals for the redrafting of sections 86(4), 88 and 90, the Department advises that it will investigate these recommendations in due course.

(cc) Evaluation and recommendations

2.132 For purposes of this investigation, the Commission draws attention to the possible unconstitutionality of the provision. However, we make no formal recommendations for amendment.

(c) Chapter 15: Sections 105 to 109: the plea

(i) Section 105: Accused plead to charge

2.133 In the consultation paper, we noted that section 105 provides that the charge shall be put to the accused by the prosecutor before the trial of the accused begins. The accused shall, subject to the provisions of sections 77, 85 and 105A, be required by the court to plead thereto, in accordance with section 106. We also indicated that in the Project 101 report,³¹ the

³¹ Report Project 101 *The Application of the Bill of Rights to criminal procedure, criminal law, the law of evidence and sentencing.*

Commission considered an amendment to provide for the explanation of an accused's rights in terms of Constitution. In the Commission's final report, we noted that an unrepresented accused must be advised fully of his or her rights, and how to best exercise those rights at each step in the criminal process.

2.134 The question arises whether it would be in the interests of an unrepresented accused person for legislation to codify these instructions to presiding officers, with regard to when and how they should give an unrepresented accused person such information. In other words, should these instructions be codified in the Criminal Procedure Act? The Commission noted that in the short term, codification would have advantages, in that the instructions would be more likely to be noted by presiding officers. However, a disadvantage would be the rigidity of codification, and the risk of attention being paid to form rather than substance. The Commission recommended that if codification is preferred, a full investigation should be made as to the contents of the instructions to be given at each stage in the criminal process. (See also the provisions of sections 105, 119, 126 and 213). The Commission was of the view that codification of an explanation of rights to undefended accused persons should not be recommended, and we invited comments on this proposal. After considering the comments received on the proposal, the Commission confirmed its view that no codification is necessary.

(aa) Recommendation

2.135 The Commission remains of the view that codification of the explanation of an accused's rights in terms of the Constitution is not called for.

(ii) Section 106: Pleas

2.136 Section 106 contains wording which is outdated in terms of the right to equality contained in the Constitution (references to exclusively male pronouns) and it also contains references to terms which have been amended in subsequent legislation. These should be amended to bring the provisions in line with the equality clause of the Constitution. It also contains outdated references (for example, some subsections refer to outdated terms like "State President" and "Attorney-General".)

(aa) Recommendation

2.137 The SALRC recommends that section 106(1), (3) and (4) be amended as follows:

106 Pleas—

- (1) When an accused pleads to a charge he or she may plead—
 - (a) that he or she is guilty of the offence charged or of any offence of which he may be convicted on the charge; or
 - (b) that he or she is not guilty; or
 - (c) that he or she has already been convicted of the offence with which he or she is charged; or
 - (d) that he or she has already been acquitted of the offence with which he or she is charged; or
 - (e) that he or she has received a free pardon under section 327 (6) from the [State President] the President for the offence charged; or
 - (f) that
 - (g) that he or she has been discharged under the provisions of section 204 from prosecution for the offence charged; or
 - (h) ...
- (3) An accused shall give reasonable notice to the prosecution of his or her intention to plead a plea other than the plea of guilty or not guilty, and shall in such notice state the ground on which he or she bases this plea: Provided that the requirement of such notice may be waived by the [attorney-general] Director of Public Prosecutions or the prosecutor, as the case may be, and the court may, on good cause shown, dispense with such notice or adjourn the trial to enable such notice to be given.
- (4) An accused who pleads to a charge, other than a plea that the court has no jurisdiction to try the offence, or an accused on behalf of whom a plea of not guilty is entered by the court, shall, save as is otherwise expressly provided by this Act or any other law, be entitled to demand that he or she be acquitted or be convicted.

(iii) Section 108: Issue raised by plea to be tried

2.138 Section 108 provides that if an accused person pleads anything other than guilty, that person shall – subject to the provisions of sections 115, 122 and 141(3) – by such plea be deemed to demand that the issues raised by the plea be tried. This provision is unconstitutional to the extent that it contains male-centric language (the exclusive use of masculine pronouns).in conflict with section 9 of the Constitution. The exclusive use of masculine pronouns must be altered to include feminine pronouns.

(aa) Recommendation:

2.139 The SALRC recommends that the provision be amended as follows:

108. Issues raised by plea to be tried

If an accused pleads a plea other than a plea of guilty, he or she shall, subject to the provisions of sections 115, 122, and 141(3), by such plea be deemed to demand that the issues raised by the plea be tried.

(d) Chapter 16: Sections 110 to 111: Jurisdiction

(i) Section 110A and section 111: Minister may remove trial to jurisdiction of another attorney-general

2.140 Section 111 contains outdated references where the provision mentions outdated definitions, terminology or laws which have been amended.

(aa) Recommendation in Consultation Paper

2.141 The SALRC recommended that section 111 be amended as follows:

111 Minister may remove trial to jurisdiction of another [attorney-general] Director of Public Prosecutions

- (1) (a) The direction of the National Director of Public Prosecutions contemplated in section 179(1)(a) of the Constitution of the Republic of South Africa, 1996 (Act No.1108 of 1996), shall state the name of the accused, the relevant offence, the place at which (if known) and the Director in whose area of jurisdiction the relevant investigation and criminal proceedings shall be conducted and commenced.

(bb) Comments by the Department

2.142 The Department recommended that the reference in section 110A(3) of the Act to "Minister of Foreign Affairs" be changed to "Minister of International Relations and

Cooperation". The heading of section 111 must be amended, and the reference in section 111(1) to the Constitution's number must be deleted.

(cc) Evaluation and recommendations

2.143 The amendments proposed by the Department are accepted. The SALRC recommends that sections 110A and 111 be amended as follows:

110A. Jurisdiction in respect of offences committed by certain persons outside Republic

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

...

(3) At the conclusion of the trial against a person under this section, a copy of the proceedings, certified by the clerk of the court or registrar, together with any remarks as the prosecutor may wish to append thereto, must be submitted to the Minister of **[Foreign Affairs]** International Relations and Cooperation.

111 Minister may remove trial to jurisdiction of another [attorney-general] Director of Public Prosecutions

(1) (a) The direction of the National Director of Public Prosecutions contemplated in section 179(1)(a) of the Constitution of the Republic of South Africa, **[1996 (Act No.108 of 1996)]**, shall state the name of the accused, the relevant offence, the place at which (if known) and the Director in whose area of jurisdiction the relevant investigation and criminal proceedings shall be conducted and commenced.

(e) Chapter 17: Sections 112 to 114: Plea of guilty at summary trial

(i) Section 112: Plea of guilty

2.144 Section 112 is unconstitutional to the extent that it uses male-centric language. To bring the relevant provisions in line with the equality clause of Constitution, feminine pronouns must

be added to the male pronouns, and/or the wording of provisions must be altered to minimise the use of gender pronouns.

(aa) Recommendation in Consultation Paper

2.145 The SALRC recommended that section 112 be amended as follows:

112 Plea of guilty.

(1) Where an accused at a summary trial in any court pleads guilty to the offence charged, or to an offence of which he or she may be convicted on the charge and the prosecutor accepts that plea—

(a)...

(2) If an accused or his or her legal adviser hands a written statement by the accused into court, in which the accused sets out the facts which he or she admits and on which he or she has pleaded guilty, the court may, in lieu of questioning the accused under subsection (1) (b), convict the accused on the strength of such statement and sentence him or her as provided in the said subsection if the court is satisfied that the accused is guilty of the offence to which he has pleaded guilty: Provided that the court may in its discretion put any question to the accused in order to clarify any matter raised in the statement.

(bb) Comments by the Department

2.146 The Department comments that the SALRC stated that section 112 is unconstitutional, but that no reasoning or motivation was provided.

(cc) Evaluation and recommendations

2.147 Section 112 is unconstitutional to the extent that it contains male-centric language (the exclusive use of masculine pronouns) in conflict with section 9 of the Constitution..The SALRC recommends that section 112 be amended as follows:

112 Plea of guilty.

(1) Where an accused at a summary trial in any court pleads guilty to the offence charged, or to an offence of which he or she may be convicted on the charge and the prosecutor accepts that plea—

(a)...

(2) If an accused or his or her legal adviser hands a written statement by the accused into court, in which the accused sets out the facts which he or she admits and on which he or she has pleaded guilty, the court may, in lieu of questioning the accused under subsection (1) (b), convict the accused on the strength of such statement and sentence him or her as provided in the said subsection if the court is satisfied that the accused is guilty of the offence to which he or she has pleaded guilty: Provided that the court may in its discretion put any question to the accused in order to clarify any matter raised in the statement.

(ii) Section 114: Committal by magistrate's court of accused for sentence by regional court after plea of guilty

2.148 Section 114 is unconstitutional to the extent that it contains male-centric language (the exclusive use of masculine pronouns).in conflict with section 9 of the Constitution.

(aa) Recommendation

2.149 The SALRC recommends that section 114(3) be amended as follows:

114. Committal by magistrate's court of accused for sentence by regional court after plea of guilty

...

(3) (a) Unless the regional court concerned—

- (i) is satisfied that a plea of guilty or an admission by the accused which is material to his or her guilt was incorrectly recorded; or
- (ii) is not satisfied that the accused is guilty of the offence of which he or she has been convicted and in respect of which he has been committed for sentence,

the court shall make a formal finding of guilty and sentence the accused.

- (b) If the court is satisfied that a plea of guilty or any admission by the accused which is material to his or her guilt was incorrectly recorded, or if the court is not satisfied that the accused is guilty of the offence of which he or she has been convicted and in respect of which he or she has been committed for sentence or that he or she has no valid defence to the charge, the court shall enter a plea of not guilty and proceed with the trial as a summary trial in that court: Provided that any admission by the accused the recording of which is not disputed by the accused, shall stand as proof of the fact thus admitted.

...

(f) Chapter 18: Sections 115 to 118 Plea of not guilty at trial

(i) Section 116: Committal of accused for sentence by regional court after trial in magistrate's court

2.150 Section 116 is unconstitutional to the extent that it contains male-centric language (the exclusive use of masculine pronouns).in conflict with section 9 of the Constitution.

(aa) Recommendation in Consultation Paper

2.151 The SALRC recommends that section 116 be amended as follows:

116. Committal of accused for sentence by regional court after trial in magistrate's court

...

(b) If a regional magistrate acts under the proviso to paragraph (a), he or she shall inform the accused accordingly and postpone the case to some future date pending the outcome of the review proceedings, and, if the accused is in custody, the regional magistrate may make such order with regard to the detention or release of the accused as he or she may deem fit.

(bb) Comment by the Department

2.152 The sentence "that section 116 of the Act is constitutional since the provision is non-compliant with the equality clause of the Constitution" is nonsensical.

(cc) Evaluation and recommendations

2.153 The SALRC has noted the Department's comments, and we agree that the sentence should read "section 116 is unconstitutional to the extent that it contains male-centric language (the exclusive use of masculine pronouns).in conflict with section 9 of the Constitution.

2.154 It is recommended that section 116 be amended as follows:

116. Committal of accused for sentence by regional court after trial in magistrate's court

...

(b) If a regional magistrate acts under the proviso to paragraph (a), he or she shall inform the accused accordingly and postpone the case to some future date pending the outcome of the review proceedings, and, if the accused is in custody, the regional magistrate may make such order with regard to the detention or release of the accused as he or she may deem fit.

(ii) Section 117: Committal to superior court in special case.

2.155 Section 117 is unconstitutional to the extent that it contains male-centric language (the exclusive use of masculine pronouns).in conflict with section 9 of the Constitution. The pronouns should be changed to include the feminine as well as masculine forms. Furthermore, the section contains terminology that has become outdated because of new legislation.

(aa) Recommendation

2.156 The SALRC recommends that section 117 be amended as follows:

117. Committal to superior court in special case.-

Where an accused in a lower court pleads not guilty to the offence charged against him or her and a ground of his or her defense is the alleged invalidity of a provincial ordinance or a proclamation of the [State President] President on which the charge against him or her is founded and upon the validity of which a magistrate's court is in terms of section 110 of the Magistrates' Courts Act, 1944 (Act 32 of 1944), not competent to pronounce, the accused shall be committed for a summary trial before a superior court having jurisdiction.

(g) Chapter 19: Sections 119 to 122: Plea in Magistrate's Court on charge justiciable in superior Court

(i) Section 119: Accused to plead in magistrate's court on instructions of attorney-general

2.157 The provision refers to outdated terminology and to laws which have been repealed; these issues should be corrected. In addition it is necessary to affirm the constitutional rights of

an accused. In its Project 101,³² the SALRC recommended that a subsection (b) should be added, as follows:

(b) The presiding officer shall thereupon explain to the accused of the rights enshrined by section 35(3)(f) to (k) of the Constitution and thereafter the accused shall, subject to the provisions of sections 77 and 85, be required by the magistrate to plead thereto forthwith.”

(aa) Recommendation in the Consultation Paper

2.158 In the consultation paper we recommended that section 119 be amended as follows, by renumbering the existing part as subsection (a) and adding the suggested subsection (b):

119 Accused to plead in magistrate’s court on instructions of [attorney-general] the Director of Public Prosecutions.

(a) When an accused appears in a magistrate’s court and the alleged offence may be tried by a superior court only or is of such a nature or magnitude that it merits punishment in excess of the jurisdiction of a magistrate’s court, the prosecutor may, notwithstanding the provisions of section 75, on the instructions of the [attorney-general] Director of Public Prosecutions, whether in general or in any particular case, put the charge, as well as any other charge which shall, in terms of section 82, be disposed of in a superior court, to the accused in the magistrate’s court. [and the accused shall, subject to the provisions of sections 77, and 85, be required by the magistrate to plead thereto forthwith.]

(b) The presiding officer shall thereupon explain to the accused of the rights enshrined by section 35(3)(f) to (k) of the Constitution and thereafter the accused shall, subject to the provisions of sections 77 and 85, be required by the magistrate to plead thereto forthwith.

(bb) Comment by Department

2.159 The Department comments that the Commission had recommended new wording for section 119(b) of the Act, but that the recommendation was incorrect. The Department stated that section 119 of the Act does not have paragraphs, and that the recommended wording in paragraph 2.84 of the consultation paper and in the Bill did not correlate with the recommended wording for section 119(b).

³² Project 101 *The Application of the Bill of Rights to criminal procedure, criminal law, the law of evidence and sentencing*. Annexure A.

(cc) Evaluation and recommendations

2.160 The Commission's report for Project 101 noted that clearly an unrepresented accused must be advised fully of his or her rights and how to best exercise those rights, at each step in the criminal process. The question arose whether it is in the interests of the unrepresented accused to instruct presiding officers when and how they should do this by codifying these instructions in the Criminal Procedure Act. In the short term, codification has advantages in that the instructions are more likely to be noticed by presiding officers. The disadvantage is the rigidity of codification and the risk of attention being paid to form rather than substance. If codification is preferred, a full investigation should be made as to the contents of the instructions to be given at each stage in the criminal process. (See also the provisions of sections 105, 119, 126 and 213). In the consultation paper, the Commission invited the Department's comments on whether such recommendation is supported.

2.161 In its discussion paper for Project 101, the Commission was of the view that codification of an explanation of rights to undefended accused persons should not be recommended. The Commission had invited comments on this proposal. As mentioned in the above paragraph, in its final report the Commission confirmed its view that no codification was necessary. Having regard to the final recommendations in the Commission's report for Project 101 as well as the views of the Department, the Commission is of the view that the proposed amendment in the consultation paper referred to above – that is, adding paragraph (b) – should not be pursued. However, section 119 is out-dated where the provision refers to old terminology or laws which have been repealed.

2.162 The Commission recommends that section 119 be amended to correct the references to outdated terminology, as follows:

119 Accused to plead in magistrate's court on instructions of [attorney-general] the Director of Public Prosecutions.

When an accused appears in a magistrate's court and the alleged offence may be tried by a superior court only or is of such a nature or magnitude that it merits punishment in excess of the jurisdiction of a magistrate's court, the prosecutor may, notwithstanding the provisions of section 75, on the instructions of the **[attorney-general] Director of Public Prosecutions**, whether in general or in any particular case, put the charge, as well as any other charge which shall, in terms of section 82, be disposed of in a superior court, to the accused in the magistrate's court, and the accused shall, subject to the provisions of sections 77 and 85, be required by the magistrate to plead thereto forthwith.

(ii) Section 121: Plea of guilty

2.163 Section 121 is unconstitutional to the extent that it contains male-centric language (the exclusive use of masculine pronouns).in conflict with section 9 of the Constitution.References to “he” and “him” should be changed to include the feminine pronouns. Section 121 also contains references to outdated terminology.

(aa) Recommendation

2.164 The SALRC recommends that section 121 be amended as follows:

121 Plea of guilty

(1) Where an accused under section 119 pleads guilty to the offence charged, the presiding magistrate shall question him or her in terms of the provisions of paragraph (b) of section 112 (1).

(2) (a) If the magistrate is satisfied that the accused admits the allegations stated in the charge, he or she shall stop the proceedings. (b) If the magistrate is not satisfied as provided in paragraph (a), he or she shall record in what respect he or she is not so satisfied and enter a plea of not guilty and deal with the matter in terms of section 122 (1): Provided that an allegation with reference to which the magistrate is so satisfied and which has been recorded as an admission, shall stand at the trial of the accused as proof of such allegation.

(3) If the magistrate is satisfied as provided in subsection (2) (a), he or she shall adjourn the proceedings pending the decision of the **[attorney-general]** Director of Public Prosecutions, who may-

- (a) arraign the accused for sentence before a **[superior] High [c]Court** or any other court having jurisdiction, including the magistrate's court in which the proceedings were stopped under subsection (2) (a) ;
- (b) decline to arraign the accused for sentence before any court but arraign him or her for trial on any charge at a summary trial before a superior court or any other court having jurisdiction, including the magistrate's court in which the proceedings were stopped under subsection (2) (a) ;
- (c) institute a preparatory examination against the accused.

(4) The magistrate or any other magistrate of the magistrate's court concerned shall advise the accused of the decision of the **[attorney-general]** Director of Public Prosecutions and, if the decision is that the accused be arraigned for sentence-

- (a) in the magistrate's court concerned, dispose of the case on the charge on which the accused is arraigned; or
 - (b) in a regional court or [superior] High [c]Court, adjourn the case for sentence by the regional court or [superior] High [c]Court concerned.
- (5) (a) ...
- (b) Unless the accused satisfies the court that a plea of guilty or an admission was incorrectly recorded or unless the court is not satisfied that the accused is guilty of the offence to which he or she has pleaded guilty or that the accused has no valid defence to the charge, the court may convict the accused on his or her plea of guilty of the offence to which he or she has pleaded guilty and impose any competent sentence.
- (6) If the accused satisfies the court that the plea of guilty or an admission which is material to his or her guilt was incorrectly recorded, or if the court is not satisfied that the accused is guilty of the offence to which he or she has pleaded guilty or that the accused has no valid defence to the charge, the court shall record a plea of not guilty and proceed with the trial as a summary trial in that court: Provided that an admission by the accused the recording of which is not disputed by the accused, shall stand as proof of the fact thus admitted.

(iii) Section 122: Plea of not guilty

2.165 Section 122 is unconstitutional to the extent that it contains male-centric language (the exclusive use of masculine pronouns) in conflict with section 9 of the Constitution. Feminine pronouns must be added and outdated terminology must be updated.

(aa) Recommendation in the Consultation Paper

2.166 The SALRC recommended that section 122 be amended as follows:

122 Plea of not guilty.

(1) Where an accused under section 119 pleads not guilty to the offence charged, the court shall act in terms of section 115 and when that section has been complied with, the magistrate shall stop the proceedings and adjourn the case pending the decision of the [attorney-general] Director of Public Prosecutions.

(2) Where the proceedings have been adjourned under subsection (1), the [attorney-general] Director of Public Prosecutions may—

- (i) arraign the accused on any charge at a summary trial before a [superior] High [c]Court or any other court having jurisdiction, including the magistrate's court in which the proceedings were adjourned under subsection (1); or

(ii) institute a preparatory examination against the accused, and the **[attorney-general] Director of Public Prosecutions** shall advise the magistrate's court concerned of his or her decision.

(3) The magistrate, who need not be the magistrate before whom the proceedings under section 119 or 122 (1) were conducted, shall advise the accused of the decision of the **[attorney-general] Director of Public Prosecutions**, and if the decision is that the accused be arraigned—

...

(bb) Comment by the Department

2.167 The Department comments that references in section 122(2)(i) and (3)(b) of the Act to "superior court" must be replaced by "High Court" (similar to the amendments proposed for section 121 in paragraph 2.86 of the consultation paper). The Superior Courts Act of 2013 identifies "Superior Court" as "the Constitutional Court, the Supreme Court of Appeal, the High Court and any court of a status similar to the High Court." This definition appears to be wider than a reference merely to the High Court, as it includes the Supreme Court of Appeal and the Constitutional Court. The references in sections 121 and 122 to "superior court" clearly mean a court with reference to trial and not to the Supreme Court of Appeal or Constitutional Court as courts of appeal and not of first instance. The Department therefore recommended that the reference to "superior court" here should be to the "High Court" only, and should exclude the courts of appeal. The relevant provisions must be amended accordingly.

(cc) Evaluation and recommendation

2.168 The SALRC recommends that section 122 be amended to include the Department's suggestions regarding the substitution of "superior court" with "High Court" in section 122(3)(b), as follows:

122 Plea of not guilty.

(1) Where an accused under section 119 pleads not guilty to the offence charged, the court shall act in terms of section 115 and when that section has been complied with, the magistrate shall stop the proceedings and adjourn the case pending the decision of the **[attorney-general] Director of Public Prosecutions**.

(2) Where the proceedings have been adjourned under subsection (1), the **[attorney-general] Director of Public Prosecutions** may—

(i) arraign the accused on any charge at a summary trial before a **[superior] High [c]Court** or any other court having jurisdiction, including the

magistrate's court in which the proceedings were adjourned under subsection (1); or

(ii) institute a preparatory examination against the accused, and the **[attorney-general] Director of Public Prosecutions** shall advise the magistrate's court concerned of his or her decision.

(3) The magistrate, who need not be the magistrate before whom the proceedings under section 119 or 122 (1) were conducted, shall advise the accused of the decision of the **[attorney-general] Director of Public Prosecutions**, and if the decision is that the accused be arraigned—

- (a) ...
 - (b) in a regional court or a **[superior] High [c]Court**, commit the accused for a summary trial before the court concerned.
- (4) ...

(h) Chapter 19A: Sections 122A to 122D: Plea in a Magistrate's Court on a charge to be adjudicated in Regional Court

2.169 Section 122C is unconstitutional to the extent that it contains male-centric language (the exclusive use of masculine pronouns).in conflict with section 9. The exclusive use of male pronouns must be amended by the addition of female pronouns.

(aa) Recommendation

2.170 The SALRC recommends that section 122C be amended as follows:

122C Plea of guilty.

(1) Where an accused under section 122A pleads guilty to the offence charged, the presiding magistrate shall question him or her in terms of the provisions of paragraph (b) of section 112 (1).

(2) (a) If the magistrate is satisfied that the accused admits the allegations stated in the charge, he or she shall adjourn the case for sentence by the regional court concerned.

(b) If the magistrate is not satisfied as provided in paragraph (a), he or she shall record in what respect he or she is not so satisfied and enter a plea of not guilty and deal with the matter in terms of section 122D (1): Provided that an allegation with reference to which the magistrate is so satisfied and which has

been recorded as an admission, shall stand at the trial of the accused as proof of such allegation.

(c) Unless the accused satisfies the court that the plea of guilty or an admission was incorrectly recorded or unless the court is not satisfied that the accused is guilty of the offence to which he or she has pleaded guilty or that the accused has no valid defence to the charge, the court may convict the accused on his or her plea of guilty of the offence to which he or she has pleaded guilty, and impose any competent sentence.

(4) If the accused satisfies the court that the plea of guilty or an admission which is material to his or her guilt was incorrectly recorded, or if the court is not satisfied that the accused is guilty of the offence to which he or she has pleaded guilty or that the accused has no valid defence to the charge, the court shall record a plea of not guilty and proceed with the trial as a summary trial in that court: Provided that an admission by the accused the recording of which is not disputed by the accused, shall stand as proof of the fact thus admitted.

(i) Chapter 20: Sections 123 to 143: Preparatory Examination

(i) Section 123: Attorney-general may instruct that preparatory examination be held

2.171 Section 123 is unconstitutional to the extent that it contains male-centric language (the exclusive use of masculine pronouns) in conflict with section 9 of the Constitution. The exclusive use of masculine pronouns must be altered to include feminine pronouns. Also, the outdated terms or definitions which appear must be updated.

(aa) Recommendation

2.172 The SALRC recommends that section 123 be amended as follows:

123 [Attorney-general] The Director of Public Prosecutions may instruct that preparatory examination be held

If a[n attorney-general] Director of Public Prosecutions is of the opinion that it is necessary for the more effective administration of justice—

(a) that a trial in a superior court be preceded by a preparatory examination in a magistrate's court into the allegations against the accused, he or she may,

where he or she does not follow the procedure under section 119, or, where he or she does follow it and the proceedings are adjourned under section 121(3) or 122(1) pending the decision of the **[attorney-general] Director of Public Prosecutions**, instruct that a preparatory examination be instituted against the accused;

(b) that a trial in a magistrate's court or a regional court be converted into a preparatory examination, he or she may at any stage of the proceedings, but before sentence is passed, instruct that the trial be converted into a preparatory examination.

(ii) Section 123: Attorney-general may direct that preparatory examination be conducted at a specified place

2.173 Section 123 is unconstitutional to the extent that it contains male-centric language (the exclusive use of masculine pronouns) in conflict with section 9 of the Constitution. The exclusive use of masculine pronouns must be altered to include feminine pronouns. Also, the outdated terms or definitions which appear must be updated.

(aa) Recommendation in Consultation Paper

2.174 The SALRC recommended that section 123 be amended as follows:

123 [Attorney-general] The Director of Public Prosecutions may direct that preparatory examination be conducted at a specified place.

(1) Where **[an attorney-general]** a Director of Public Prosecutions instructs that a preparatory examination be instituted or that a trial be converted into a preparatory examination, he or she may, if it appears to him or her expedient on account of the number of accused involved or of excessive inconvenience or of possible disturbance of the public order, that the preparatory examination be held within his or her area of jurisdiction in a court other than the court in which the relevant proceedings were commenced, direct that the preparatory examination be instituted in such court or, where a trial has been converted into a preparatory examination, be continued in such other court.

(2) The magistrate or regional magistrate shall, after advice of the decision of the **[attorney-general] Director of Pulic Prosecutions**, advise the accused of the decision of the **[attorney-general] Director of Public Prosecutions** and adjourn the proceedings of such other court, and thereafter forward a copy of the record of the proceedings, certified as correct by the clerk of the court, to the court to which the proceedings have been adjourned.

(3) The court to which the proceedings are adjourned under subsection (2), shall receive the copy of the record referred to in that subsection, which shall then form part of the proceedings of that court, and shall proceed to conduct the preparatory examination as if it were a preparatory examination instituted in that court.

(bb) Comment by the Department

2.175 The reference to section 123 of the Act is incorrect and should be to section 125.

(cc) Evaluation and recommendation

2.176 We agree that the reference in paragraph 2.144 of the consultation paper should be corrected to refer to section 125, not to section 123.

2.177 The SALRC recommends that section 125 be amended as follows:

125 [Attorney-general] The Director of Public Prosecutions may direct that preparatory examination be conducted at a specified place.

(1) Where **[an attorney-general]** a Director of Public Prosecutions instructs that a preparatory examination be instituted or that a trial be converted into a preparatory examination, he or she may, if it appears to him or her expedient on account of the number of accused involved or of excessive inconvenience or of possible disturbance of the public order, that the preparatory examination be held within his or her area of jurisdiction in a court other than the court in which the relevant proceedings were commenced, direct that the preparatory examination be instituted in such court or, where a trial has been converted into a preparatory examination, be continued in such other court.

(2) The magistrate or regional magistrate shall, after advice of the decision of the **[attorney-general] Director of Pulic Prosecutions**, advise the accused of the decision of the **[attorney-general] Director of Public Prosecutions** and adjourn the proceedings of such other court, and thereafter forward a copy of the record of the proceedings, certified as correct by the clerk of the court, to the court to which the proceedings have been adjourned.

(3) ...

(iii) Section 126: Procedure to be followed by magistrate at preparatory examination

(aa) Comments by the Department of Justice and Constitutional Development

2.178 The references in section 126 of the Act to "attorney-general" must be replaced with "Director of Public Prosecutions".

(bb) Evaluation and recommendations

2.179 We agree with the Department's comment, and recommend that section 126 be amended as follows:

126. Procedure to be followed by magistrate at preparatory examination

Where a[n] **[attorney-general]** Director of Public Prosecutions instructs that a preparatory examination be held against an accused, the magistrate or regional magistrate shall, after advice of the decision of the **[attorney-general]** Director of Public Prosecutions, advise the accused of the decision of the **[attorney-general]** Director of Public Prosecutions and proceed in the manner hereinafter described to enquire into the charge against the accused.

(iv) Section 127: Recalling of witnesses after conversion of trial into preparatory examination

2.180 Section 127 is unconstitutional to the extent that it contains male-centric language (the exclusive use of masculine pronouns) in conflict with section 9 of the Constitution. The exclusive use of masculine pronouns must be altered to include feminine pronouns. Also, the outdated terms or definitions which appear must be updated.

(aa) Recommendation

2.181 The SALRC recommends that section 127 be amended as follows:

127 Recalling of witnesses after conversion of trial into preparatory examination

Where **[an attorney-general]** a Director of Public Prosecutions instructs that a trial be converted into a preparatory examination, it shall not be necessary for the magistrate or

regional magistrate to recall any witness who has already given evidence at the trial, but the record of the evidence thus given, certified as correct by the magistrate or regional magistrate, as the case may be, or, if such evidence was recorded in shorthand or by mechanical means, any document purporting to be the transcription of the original record of such evidence and purporting to be certified as correct under the hand of the person who transcribed it, shall have the same legal force and effect and shall be admissible in evidence in the same circumstances as the evidence given in the course of a preparatory examination: Provided that if it appears to the magistrate or regional magistrate concerned that it may be in the interests of justice to have a witness already examined recalled for further examination, then such witness shall be recalled and further examined and the evidence given by him or her shall be recorded in the same manner as other evidence given at a preparatory examination.

(v) Sections 132, 133 and 135: Procedure after plea, and accused may testify at preparatory examination

2.182 Sections 132, 133 and 135 are unconstitutional to the extent that it contains male-centric language (the exclusive use of masculine pronouns) in conflict with section 9 of the Constitution.

(aa) Recommendation

2.183 The SALRC recommends that sections 132, 133 and 135 be amended as follows:

132 Procedure after plea

- (1) (a) Where an accused who has been required under section 131 to plead to a charge to which he or she has not pleaded before, pleads guilty to the offence charged, the presiding judicial officer shall question him or her in accordance with the provisions of paragraph (b) of section 112 (1).
- (b) If the presiding judicial officer is not satisfied that the accused admits all the allegations in the charge, he or she shall record in what respect he or she is not so satisfied and enter a plea of not guilty: Provided that an allegation with reference to which the said judicial officer is so satisfied and which has been recorded as an admission, shall stand at the trial of the accused as proof of such allegation.

(2) Where an accused who has been required under section 131 to plead to a charge to which he or she has not pleaded before, pleads not guilty to the offence charged, the presiding judicial officer shall act in accordance with the provisions of section 115.

133 Accused may testify at preparatory examination

An accused may, after the provisions of section 132 have been complied with but subject to the provisions of section 151 (1) (b) which shall mutatis mutandis apply, give evidence or make an unsworn statement in relation to a charge put to him or her under section 130, and the record of such evidence or statement shall be received in evidence before any court in criminal proceedings against the accused upon its mere production without further proof.

135 Discharge of accused at conclusion of preparatory examination

As soon as a preparatory examination is concluded and the magistrate or regional magistrate, as the case may be, is upon the whole of the evidence of the opinion that no sufficient case has been made out to put the accused on trial upon any charge put to the accused under section 130 or upon any charge in respect of an offence of which the accused may on such charge be convicted, he or she may discharge the accused in respect of such charge.

(vi) Section 137: Magistrate to transmit record of preparatory examination to [attorney-general] Director of Public Prosecutions

2.184 Section 137 is unconstitutional to the extent that it contains male-centric language (the exclusive use of masculine pronouns) in conflict with section 9 of the Constitution. The exclusive use of masculine pronouns must be altered to include feminine pronouns. Also, the outdated terms or definitions which appear must be updated.

(aa) Recommendation

2.185 The SALRC recommends that section 137 be amended as follows:

137 Magistrate to transmit record of preparatory examination to [attorney-general] the Director of Public Prosecutions

The magistrate or regional magistrate, as the case may be, shall, at the conclusion of a preparatory examination and whether or not the accused is under section 135 discharged in respect of any charge, send a copy of the record of the preparatory examination to the attorney-general and, where the accused is not discharged in respect of all the charges put to him or her under section 13, adjourn the proceedings pending the decision of the [attorney-general] Director of Public Prosecutions.

(vii) Section 139: [Attorney-general] Director of Public Prosecutions may arraign accused for sentence or trial

2.186 Section 139 is unconstitutional to the extent that it contains male-centric language (the exclusive use of masculine pronouns) in conflict with section 9 of the Constitution. The exclusive use of masculine pronouns must be altered to include feminine pronouns. Also, the outdated terms or definitions which appear must be updated.

(aa) Comment by the Department

2.187 The Department comments that section 140 of the Act should be added to the list of amendments. The section is unconstitutional to the extent that it contains male-centric language (the exclusive use of masculine pronouns).in conflict with section 9 of the Constitution. Also, the references in section 140 to "attorney-general" and "he" must be replaced with "Director of Public Prosecutions" and "he and [sic] she", respectively.

(bb) Evaluation and recommendation

2.188 The comment by the Department is supported.

2.189 The SALRC recommends that sections 139 and 140 be amended as follows:

139 [Attorney-general]The Director of Public Prosecutions may arraign accused for sentence or trial

After considering the record of a preparatory examination transmitted to him or her under section 137, the [attorney-general]Director of Public Prosecutions may—

- (a) in respect of any charge to which the accused has under section 131 pleaded guilty, arraign the accused for sentence before any court having jurisdiction;
- (b) arraign the accused for trial before any court having jurisdiction, whether the accused has under section 131 pleaded guilty or not guilty to any charge and whether or not he or she has been discharged under section 135;
- (c) decline to prosecute the accused,

and the [attorney-general] Director of Public Prosecutions shall advise the lower court concerned of his or her decision.

140. Procedure where accused arraigned for sentence

(1) Where an accused is under section 139 (a) arraigned for sentence, any magistrate or regional magistrate of the court in which the preparatory examination was held shall advise the accused of the decision of the **[attorney-general]** Director of Public Prosecutions and, if the decision is that the accused be arraigned -

- (a) ...
- (2) (a)
 - (b) Unless the accused satisfies the court that the plea of guilty or an admission was incorrectly recorded or unless the court is not satisfied that the accused is guilty of the offence to which he or she has pleaded guilty or that the accused has no valid defence to the charge, the court may convict the accused on his or her plea of guilty of the offence to which he or she has pleaded guilty and impose any competent sentence.
- (3) If the accused satisfies the court that the plea of guilty or an admission which is material to his or her guilt was incorrectly recorded, or if the court is not satisfied that the accused is guilty of the offence to which he or she has pleaded guilty or that the accused has no valid defence to the charge, the court shall record a plea of not guilty and proceed with the trial as a summary trial in that court: Provided that an admission by the accused the recording of which is not disputed by the accused, shall stand as proof of the fact thus admitted.
- (4) ...

(viii) Section 142: Procedure where attorney-general declines to prosecute

2.190 Section 142 is unconstitutional to the extent that it contains male-centric language (the exclusive use of masculine pronouns).in conflict with section 9 of the Constitution. The exclusive use of masculine pronouns must be altered to include feminine pronouns. Also, the outdated terms or definitions which appear must be updated.

(aa) Recommendation

2.191 The SALRC recommends that section 142 be amended as follows:

142 Procedure where [attorney-general] the Director of Public Prosecutions declines to prosecute

Where **[an attorney-general]** a Director of Public Prosecutions under section 139(c) declines to prosecute an accused, he or she shall advise the magistrate of the district in which the preparatory examination was held of his or her decision, and such magistrate

shall forthwith have the accused released from custody or, if the accused is not in custody, advise the accused in writing of the decision of the **[attorney-general]** the Director of Public Prosecutions, whereupon no criminal proceedings shall again be instituted against the accused in respect of the charge in question.

(ix) Section 143: Accused may inspect preparatory examination record and is entitled to copy thereof

2.192 Section 143 is unconstitutional to the extent that it contains male-centric language (the exclusive use of masculine pronouns).in conflict with section 9 of the Constitution. The exclusive use of masculine pronouns must be altered to include feminine pronouns.

(aa) Recommendation in the Consultation Paper

2.193 The SALRC recommends that section 143 be amended as follows:

143 Accused may inspect preparatory examination record and is entitled to copy thereof

(1) An accused who is arraigned for sentence or for trial under section 139 may, without payment, inspect the record of the preparatory examination at the time of his or her arraignment before the court.

(2) (a) An accused who is arraigned for sentence or for trial under section 139 shall be entitled to a copy of the record of the preparatory examination upon payment, except where a legal practitioner under the Legal Aid Act, 1969 (Act 22 of 1969), or *pro Deo* counsel is appointed to defend the accused or where the accused is not legally represented, of a reasonable amount not exceeding twenty-five cents for each folio of seventy-two words or part thereof.

(b) ...

(bb) Comment by the Department

2.194 The Department comments that the SALRC should investigate whether the amounts referred to in section 143(2)(a) –

- are still reasonable; and
- should not rather be prescribed by Notice in the *Gazette*.

(cc) Evaluation and recommendation

2.195 The Department's suggestions, summarised in the above paragraph, fall outside the mandate and scope of the current investigation. However, the Commission recommends that the Department of Justice should review the tariff referred to in section 143(2)(a). We recommend that section 143 be amended as follows:

143 Accused may inspect preparatory examination record and is entitled to copy thereof

(1) An accused who is arraigned for sentence or for trial under section 139 may, without payment, inspect the record of the preparatory examination at the time of his or her arraignment before the court.

(2) ...

(j) Chapter 21: Sections 144 to 149: Trial before Superior

(i) Section 144: Charge in superior court to be laid in an indictment

2.196 Section 144 is unconstitutional to the extent that it contains male-centric language (the exclusive use of masculine pronouns).in conflict with section 9 of the Constitution. The exclusive use of masculine pronouns must be altered to include feminine pronouns. Also, the outdated terms which appear must be updated.

(aa) Recommendation

2.197 The SALRC recommends that section 144 be amended as follows:

144 Charge in [superior c]High Court to be laid in an indictment

(1) Where [an attorney-general] a Director of Public Prosecutions arraigns an accused for sentence or trial by a [superior c]High Court, the charge shall be contained in a document called an indictment, which shall be framed in the name of the [attorney-general] Director of Public Prosecutions.

...

- (3) (a) Where **[an attorney-general]** a Director of Public Prosecutions under section 75, 121 (3) (b) or 122 (2) (i) arraigns an accused for a summary trial in a **[superior c]**High Court, the indictment shall be accompanied by a summary of the substantial facts of the case that, in the opinion of the **[attorney-general]** the Director of Public Prosecutions are necessary to inform the accused of the allegations against him or her and that will not be prejudicial to the administration of justice or the security of the State, as well as a list of the names and addresses of the witnesses the **[attorney-general]** Director of Public Prosecutions intends calling at the summary trial on behalf of the State: Provided that this provision shall not be so construed that the State shall be bound by the contents of the summary; the **[attorney-general]** Director of Public Prosecutions may withhold the name and address of a witness if he or she is of the opinion that such witness may be tampered with or be intimidated or that it would be in the interest of the security of the State that the name and address of such witness be withheld; the omission of the name or address of a witness from such list shall in no way affect the validity of the trial.
- (b) Where the evidence for the State at the trial of the accused differs in a material respect from the summary referred to in paragraph (a), the trial court may, at the request of the accused and if it appears to the court that the accused might be prejudiced in his or her defence by reason of such difference, adjourn the trial for such period as to the court may seem adequate.
- (4) (a) An indictment, together with a notice of trial referred to in the rules of court, shall, unless an accused agrees to a shorter period, be served on an accused at least ten days (Sundays and public holidays excluded) before the date appointed for the trial—
- (i) in accordance with the procedure and manner laid down by the rules of court, by handing it to him or her personally, or, if he or she cannot be found, by delivering it at his or her place of residence or place of employment or business to a person apparently over the age of sixteen years and apparently residing or employed there, or, if he or she has been released on bail, by leaving it at the place determined under section 62 for the service of any document on him or her; or
- (ii) by the magistrate or regional magistrate committing him or her to the **superior c]** High Court, by handing it to him or her.

(ii) Section 145: Trial in superior court by judge sitting with or without assessors

2.198 Section 145 is unconstitutional to the extent that it contains male-centric language (the exclusive use of masculine pronouns).in conflict with section 9 of the Constitution. The exclusive use of masculine pronouns must be altered to include feminine pronouns. Also, the outdated terms or definitions which appear must be updated.

(aa) Recommendation

2.199 The SALRC recommends that section 145 be amended as follows:

145 Trial in [superior c] High Court by judge sitting with or without assessors

(1) (a) Except as provided in section 148, an accused arraigned before a [superior c] High Court shall be tried by a judge of that court sitting with or without assessors in accordance with the provisions set out hereunder.

(b) An assessor for the purposes of this section means a person who, in the opinion of the judge who presides at a trial, has experience in the administration of justice or skill in any matter which may be considered at the trial.

(2) Where [an attorney-general] a Director of Public Prosecutions arraigns an accused before a [superior c] High Court—

(a) for trial and the accused pleads not guilty; or

(b) for sentence, or for trial and the accused pleads guilty, and a plea of not guilty is entered at the direction of the presiding judge, the presiding judge may summon not more than two assessors to assist him or her at the trial.

(3) No assessor shall hear any evidence unless he or she first takes an oath or, as the case may be, makes an affirmation, administered by the presiding judge, that he or she will, on the evidence placed before [him] the court, give a true verdict upon the issues to be tried.

(4) An assessor who takes an oath or makes an affirmation under subsection (3) shall be a member of the court: Provided that—

(a) subject to the provisions of paragraphs (b) and (c) of this proviso and of section 217 (3) (b), the decision or finding of the majority of the members of the court upon any question of fact or upon the question referred to in the said paragraph (b) shall be the decision or finding of the court, except when the presiding judge sits with only one assessor, in which case the decision or finding of the judge shall, in the case of a difference of opinion, be the decision or finding of the court;

(b) if the presiding judge is of the opinion that it would be in the interests of the administration of justice that the assessor or the assessors assisting him or her do not take part in any decision upon the question whether evidence of any confession or other statement made by an accused is admissible as evidence against him or her, the judge alone shall decide upon such question, and he or she may for this purpose sit alone;

(c) the presiding judge alone shall decide upon any other question of law or upon any question whether any matter constitutes a question of law or a question of fact, and he or she may for this purpose sit alone.

(5) If an assessor is not in the full-time employment of the State, he or she shall be entitled to such compensation as the Minister, in consultation with the Minister of Finance, may determine in respect of expenses incurred by him or her in connection with his or her attendance at the trial, and in respect of his or her services as assessor.

(iii) Section 146 Reasons for decision by superior court in criminal trial

2.200 Section 146 is unconstitutional to the extent that it contains male-centric language (the exclusive use of masculine pronouns).in conflict with section 9 of the Constitution. The exclusive use of masculine pronouns must be altered to include feminine pronouns. Also, the outdated terms or definitions which appear must be updated.

(aa) Recommendation

2.201 The SALRC recommends that section 146 be amended as follows:

146 Reasons for decision by [superior] High [c]Court in criminal trial

A judge presiding at a criminal trial in a [superior] High [c]Court shall—

- (a) where he or she decides any question of law, including any question under paragraph (c) of the proviso to section 145 (4) whether any matter constitutes a question of law or a question of fact, give the reasons for his decision;
- (b) whether he or she sits with or without assessors, give the reasons for the decision or finding of the court upon any question of fact;
- (c) where he or she sits with assessors, give the reasons for the decision or finding of the court upon the question referred to in paragraph (b) of the proviso to section 145(4);
- (d) where he or she sits with assessors and there is a difference of opinion upon any question of fact or upon the question referred to in paragraph (b) of the proviso to section 145 (4), give the reasons for the decision or finding of the member of the court who is in the minority or, where the presiding judge sits with only one assessor, of such an assessor.

(k) Chapter 22: Sections 150 to 178: Conduct of proceedings

(i) Section 150: Prosecutor may address court and adduce evidence

2.202 Section 150 is is unconstitutional to the extent that it contains male-centric language (the exclusive use of masculine pronouns).in conflict with section 9 of the Constitution. The exclusive use of the male pronoun should be altered to include feminine pronouns..“he”.

(aa) Recommendation

2.203 The SALRC recommends that section 150 be amended as follows:

150 Prosecutor may address court and adduce evidence

(1) The prosecutor may at any trial, before any evidence is adduced, address the court for the purpose of explaining the charge and indicating, without comment, to the court what evidence he or she intends adducing in support of the charge.

(2) (a) The prosecutor may then examine the witnesses for the prosecution and adduce such evidence as may be admissible to prove that the accused committed the offence referred to in the charge or that he or she committed an offence of which he or she may be convicted on the charge.

...

(ii) Section 151: Accused may address court and adduce evidence

2.204 Section 151 is unconstitutional to the extent that it contains male-centric language (the exclusive use of masculine pronouns).in conflict with section 9 of the Constitution. The exclusively masculine pronouns must be altered to include feminine pronouns.

(aa) Recommendation

2.205 The SALRC recommends that section 151 be amended as follows:

151 Accused may address court and adduce evidence

- (1) (a) If an accused is not under section 174 discharged at the close of the case for the prosecution, the court shall ask him or her whether he or she intends adducing any evidence on behalf of the defence, and if he or she answers in the affirmative, he or she may address the court for the purpose of indicating to the court, without comment, what evidence he or she intends adducing on behalf of the defence.
- (b) The court shall also ask the accused whether **[himself]** he or she intends giving evidence on behalf of the defence, and—
- (i) if the accused answers in the affirmative, he or she shall, except where the court on good cause shown allows otherwise, be called as a witness before any other witness for the defence; or
- (ii) if the accused answers in the negative but decides, after other evidence has been given on behalf of the defence, to give evidence **[himself]** in his or her own defence, the court may draw such inference from the accused's conduct as may be reasonable in the circumstances.
- (2) (a) ...
- (b) Where any document may be received in evidence before any court upon its mere production and the accused wishes to place such evidence before the court, he or she shall read out the relevant document in court unless the prosecutor is in possession of a copy of such document or dispenses with the reading out thereof.

(iii) Section 153: Circumstances in which criminal proceedings shall not take place in open court

1.206 Section 153 is compliant is unconstitutional to the extent that it contains male-centric language (the exclusive use of masculine pronouns).in conflict with section 9 of the Constitution. The exclusive use of the male pronouns must be altered to include feminine pronouns “he”, “his” and “him”.

(aa) Recommendation in Consultation Paper

1.207 The SALRC recommends that section 153 be amended as follows:

153 Circumstances in which criminal proceedings shall not take place in open court

- (1) ...

(2) If it appears to any court at criminal proceedings that there is a likelihood that harm might result to any person, other than an accused, if he or she testifies at such proceedings, the court may direct—

(a) that such person shall testify behind closed doors and that no person shall be present when such evidence is given unless his or her presence is necessary in connection with such proceedings or is authorized by the court;

(b) ...

(3) In criminal proceedings relating to a charge that the accused committed or attempted to commit—

(a)...

(b)...

(c) extortion or any statutory offence of demanding from any other person some advantage which was not due and, by inspiring fear in the mind of such other person, compelling him or her to render such advantage,

the court before which such proceedings are pending may, at the request of such other person or, if he or she is a minor, at the request of his parent or guardian, direct that any person whose presence is not necessary at the proceedings or any person or class of persons mentioned in the request, shall not be present at the proceedings: Provided that judgment shall be delivered and sentence shall be passed in open court if the court is of the opinion that the identity of the other person concerned would not be revealed thereby.

(3A) Any person whose presence is not necessary at criminal proceedings referred to in paragraphs (a) and (b) of subsection (3), shall not be admitted at such proceedings while the other person referred to in those paragraphs is giving evidence, unless such other person or, if he or she is a minor, his or her parent or guardian or a person *in loco parentis*, requests otherwise.

(4) Where an accused at criminal proceedings before any court is under the age of eighteen years, no person, other than such accused, his or her legal representative and parent or guardian or a person *in loco parentis*, shall be present at such proceedings, unless such person's presence is necessary in connection with such proceedings or is authorized by the court.

(5) Where a witness at criminal proceedings before any court is under the age of eighteen years, the court may direct that no person, other than such witness and his or her parent or guardian or a person *in loco parentis*, shall be present at such proceedings, unless such person's presence is necessary in connection with such proceedings or is authorized by the court.

(6) The court may direct that no person under the age of eighteen years shall be present at criminal proceedings before the court, unless he or she is a witness referred to in subsection (5) and is actually giving evidence at such proceedings or his presence is authorized by the court.

(bb) Comment by the Department

2.208 Subsection (4) was repealed by the Child Justice Act 75 of 2008.

(cc) Evaluation and recommendation

2.209 The SALRC agrees with the comment by the Department.

2.210 The SALRC recommends that section 153 be amended as follows:

153. Circumstances in which criminal proceedings shall not take place in open court

(1)

(2) If it appears to any court at criminal proceedings that there is a likelihood that harm might result to any person, other than an accused, if he or she testifies at such proceedings, the court may direct -

(a) that such person shall testify behind closed doors and that no person shall be present when such evidence is given unless **[his or her]** that person's presence is necessary in connection with such proceedings or is authorized by the court;

(b) that the identity of such person shall not be revealed or that it shall not be revealed for a period specified by the court.

(3) In criminal proceedings relating to a charge that the accused committed or attempted to commit –

(a) any sexual offence as contemplated in section 1 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, towards or in connection with any other person;

(b) any act for the purpose of furthering the commission of a sexual offence as contemplated in section 1 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, towards or in connection with any other person; or

(c) extortion or any statutory offence of demanding from any other person some advantage which was not due and, by inspiring fear in the mind of such other person, compelling him or her to render such advantage,

the court before which such proceedings are pending may, at the request of such other person or, if he or she is a minor, at the request of his or her parent or guardian, direct that any person whose presence is not necessary at the proceedings or any person or class of persons mentioned in the request, shall not be present at the proceedings: Provided that judgment shall be delivered and sentence shall be passed in open court if the court is of the opinion that the identity of the other person concerned would not be revealed thereby.

(3A) Any person whose presence is not necessary at criminal proceedings referred to in paragraphs (a) and (b) of subsection (3), shall not be admitted at such proceedings while the other person referred to in those paragraphs is giving evidence, unless such other person or, if he or she is a minor, his or her parent or guardian or a person in *loco parentis*, requests otherwise.

(4)
[Subs. (4) deleted by s. 99 of Act 75/2008]

(5) Where a witness at criminal proceedings before any court is under the age of eighteen years, the court may direct that no person, other than such witness and his or her parent or guardian or a person in *loco parentis*, shall be present at such proceedings, unless such person's presence is necessary in connection with such proceedings or is authorized by the court.

(6) The court may direct that no person under the age of eighteen years shall be present at criminal proceedings before the court, unless he or she is a witness referred to in subsection (5) and is actually giving evidence at such proceedings or his or her presence is authorized by the court.

(iv) Section 154: Prohibition of publication of certain information relating to criminal proceedings

2.211 Section 154 is unconstitutional to the extent that it contains male-centric language (the exclusive use of masculine pronouns) in conflict with section 9 of the Constitution. The exclusive use of masculine pronouns must be altered to include feminine pronouns.

(aa) Recommendation

2.212 The SALRC recommends that section 154 be amended as follows:

154 Prohibition of publication of certain information relating to criminal proceedings

(1) Where a court under section 153 (1) on any of the grounds referred to in that subsection directs that the public or any class thereof shall not be present at any proceedings or part thereof, the court may direct that no information relating to the proceedings or any part thereof held behind closed doors shall be published in any manner whatever: Provided that a direction by the court shall not prevent the publication of information relating to the name and personal particulars of the accused, the charge against him or her, the plea, the verdict and the sentence, unless the court is of the opinion that the publication of any part of such information might defeat the object of its direction under section 153 (1), in which event the court may direct that such part shall not be published.

(2) (a) Where a court under section 153 (3) directs that any person or class of persons shall not be present at criminal proceedings or where any person is in terms of section 153 (3A) not admitted at criminal

proceedings, no person shall publish in any manner whatever any information which might reveal the identity of any complainant in the proceedings: Provided that the presiding judge or judicial officer may authorize the publication of such information if he or she is of the opinion that such publication would be just and equitable.

(b) ...

(3) No person shall publish in any manner whatever any information which reveals or may reveal the identity of an accused under the age of eighteen years or of a witness at criminal proceedings who is under the age of eighteen years: Provided that the presiding judge or judicial officer may authorize the publication of so much of such information as he or she may deem fit if the publication thereof would in his or her opinion be just and equitable and in the interest of any particular person.

(v) Section 156: Persons committing separate offences at same time and place may be tried together

2.213 Section 156 is unconstitutional to the extent that it contains male-centric language (the exclusive use of masculine pronouns) in conflict with section 9 of the Constitution. The exclusive use of the male pronoun must be altered to include feminine pronouns.

(aa) Recommendation in Consultation Paper

2.214 It was recommended that section 156 be amended as follows:

156 Persons committing separate offences at same time and place may be tried together

Any number of persons charged in respect of separate offences committed at the same place and at the same time or at about the same time, may be charged and tried together in respect of such offences if the prosecutor informs the court that evidence admissible at the trial of one of such persons will, in his or her opinion, also be admissible as evidence at the trial of any other such person or such persons.

(bb) Comment by the Department

2.215 The Department comments that the SALRC had not identified, for amendment, several references to “he” in section 159 of the Act.

(cc) Evaluation and recommendations

2.216 The SALRC appreciates the comment by the Department. We recommend that section 159 be amended as follows:

159. Circumstances in which criminal proceedings may take place in absence of accused

(1) If an accused at criminal proceedings conducts himself or herself in a manner which makes the continuance of the proceedings in his or her presence impracticable, the court may direct that **[he]** the accused be removed and that the proceedings continue in his or her absence.

(2) If two or more accused appear jointly at criminal proceedings and -

(a) the court is at any time after the commencement of the proceedings satisfied, upon application made to it by any accused in person or by his or her representative -

(i) that the physical condition of that accused is such that he or she is unable to attend the proceedings or that it is undesirable that he or she should attend the proceedings; or

(ii) that circumstances relating to the illness or death of a member of the family of that accused make his or her absence from the proceedings necessary; or

(b) ...

(3) Where an accused becomes absent from the proceedings in the circumstances referred to in subsection (2), the court may, in lieu of directing that the proceedings be proceeded with in the absence of the accused concerned, upon the application of the prosecution direct that the proceedings in respect of the absent accused be separated from the proceedings in respect of the accused who are present, and thereafter, when such accused is again in attendance, the proceedings against him or her shall continue from the stage at which he or she became absent, and the court shall not be required to be differently constituted merely by reason of such separation.

(4) If an accused who is in custody in terms of an order of court cannot, by reason of his physical indisposition or other physical condition, be brought before a court for the purposes of obtaining an order for his or her further detention, the court before which the accused would have been brought for purposes of such an order if it were not for the indisposition or other condition, may, upon application made by the prosecution at any time prior to the expiry of the order for his or her detention wherein the circumstances surrounding the indisposition or other condition are set out, supported by a certificate from a medical practitioner, order, in the absence of such an accused, that he or she be detained at a place indicated by the court and for the period which the court deems necessary in order that he or she can recover and be brought before the court so that an order for his or her further detention for the purposes of his or her trial can be obtained.

(I) Chapter 22: Sections 160, 162, 163, 164, 165 and 167: Conduct of Proceedings

2.217 Sections 160, 162, 163, 164, 165 and 167 are unconstitutional to the extent that it contains male-centric language (the exclusive use of masculine pronouns) in conflict with section 9 of the Constitution. The exclusive use of masculine pronouns must be altered to include feminine pronouns.

(aa) Recommendation

2.218 The SALRC recommends that sections 160, 162, 163, 164, 165 and 167 be amended as follows:

160 Procedure at criminal proceedings where accused is absent

(1) If an accused referred to in section 159(1) or (2) again attends the proceedings in question, he or she may, unless he or she was legally represented during his or her absence, examine any witness who testified during his or her absence, and inspect the record of the proceedings or require the court to have such record read over to him or her.

(2)...

(3) (a) ...

(b) If it appears to the court that the presence of an absent accused cannot reasonably be obtained, the court may direct that the proceedings in respect of the accused who are present be concluded as if such proceedings had been separated from the proceedings at the stage at which the accused concerned became absent from the proceedings, and when such absent accused is again in attendance, the proceedings against him or her shall continue from the stage at which he or she became absent, and the court shall not be required to be differently constituted merely by reason of such separation.

(c) When, in the case of a trial, the evidence on behalf of all the accused has been concluded and any accused is absent when the verdict is to be delivered, the verdict may be delivered in respect of all the accused or be withheld until all the accused are present or be delivered in respect of any accused present and withheld in respect of the absent accused until he or she is again in attendance.

162. Witness to be examined under oath

(1) Subject to the provisions of sections 163 and 164, no person shall be examined as a witness in criminal proceedings unless he or she is under oath, which shall be administered by the presiding judicial officer or, in the case of a superior court, by the presiding judge or the registrar of the court, and which shall be in the following form:—

“I swear that the evidence that I shall give, shall be the truth, the whole truth and nothing but the truth, so help me God.”

(2) If any person to whom the oath is administered wishes to take the oath with uplifted hand, he or she shall be permitted to do so.

163 Affirmation in lieu of oath

(1) Any person who is or may be required to take the oath and—

(a) ..

(c) who does not consider the oath in the prescribed form to be binding on his or her conscience; or

(d) who informs the presiding judge or, as the case may be, the presiding judicial officer, that he or she has no religious belief or that the taking of the oath is contrary to his or her religious belief,

shall make an affirmation in the following words in lieu of the oath and at the direction of the presiding judicial officer or, in the case of a superior court, the presiding judge or the registrar of the court: -

“I solemnly affirm that the evidence that I shall give, shall be the truth, the whole truth and nothing but the truth”.

...

164 When unsworn or unaffirmed evidence admissible

(1) ...

(2) If such person wilfully and falsely states anything which, if sworn, would have amounted to the offence of perjury or any statutory offence punishable as perjury, he or she shall be deemed to have committed that offence, and shall, upon conviction, be liable to such punishment as is by law provided as a punishment for that offence.

165 Oath, affirmation or admonition may be administered by or through interpreter or intermediary

Where the person concerned is to give his or her evidence through an interpreter or an intermediary appointed under section 170A (1), the oath, affirmation or admonition under section 162,163 or 164 shall be administered by the presiding judge or judicial officer or the registrar of the court, as the case may be, through the interpreter or intermediary or by the interpreter or intermediary in the presence or under the eyes of the presiding judge or judicial officer, as the case may be.

167 Court may examine witness or person in attendance

The court may at any stage of criminal proceedings examine any person, other than an accused, who has been subpoenaed to attend such proceedings or who is in attendance at such proceedings, and may recall and re-examine any person, including an accused, already examined at the proceedings, and the court shall examine, or recall and re-examine, the person concerned if his or her evidence appears to the court essential to the just decision of the case.

(i) Section 170: Failure of accused to appear after adjournment or to remain in attendance

2.219 Section 170(2) is an unconstitutional provision. It does not comply with the Constitution because it contains a reverse *onus* and is therefore in conflict with the right to be presumed innocent. The problem had already been identified in SALRC Project 101, where we suggested in the draft legislation that subsection (2) of Section 170 should be amended (see discussion in Chapter 4 of the Project 101 report and the recommendation copied in consultation paper below). In other regards, section 170 of the Act is unconstitutional to the extent that it contains male-centric language (the exclusive use of masculine pronouns) in conflict with section 9 of the Constitution. The exclusive use of male pronouns must be amended to include the feminine.

2.220 The Commission confirms its previous recommendation (in Project 101) with regard to the amendment of section 170(2). The Department was requested to comment on the recommendation contained in the Commission's Project 101 report.

(aa) Recommendation in Consultation Paper

2.221 The SALRC recommended that section 170(2) be amended as follows:

170 Failure of accused to appear after adjournment or to remain in attendance

(1) ...

(2) The court may, if satisfied that an accused referred to in subsection (1) has failed to appear at the place and on the date and at the time to which the proceedings in question were adjourned or has failed to remain in attendance at such proceedings as so adjourned, issue a warrant for his or her arrest and, when he or she is brought before the court, in a summary manner enquire into his or her failure so to appear or so to remain in attendance and, unless the accused **[satisfies the court]** raises a reasonable doubt that his or her failure was not due to fault on his or her part, convict him or her of the offence referred to in subsection (1) and sentence him or her to a fine not exceeding R300 or to imprisonment for a period not exceeding three months.

(bb) Comment by the Department

2.222 The SALRC must take cognizance of the draft Second Judicial Matters Amendment Bill, 2011, which will be introduced to Parliament. This Bill proposes amendments to section 170 of the Act.

2.223 The Department also noted that in *S v Singo* 2002 (2) SACR 160 (CC) & 2002 (4) SA 858 (CC), the court held that certain wording of section 72(4) of the Act was inconsistent with the Constitution and must be amended. By contrast, however, in paragraph 2.38 of the SALRC's consultation paper, the Commission recommended that this subsection should remain unchanged. The Department also pointed out that a notice in terms of rule 4(8) of the Rules of the Constitutional Court, made by the President of the Constitutional Court in consultation with the Chief Justice,³³ provides that in section 72(4) of the Act, the omission of the phrase "there is a reasonable possibility that" between the words "that" and "his failure" renders this provision inconsistent with the Constitution. Thus, section 72(4) of the Act is to be read as though the phrase "there is a reasonable possibility that" appears between the words "that" and "his failure". The Department recommends that this section be amended accordingly.

(cc) Evaluation and recommendations

2.224 The Commission notes the intended amendment by the Department, and excludes this issue from the current investigation. In view of the finding of the Constitutional Court, the Commission recommends that section 72(4) be amended in line with the judgment of that Court. The Commission also notes the intended amendment by the Department to section 170 of the Act, because section 170(2) of the Act contains exactly the same wording as section 72(4); and in view of the finding of the Constitutional Court, the Commission recommends that section 170(2) should similarly be amended in line with the judgment of the Constitutional Court. The Bill referred to by the Department has not yet been passed, and the Commission's recommendations therefore includes a proposed amendment to section 170 (2) in line with the

³³ The notice was made under section 171 of the Constitution of the Republic of South Africa, 1996, and section 16 of the Constitutional Court Complementary Act of 1995 (published as Government Notice No. R. 888 in *Gazette* 23535 of 28 June 2002).

Court's judgment until the amendments have been given effect to.³⁴

2.225 The SALRC recommends that section 170(2) be amended as follows:

170 Failure of accused to appear after adjournment or to remain in attendance

(1) ...

(2) The court may, if satisfied that an accused referred to in subsection (1) has failed to appear at the place and on the date and at the time to which the proceedings in question were adjourned or has failed to remain in attendance at such proceedings as so adjourned, issue a warrant for his or her arrest and, when he or she is brought before the court, in a summary manner enquire into his or her failure so to appear or so to remain in attendance and, unless the accused [**satisfies the court**] raises a reasonable possibility that his or her failure was not due to fault on his or her part, convict him or her of the offence referred to in subsection (1) and sentence him or her to a fine not exceeding R300 or to imprisonment for a period not exceeding three months.

(ii) Sections 174 and 175: Conduct of proceedings

2.226 Section 174 is unconstitutional to the extent that it contains male-centric language (the exclusive use of masculine pronouns) in conflict with section 9 of the Constitution. The exclusive use of masculine pronouns must be altered to include feminine pronouns.

(aa) Recommendation in Consultation Paper

2.227 It was recommended that sections 174 and 175 be amended as follows:

174 Accused may be discharged at close of case for prosecution

If, at the close of the case for the prosecution at any trial, the court is of the opinion that there is no evidence that the accused committed the offence referred to in the charge or any offence of which he or she may be convicted on the charge, it may return a verdict of not guilty.

175 Prosecution and defence may address court at conclusion of evidence.—

(1) After all the evidence has been adduced, the prosecutor may address the court, and thereafter the accused may address the court.

³⁴ The Constitutional Court Order published under Government Notice R888 in *Government Gazette* 23535 of 28 June 2002 states: "The omission from section 72(4) of the Criminal Procedure Act 51 of 1977 between the words 'that' and 'his failure' of the words 'there is a reasonable possibility that', is declared to be inconsistent with the Constitution. Section 72(4) of the Criminal Procedure Act 51 of 1977, is to be read as though the words 'there is a reasonable possibility that' appear therein between words 'that' and 'his failure'."

(2) The prosecutor may reply on any matter of law raised by the accused in his or her address, and may, with leave of the court, reply on any matter of fact raised by the accused in his or her address.

(bb) Comment by the Department

2.228 Section 178(2) of the Act contains a reference to "he" and should be included in the recommendations.

(cc) Evaluation and recommendation

2.229 The SALRC supports the comment by the Department. We recommend that sections 174, 175 and 178(2) be amended as follows:

174 Accused may be discharged at close of case for prosecution

If, at the close of the case for the prosecution at any trial, the court is of the opinion that there is no evidence that the accused committed the offence referred to in the charge or any offence of which he or she may be convicted on the charge, it may return a verdict of not guilty.

175 Prosecution and defence may address court at conclusion of evidence.—

(1) ...

(2) The prosecutor may reply on any matter of law raised by the accused in his or her address, and may, with leave of the court, reply on any matter of fact raised by the accused in his or her address.

178. Arrest of person committing offence in court and removal from court of person disturbing proceedings

(1)

(2) If any person, other than an accused, who is present at criminal proceedings, disturbs the peace or order of the court, the court may order that such person be removed from the court and that he or she be detained in custody until the rising of the court.

Part 3: Chapters 23 to 33 (sections 179 to 342A)

(a) Sections 179 to 342A: gender pronouns

2.230 Sections 179 to 342A contain exclusive reference to the masculine pronouns “he”, “him” and “his”. All such instances are unconstitutional to the extent that it contains male-centric language (the exclusive use of masculine pronouns) in conflict with section 9 of the Constitution. All such references must be amended to include feminine pronouns.

2.231 The SALRC recommends that the following sections should be amended accordingly:

- 179;
- 183(1);
- 184(1), (2) and (4);
- 185(1)(a)(i) and (ii), 185(1)(b) and (c), 185 (2), (4), (5), (6) and (7);
- 187;
- 189(1) and (6);
- 190(2);
- 191(1), (2) and (5);
- 194;
- 195;
- 196(1)(a), 196 (2) and (3);
- 197;
- 200;
- 201;
- 203;
- 204;
- 209;
- 211;
- 212(a) and (b), 212 (2), (3), (4), (5), (6), (7), (8) and (11)(b);
- 213;
- 219A(1)(a);
- 221(1)(b);
- 234;

- 236(1)(a) and (2)(a), 236A(1)(a), and 236 (2)(a) and(b);
- 271(2);
- 285;
- 288;
- 297;
- 311(2);
- 312(2);
- 314;
- 339;
- 340; and
- 341.

(b) Sections 179 to 342A: outdated terminology

2.232 Sections 179 to 342A contain references to terminology that is outdated or has been amended by later legislation. These include “attorney-general”, which should be replaced by “Director of Public Prosecutions”.

2.233 The SALRC recommends that the following sections should be amended accordingly:

- 185(1)(b) and (c), (2)(a) and (b), (3), (4)(a), and (5);
- 195(2);
- 234(2)(a);
- 252A(4);
- 304(3);
- 310(1) and (2), and 310A;
- 311;
- 316; and
- 342A(4)(b).

2.234 In this part of the discussion paper, comments received from the Department with regard to each of the above sections are summarised. Before making recommendations on each section, the Commission reflects on and evaluates these comments and recommendations from the Department. The departmental input is thus integrated into our final recommendations. Thereafter, we provide the actual proposed amendments to the legislation

for each section. If the Commission agrees with the Department's comments, they will be included in our recommendations.

2.235 Where the Department's comments relate to the inclusion of sections for amendment which were not covered in the Commission's initial consultation paper, this fact will be stated.

(c) Sections 179 to 209

(aa) SALRC Recommendation

2.236 The SALRC recommends that the sections of the Criminal Procedure Act referred to in paragraphs 2.231 and 2.233 above be amended as outlined below. With reference to sections 179, 182, 185, 191 and 198, the Department notes that the SALRC must take cognizance of the draft Second Judicial Matters Amendment Bill, 2011, which will be introduced into Parliament. This Bill proposes amendments to sections 179, 182, 185, 191 and 198 of the Act. The proposed amendment Bill has not yet been passed by Parliament, and as such does not affect the Commission's recommendations.

2.237 Section 195(2) is unconstitutional and is unconstitutional to the extent that it contains male-centric language (the exclusive use of masculine pronouns).in conflict with section 9 of the Constitution. and should be amended to include feminine pronouns. As it stands it contains an outdated definition of marriage, which has been altered by the passing of subsequent legislation. The definition should therefore be broadened to include customary marriages and civil unions. The Commission recommends that sections 179, 183, 184,185, 187, 189, 194,195,196, 197,200, 201, 203.204, 209, 211, 212, 219A, 221, 234 236, 271, 285, 288, 287, 311, 312, 314, 339, 340, and 341 of the Act be amended as outlined below:

179 Process for securing attendance of witness

(1) (a)...

(b) If any police official has reasonable grounds for believing that the attendance of any person is or will be necessary to give evidence or to produce any book, paper or document in criminal proceedings in a lower court, and hands to such person a written notice calling upon him or her to attend such

criminal proceedings on the date and at the time and place specified in the notice, to give evidence or to produce any book, paper or document, likewise specified, such person shall, for the purposes of this Act, be deemed to have been duly subpoenaed so to attend such criminal proceedings.

(2) ...

(3) (a) Where an accused desires to have any witness subpoenaed and he or she satisfies the prescribed officer of the court-

- (i) that he or she is unable to pay the necessary costs and fees; and
- (ii) that such witness is necessary and material for his or her defence,

such officer shall subpoena such witness.

(b) In any case where the prescribed officer of the court is not so satisfied, he or she shall, upon the request of the accused, refer the relevant application to the judge or judicial officer presiding over the court, who may grant or refuse the application or defer his decision until he or she has heard other evidence in the case.

(4) ...

183 Witness to keep police informed of whereabouts

(1) Any person who is advised in writing by any police official that he or she will be required as a witness in criminal proceedings, shall, until such criminal proceedings have been finally disposed of or until he or she is officially advised that he or she will no longer be required as a witness, keep such police official informed at all times of his or her full residential address or any other address where he may conveniently be found.

(2) ...

184 Witness about to abscond and witness evading service of summons

(1) Whenever any person is likely to give material evidence in criminal proceedings with reference to any offence, other than an offence referred to in Part III of Schedule 2 any magistrate, regional magistrate or judge of the court before which the relevant proceedings are pending may, upon information in writing and on oath that such person is about to abscond, issue a warrant for his or her arrest.

(2) If a person referred to in subsection (1) is arrested, the magistrate, regional magistrate or judge, as the case may be, may warn **[him]** that person to appear at the proceedings in question at a stated place and at a stated time and on a stated date and release him or her on any condition referred to in paragraph (a), (b) or (e) of section 62, in which event the provisions of subsections (1), (3) and (4) of section 66 shall *mutatis mutandis* apply with reference to any such condition.

(3) (a)...

(b)...

(4) Whenever any person is likely to give material evidence in criminal proceedings, any magistrate, regional magistrate or judge of the court before which the relevant

proceedings are pending may, upon information in writing and on oath that such person is evading service of the relevant subpoena, issue a warrant for his or her arrest, whereupon the provisions of subsections (2) and (3) shall *mutatis mutandis* apply with reference to such person.

185 Detention of witness

(1) (a) Whenever any person is with reference to any offence referred to in Part III of Schedule 2 in the opinion of the **[attorney-general] Director of Public Prosecutions** likely to give evidence on behalf of the State at criminal proceedings in any court, and the **[attorney-general] Director of Public Prosecutions**, from information placed before him or her-

(i) is of the opinion that the personal safety of such person is in danger or that he or she may abscond or that he or she may be tampered with or that he or she may be intimidated; or

(ii) deems it to be in the interests of such person or of the administration of justice that he or she be detained in custody,

the **[attorney-general] Director of Public Prosecutions** may by way of affidavit place such information before a judge in chambers and apply to such judge for an order that the person concerned be detained pending the relevant proceedings.

(b) The **[Attorney-general] Director of Public Prosecutions** may in any case in which he or she is of the opinion that the object of obtaining an order under paragraph (a) may be defeated if the person concerned is not detained without delay, order that such person be detained forthwith but such order shall not endure for longer than seventy-two hours unless the **[attorney-general] Director of Public Prosecutions** within that time by way of affidavit places before a judge in chambers the information on which he or she ordered the detention of the person concerned and such further information as might become available to him or her, and applies to such judge for an order that the person concerned be detained pending the relevant proceedings.

(c) The **[attorney-general] Director of Public Prosecutions** shall, as soon as he or she applies to a judge under paragraph (b) for an order of detention, in writing advise the person in charge of the place where the person concerned is being detained, that he or she has so applied for an order, and shall, where a judge under subsection (2) (a) refuses to issue a warrant for the detention of the person concerned, forthwith advise the person so in charge of such refusal, whereupon the person so in charge shall without delay release the person detained.

(2) (a) The judge hearing the application under subsection (1) may, if it appears **[to him]** from the information placed before him or her by the **[attorney-general] Director of Public Prosecutions**—

- (i) that there is a danger that the personal safety of the person concerned may be threatened or that **[he] the person** may abscond **[or that he]** may be tampered with, or **[that he may]** be intimidated; or
- (ii) that it would be in the interests of the person concerned or of the administration of justice that he or she be detained in custody,

issue a warrant for the detention of such person.

- (b) The decision of a judge under paragraph (a) shall be final: Provided that where a judge refuses an application and further information becomes available to the **[attorney-general] Director of Public Prosecutions** concerning the person in respect of whom the application was refused, the **[attorney-general] Director of Public Prosecutions** may again apply under subsection (1) (a) for the detention of that person.

(3) A person in respect of whom a warrant is issued under subsection (2), shall be taken to the place mentioned in the warrant and, in accordance with regulations which the Minister is hereby authorized to make, be detained there or at any other place determined by any judge from time to time, or, where the person concerned is detained in terms of an order by the **[attorney-general] Director of Public Prosecutions** under subsection (1) (b), such person shall, pending the decision of the judge under subsection (2) (a), be taken to a place determined by the **[attorney-general] Director of Public Prosecutions** and detained there in accordance with the said regulations.

(4) Any person detained under a warrant in terms of subsection (2) shall be detained for the period terminating on the day on which the criminal proceedings concerned are concluded, unless-

- (a) the **[attorney-general] Director of Public Prosecutions** orders that he or she be released earlier; or
- (b) such proceedings have not commenced within six months from the date on which he or she is so detained, in which case he or she shall be released after the expiration of such period.

(5) No person, other than an officer in the service of the State acting in the performance of his or her official duties, shall have access to a person detained under subsection (2), except with the consent of and subject to the conditions determined by the **[attorney-general] Director of Public Prosecutions** or an officer in the service of the State delegated by him or her.

(6) Any person detained under subsection (2) shall be visited in private at least once during each week by a magistrate of the district or area in which he or she is detained.

(7) For the purposes of section 191 any person detained under subsection (2) of this section shall be deemed to have attended the criminal proceedings in question as a witness for the State during the whole of the period of his or her detention.

- (8) ...
- (9) (a)...
- (b)...

187 Witness to attend proceedings and to remain in attendance

A witness who is subpoenaed to attend criminal proceedings, shall attend the proceedings and remain in attendance at the proceedings, and a person who is in attendance at criminal proceedings, though not subpoenaed as a witness, and who is warned by the court to remain in attendance at the proceedings, shall remain in attendance at the proceedings, unless such witness or such person is excused by the court: Provided that the court may, at any time during the proceedings in question, order that any person, other than the accused, who is to be called as a witness, shall leave the court and remain absent from the proceedings until he or she is called, and that he or she shall remain in court after he or she has given evidence.

189 Powers of court with regard to recalcitrant witness

(1) If any person present at criminal proceedings is required to give evidence at such proceedings and refuses to be sworn or to make an affirmation as a witness, or, having been sworn or having made an affirmation as a witness, refuses to answer any question put to him or her or refuses or fails to produce any book, paper or document required to be produced by him or her, the court may in a summary manner enquire into such refusal or failure and, unless the person so refusing or failing has a just excuse for his or her refusal or failure, sentence him or her to imprisonment for a period not exceeding two years or, where the criminal proceedings in question relate to an offence referred to in Part III of Schedule 2, to imprisonment for a period not exceeding five years.

(2) ...

(6) No person shall be bound to produce any book, paper or document not specified in any subpoena served upon him or her, unless he or she has such book, paper or document in court.

190 Impeachment or support of credibility of witness

(1) ...

(2) Any such party who has called a witness who has given evidence in any such proceedings (whether that witness is or is not, in the opinion of the court, adverse to the party calling him or her), may, after such party or the court has asked the witness whether he or she did or did not previously make a statement with which his or her evidence in the said proceedings is inconsistent, and after sufficient particulars of the alleged previous statement to designate the occasion when it was made have been given to the witness, prove that he or she previously made a statement with which such evidence is inconsistent.

191 Payment of expenses of witness

(1) Any person who attends criminal proceedings as a witness for the State shall be entitled to such allowance as may be prescribed under subsection (3): Provided that the judicial officer or the judge presiding at such proceedings may, if he or she thinks fit, direct that no such allowance or that only a part of such allowance shall be paid to any such witness.

(2) Subject to any regulation made under subsection (3), the judicial officer or the judge presiding at criminal proceedings may, if he or she thinks fit, direct that any person who has attended such proceedings as a witness for the accused, shall be paid such allowance as may be prescribed by such regulation, or such lesser allowance as such judicial officer or such judge may determine.

...

(5) For the purposes of this section "witness" shall include any person necessarily required to accompany any witness on account of his or her youth, old age or infirmity.

194 Incompetency due to state of mind

No person appearing or proved to be afflicted with mental illness or to be labouring under any imbecility of mind due to intoxication or drugs or the like, and who is thereby deprived of the proper use of his or her reason, shall be competent to give evidence while so afflicted or disabled.

195 Evidence for prosecution by husband or wife of accused

(1) The wife or husband of an accused shall be competent, but not compellable, to give evidence for the prosecution in criminal proceedings, but shall be competent and compellable to give evidence for the prosecution at such proceedings where the accused is charged with-

(a)

(b) any offence under Chapter 20 [8 of the Child Care Act, 1983 (Act 74 of 1983)] or section 35 of the Children's Act, (Act 38 of 2005), committed in respect of any child of either of them;

(c) ...

(2) For the purposes of the law of evidence in criminal proceedings '**marriage**' shall include a customary marriage concluded in terms of the Recognition of the Customary Marriages Act, (120 of 1998); [or] a customary marriage or union concluded under the indigenous law and custom of any of the indigenous peoples of the Republic of South Africa; [or] any marriage concluded under any system of religious law or a civil union concluded in terms of the Civil Union Act, (Act 17 of 2006).

196 Evidence of accused and husband or wife on behalf of accused

(1) An accused and the wife or husband of an accused shall be a competent witness for the defence at every stage of criminal proceedings, whether or not the accused is charged jointly with any other person: Provided that-

(a) an accused shall not be called as a witness except upon his or her own application;

(b) ...

(2) The evidence which an accused may, upon his or her own application, give in his or her own defence at joint criminal proceedings, shall not be inadmissible against a co-accused at such proceedings by reason only that such accused is for any reason not a competent witness for the prosecution against such co-accused.

(3) An accused may not make an unsworn statement at his or her trial in lieu of evidence but shall, if he or she wishes to give evidence, do so on oath or, as the case may be, by affirmation.

197 Privileges of accused when giving evidence

An accused who gives evidence at criminal proceedings shall not be asked or required to answer any question tending to show that he or she has committed or has been convicted of or has been charged with any offence other than the offence with which he or she is charged, or that he or she is of bad character, unless-

- (a) he or she or his or her legal representative asks any question of any witness with a view to establishing his or her own good character or he or she [**himself**] gives evidence of his or her own good character, or the nature or conduct of the defence is such as to involve imputation of the character of the complainant or any other witness for the prosecution;
- (b) he or she gives evidence against any other person charged with the same offence or an offence in respect of the same facts;
- (c) the proceedings against him or her are such as are described in section 240 or 241 and the notice under those sections has been given to him or her; or
- (d) the proof that he or she has committed or has been convicted of such other offence is admissible evidence to show that he or she is guilty of the offence with which he or she is charged

200 Witness not excused from answer establishing civil liability [on his part]

A witness in criminal proceedings may not refuse to answer any question relevant to the issue by reason only that the answer establishes or may establish a civil liability on his or her part.

201 Privilege of legal practitioner

No legal practitioner qualified to practise in any court, whether within the Republic or elsewhere, shall be competent, without the consent of the person concerned, to give evidence at criminal proceedings against any person by whom he or she is professionally employed or consulted as to any fact, matter or thing with regard to which such practitioner would not on the thirtieth day of May, 1961, by reason of such employment or consultation, have been competent to give evidence without such consent: Provided that such legal practitioner shall be competent and compellable to give evidence as to any fact, matter or thing which relates to or is connected with the commission of any offence with which the person by whom such legal practitioner is professionally employed or consulted, is charged, if such fact, matter or thing came to the knowledge of such legal practitioner before he or she was professionally employed or consulted with reference to the defence of the person concerned.

203 Witness excused from answering incriminating question

No witness in criminal proceedings shall, except as provided by this Act or any other law, be compelled to answer any question which he or she would not on the thirtieth day of May, 1961, have been compelled to answer by reason that the answer may expose him or her to a criminal charge.

204 Incriminating evidence by witness for prosecution

(1) Whenever the prosecutor at criminal proceedings informs the court that any person called as a witness on behalf of the prosecution will be required by the prosecution to answer questions which may incriminate such witness with regard to an offence specified by the prosecutor-

(a) the court, if satisfied that such witness is otherwise a competent witness for the prosecution, shall inform such witness-

(i) that he or she is obliged to give evidence at the proceedings in question;

(ii) that questions may be put to him or her which may incriminate him or her with regard to the offence specified by the prosecutor;

(iii) that he or she will be obliged to answer any question put to him or her, whether by the prosecution, the accused or the court, notwithstanding that the answer may incriminate him or her with regard to the offence so specified or with regard to any offence in respect of which a verdict of guilty would be competent upon a charge relating to the offence so specified;

(iv) that if he or she answers frankly and honestly all questions put to him or her, he or she shall be discharged from prosecution with regard to the offence so specified and with regard to any offence in respect of which a verdict of guilty would be competent upon a charge relating to the offence so specified; and

(b) such witness shall thereupon give evidence and answer any question put to him or her, whether by the prosecution, the accused or the court, notwithstanding that the reply thereto may incriminate him or her with regard to the offence so specified by the prosecutor or with regard to any offence in respect of which a verdict of guilty would be competent upon a charge relating to the offence so specified.

(2) If a witness referred to in subsection (1), in the opinion of the court, answers frankly and honestly all questions put to him or her-

(a) ...

(b) ...

(3) The discharge referred to in subsection (2) shall be of no legal force or effect if it is given at preparatory examination proceedings and the witness concerned does not at any trial arising out of such preparatory examination, answer, in the opinion of the court, frankly and honestly all questions put to him or her at such trial, whether by the prosecution, the accused or the court.

(4) (a) Where a witness gives evidence under this section and is not discharged from prosecution in respect of the offence in question, such evidence shall not be admissible in evidence against him or her at any trial in respect of such offence or any offence in respect of which a verdict of guilty is competent upon a charge relating to such offence.

- (b) The provisions of this subsection shall not apply with reference to a witness who is prosecuted for perjury arising from the giving of the evidence in question, or for a contravention of section 319 (3) of the Criminal Procedure Act, 1955 (Act 56 of 1955).

209 Conviction may follow on confession by accused

An accused may be convicted of any offence on the single evidence of a confession by such accused that he or she committed the offence in question, if such confession is confirmed in a material respect or, where the confession is not so confirmed, if the offence is proved by evidence, other than such confession, to have been actually committed.

(d) Sections 212 to 221

(aa) Comment by the Department

2.238 This section discusses the Department's comments and recommendations, and the SALRC's responses to those comments.

2.239 The Department proposes that the reference in section 212(8)(a) to the Anatomical Donations and Post-Mortem Examinations Act 24 of 1970 is incorrect, and must be amended to refer to the Human Tissues Act 65 of 1983. Section 212(8)(a) was amended in 2010, and refers to section 1 of the National Health Act 66 of 2003 and not to the Anatomical Donations and Post-Mortem Examinations Act 24 of 1970. The Commission is of the view that the 2010 amendment was enacted in the constitutional era, and reflects the correct position. Therefore, we do not agree that the reference should be to the Human Tissues Act 65 of 1983. However, it should further be noted that paragraph (a) was substituted by section 4 of Act 6 of 2010, and again by section 3 of Act 37 of 2013, which is yet to be proclaimed with effect from a date to be determined. The Department also commented that the SALRC must take cognizance of the draft Second Judicial Matters Amendment Bill, 2011, which will be introduced to Parliament.

(bb) SALRC recommendations

2.240 The Commission is of the view that the 2010 amendment was enacted in the constitutional era, and reflects the correct position. The Department also commented that the SALRC must take cognizance of the draft Second Judicial Matters Amendment Bill, 2011, which will be introduced to Parliament. This Bill proposes amendments to section 212(10)(a),

section 217, and section 219A of the Act. The draft Second Judicial Matters Amendment Bill, 2011 has not yet been passed by Parliament, and does not affect the Commission's recommendations in respect of sections 212(10)(a), 217 or 219A of the Act. The SALRC recommends that sections 212 to 221 be amended as shown in the following paragraphs.

212 Proof of certain facts by affidavit or certificate

(1) Whenever in criminal proceedings the question arises whether any particular act, transaction or occurrence did or did not take place in any particular department or sub-department of the State or of a provincial administration or in any branch or office of such department or sub-department or in any particular court of law or in any particular bank, or the question arises in such proceedings whether any particular functionary in any such department, sub-department, branch or office did or did not perform any particular act or did or did not take part in any particular transaction, a document purporting to be an affidavit made by a person who in that affidavit alleges-

(a) that he or she is in the service of the State or a provincial administration or of the bank in question, and that he or she is employed in the particular department or sub-department or the particular branch or office thereof or in the particular court or bank;

(b) that-

(i) ...

(ii) ...

it would in the ordinary course of events have come to his or her, the deponent's, knowledge and a record thereof, available to him or her, would have been kept; and

(c) that it has not come to his or her knowledge-

(i) that such act, transaction or occurrence took place; or

(ii) that such functionary performed such act or took part in such transaction,

and that there is no record thereof, shall, upon its mere production at such proceedings, be *prima facie* proof that the act, transaction or occurrence in question did not take place or, as the case may be, that the functionary concerned did not perform the act in question or did not take part in the transaction in question.

(2) Whenever in criminal proceedings the question arises whether any person bearing a particular name did or did not furnish any particular officer in the service of the State or of a provincial administration with any particular information or document, a document purporting to be an affidavit made by a person who in that affidavit alleges that he or she is the said officer and that no person bearing the said name furnished him or her with such information or document, shall, upon its mere production at such proceedings, be *prima facie* proof that the said person did not furnish the said officer with any such information or document.

(3) Whenever in criminal proceedings the question arises whether any matter has been registered under any law or whether any fact or transaction has been recorded thereunder or whether anything connected therewith has been done thereunder, a document purporting to be an affidavit made by a person who in that affidavit alleges that he or she is the person upon whom the law in question confers the power or imposes the duty to register such matter or to record such fact or transaction or to do such thing connected therewith and that he or she has registered the matter in question or that he or she has recorded the fact or transaction in question or that he or she has done the thing connected therewith or that he or she has satisfied him or herself that the matter in question was registered or that the fact or transaction in question was recorded or that the thing connected therewith was done, shall, upon its mere production at such proceedings, be *prima facie* proof that such matter was registered or, as the case may be, that such fact or transaction was recorded or that the thing connected therewith was done.

(4) (a)...

(5) Whenever the question as to the existence and nature of a precious metal or any precious stone is or may become relevant to the issue in criminal proceedings, a document purporting to be an affidavit made by a person who in that affidavit alleges that he or she is an appraiser of precious metals or precious stones, that he or she is in the service of the State, that such precious metal or such precious stone is indeed a precious metal or a precious stone, as the case may be, that it is a precious metal or a precious stone of a particular kind and appearance and that the mass or value of such precious metal or such precious stone is as specified in that affidavit, shall, upon its mere production at such proceedings, be *prima facie* proof that it is a precious metal or a precious stone of a particular kind and appearance and the mass or value of such precious metal or such precious stone is as so specified.

(6) In criminal proceedings in which the finding of or action taken in connection with any particular finger-print or palm-print is relevant to the issue, a document purporting to be an affidavit made by a person who in that affidavit alleges that he or she is in the service of the State and that he or she in the performance of his or her official duties-

- (a) found such finger-print or palm-print at or in the article or in the position or circumstances stated in the affidavit; or
- (b) dealt with such finger-print or palm-print in the manner stated in the affidavit,

shall, upon the mere production thereof at such proceedings, be *prima facie* proof that such finger-print or palm-print was so found or, as the case may be, was so dealt with.

(7) In criminal proceedings in which the physical condition or the identity, in or at any hospital, nursing home, ambulance or mortuary, of any deceased person or of any dead body is relevant to the issue, a document purporting to be an affidavit made by a person who in that affidavit alleges-

- (a) that he or she is employed at or in connection with the hospital, nursing home, ambulance or mortuary in question; and
- (b) that he or she during the performance of his or her official duties observed the physical characteristics or condition of the deceased person or of the dead body in question; and

- (c) that while the deceased person or the dead body in question was under his or her care, such deceased person or such dead body had or sustained the injuries or wounds described in the affidavit, or sustained no injuries or wounds; or
- (d) that he or she pointed out or handed over the deceased person or the dead body in question to a specified person or that he or she left the deceased person or the dead body in question in the care of a specified person or that the deceased person or the dead body in question was pointed out or handed over to him or her or left in his or her care by a specified person,

shall, upon the mere production thereof at such proceedings, be *prima facie* proof of the matter so alleged.

(8) ...

(9) In criminal proceedings in which it is relevant to prove-

- (a) the details of any consignment of goods delivered to the Railways Administration for conveyance to a specified consignee, a document purporting to be an affidavit made by a person who in that affidavit alleges-
 - (i) that he or she consigned the goods set out in the affidavit to a consignee specified in the affidavit;
 - (ii) that, on a date specified in the affidavit, he or she delivered such goods or caused such goods to be delivered to the Railways Administration for conveyance to such consignee, and that the consignment note referred to in such affidavit relates to such goods,

shall, upon the mere production thereof at such proceedings, be *prima facie* proof of the matter so alleged; or

- (b) that the goods referred to in paragraph (a) were received by the Railways Administration for conveyance to a specified consignee or that such goods were handled or transhipped en route by the Railways Administration, a document purporting to be an affidavit made by a person who in that affidavit alleges-
 - (i) that he or she at all relevant times was in the service of the Railways Administration in a stated capacity;
 - (ii) that he or she in the performance of his or her official duties received or, as the case may be, handled or transhipped the goods referred to in the consignment note referred to in paragraph (a) ,

shall, upon the mere production thereof at such proceedings, be *prima facie* proof of the matter so alleged.

(10) (a)...

(11) (a)...

(b) An affidavit in which the deponent declares that he or she had satisfied him or herself before using the syringe or receptacle in question-

(i) that the syringe or receptacle was sealed as provided in paragraph (a) (i) and that the seal was intact immediately before the syringe or receptacle was used for the said purpose; and

(ii) that the syringe, receptacle or, as the case may be, the holder contained the endorsement referred to in paragraph (a) (ii),

shall, upon the mere production thereof at the proceedings in question, be *prima facie* proof that the syringe or receptacle was so sealed, that the seal was so intact and that the syringe, receptacle or holder, as the case may be, was so endorsed.

(c) ...

213 Proof of written statement by consent

(1) In criminal proceedings a written statement by any person, other than an accused at such proceedings, shall, subject to the provisions of subsection (2), be admissible as evidence to the same extent as oral evidence to the same effect by such person.

(2) (a) The statement shall purport to be signed by the person who made it, and shall contain a declaration by such person to the effect that it is true to the best of his or her knowledge and belief and that he or she made the statement knowing that, if it were tendered in evidence, he or she would be liable to prosecution if he or she wilfully stated in it anything which he or she knew to be false or which he or she did not believe to be true.

(b) If the person who makes the statement cannot read it, it shall be read to him or her before he or she signs it, and an endorsement shall be made thereon by the person who so read the statement to the effect that it was so read.

(c)...

(f) When the documents referred to in paragraph (c) are served on an accused, the documents shall be accompanied by a written notification in which the accused is informed that the statement in question will be tendered in evidence at his or her trial in lieu of the State calling as a witness the person who made the statement but that such statement shall not without the consent of the accused be so tendered in evidence if he or she notifies the prosecutor concerned, at least two days before the commencement of the proceedings, that he or she objects to the statement so being tendered in evidence.

(3) ...

219A Admissibility of admission by accused

(1) Evidence of any admission made extra-judicially by any person in relation to the commission of an offence shall, if such admission does not constitute a confession of

that offence and is proved to have been voluntarily made by that person, be admissible in evidence against him or her at criminal proceedings relating to that offence: Provided that where the admission is made to a magistrate and reduced to writing by him or her or is confirmed and reduced to writing in the presence of a magistrate, the admission shall, upon the mere production at the proceedings in question of the document in which the admission is contained-

- (a) be admissible in evidence against such person if it appears from such document that the admission was made by a person whose name corresponds to that of such person and, in the case of an admission made to a magistrate or confirmed in the presence of a magistrate through an interpreter, if a certificate by the interpreter appears on such document to the effect that he or she interpreted truly and correctly and to the best of his or her ability with regard to the contents of the admission and any question put to such person by the magistrate; and

...

221 Admissibility of certain trade or business records

(1) In criminal proceedings in which direct oral evidence of a fact would be admissible, any statement contained in a document and tending to establish that fact shall, upon production of the document, be admissible as evidence of that fact if-

(a) ...

- (b) the person who supplied the information recorded in the statement in question is dead or is outside the Republic or is unfit by reason of his or her physical or mental condition to attend as a witness or cannot with reasonable diligence be identified or found or cannot reasonably be expected, having regard to the time which has elapsed since he or she supplied the information as well as all the circumstances, to have any recollection of the matters dealt with in the information he or she supplied.

...

(e) Sections 229 and 230

(aa) Comment by the Department

2.241 This section discusses the Department's comments and recommendations, and the SALRC's responses to those comments.

2.242 The Department proposes that the reference to section 26 of the General Law Amendment Act 32 of 1952 which appears in section 229(2) of the Act under discussion is obsolete. The reason for this proposal is that section 26 was partly repealed by the Civil

Proceedings Evidence Act 25 of 1965, and the remainder by section 344(1) of the Criminal Procedure Act. The Department therefore proposes that subsection (2) of section 229 of the Criminal Procedure Act be repealed.

2.243 The SALRC does not support the above proposal. Section 229(2) provides that the tables in force immediately prior to the commencement of the Criminal Procedure (Act 51 of 1977) by virtue of the provisions of section 26 of the General Law Amendment Act 32 of 1952 **“shall be deemed to be tables approved under subsection (1) of this section”** (emphasis added). The remainder of section 26 of the General Law Amendment Act (32 of 1952) was repealed by section 344 of the Criminal Procedure Act (51 of 1977). However, subsection (2) of section 229 was enacted by the Criminal Procedure Act with full awareness that section 26 of the General Law Amendment Act had been repealed. Section 229(2) therefore specifically reinstated the tables in force prior to the repeal of section 26, and is therefore not redundant.

2.244 The Department proposes that the date of 30 May 1961 in section 230 is obsolete, and that this section should therefore be repealed.

2.245 The SALRC does not support the above proposal, since section 230 regulates the admissibility of evidence and proof of facts which would have been admissible and regarded as sufficient proof of certain facts in terms of the law as it was on 31 May 1961. This includes the admissibility of evidence of the appointment of any person to any public office or the authority of any person to act as a public officer, and where such evidence would have been deemed sufficient proof of the appointment of any person to any public office or of the authority of any person to act as a public officer. It cannot be said that because 53 years have passed since 1961 it can be taken for granted that there is no longer any person alive, nor any possible case, that might need to make use of this provision to present evidence in court. It may be that in another few years the need for the section will no longer exist. However, the Commission is of the view that the passing of 53 years is not yet long enough to conclude that as a matter of fact the section is no longer needed. The recommendations of the Department are therefore not included in this discussion paper.

(f) Sections 234 to 236A

(aa) SALRC recommendations

2.246 It is recommended that sections 234 to 236A be amended as follows:

234 Proof of official documents

(1) It shall, at criminal proceedings, be sufficient to prove an original official document which is in the custody or under the control of any State official by virtue of his or her office, if a copy thereof or an extract therefrom, certified as a true copy or extract by the head of the department concerned or by any State official authorized thereto by such head, is produced in evidence at such proceedings.

(2) (a) An original official document referred to in subsection (1), other than the record of judicial proceedings, may be produced at criminal proceedings only upon the order of the **[attorney-general]** Director of Public Prosecutions.

...

236 Proof of entries in accounting records and documentation of banks

(1) The entries in the accounting records of a bank, and any document which is in the possession of any bank and which refers to the said entries or to any business transaction of the bank, shall, upon the mere production at criminal proceedings of a document purporting to be an affidavit made by any person who in that affidavit alleges-

(a) that he or she is in the service of the bank in question;

(b) ...

(2) Any entry in any accounting record referred to in subsection (1) or any document referred to in subsection (1) may be proved at criminal proceedings upon the mere production at such proceedings of a document purporting to be an affidavit made by any person who in that affidavit alleges-

(a) that he or she is in the service of the bank in question;

(b) that he or she has examined the entry, accounting record or document in question; and

(c) that a copy of such entry or document set out in the affidavit or in an annexure thereto is a correct copy of such entry or document.

(3) ...

236A Proof of entries in accounting records and documentation of banks in countries outside Republic

(1) The entries in the accounting records of an institution in a state or territory

outside the Republic which is similar to a bank in the Republic, and any document which is in the possession of such an institution and which refers to the said entries or to any business transaction of the institution, shall, upon the mere production at criminal proceedings of a document purporting to be an affidavit made by any person who in that affidavit alleges-

(a) ...that he or she is in the service of the institution in question;

(b)

(2) Any entry in any accounting record contemplated in subsection (1) or any document contemplated in subsection (1) may be proved at criminal proceedings upon the mere production at such proceedings of a document purporting to be an affidavit made by any person who in that affidavit alleges-

(a) that he or she is in the service of the institution in question;

(b) that he or she has examined the entry, accounting record or document in question; and

(c) that a copy of such entry or document set out in the affidavit or in an annexure thereto is a correct copy of such entry or document.

(3) ...

(g) Sections 240 to 250

(aa) Comment and recommendations by the Department

2.247 This section discusses the Department's comments and recommendations, and the SALRC's responses to those comments.

2.248 The Department points out that Sections 240, 241, 243, 248 and 250 of the Act are not listed for amendment, but contain references to "he" and "his". The SALRC agrees with this comment, and the amendments proposed are included in our recommendations. The Department also points out that the reference to "State President" in section 244 of the Act is obsolete. We agree with this comment, and the phrase should be amended to read "President". The Department similarly points out that the term "Secretary for Foreign Affairs" in section 247 of the Act is obsolete. We agree with this comment and the phrase should be replaced by "Director-General of International Relations and Cooperation".

2.249 The Department proposes that section 250(3) of the Act refers to a fine in specific

monetary terms or alternatively imprisonment. The Department proposes that this subsection should be amended in keeping with many other current penalty provisions by deleting the monetary value, so that the provision refers to a fine or imprisonment for a certain period. The Adjustment of Fines Act 101 of 1991 would then apply. The SALRC does not support this proposal and we submit that the wording of the Adjustment of Fines Act is such that it does not require an amendment of all penalty clauses in legislation to become effective. Furthermore, an amendment here would require a massive review of all legislation, Regulations and subordinate legislation to identify all the penalty clauses for amendment in order to have a consistent approach throughout the statute book.

2.250 The Department noted that the definition of "Railway and Harbour Fund" was repealed by section 36(6) of the Legal Succession to the South African Transport Services Act 9 of 1989. However, the Legal Succession to the South African Transport Services Act, which repealed the Fund, provides (in section 36) for the manner in which a reference to the Fund is to be interpreted in the future. The Department therefore proposes that the reference to the "Railway and Harbour Fund" in section 250(2) of the Act be qualified and interpreted with the inclusion of a reference to section 36(6) of the Legal Succession to the South African Transport Services Act 9 of 1989, rather than being repealed as a matter of course. We agree with the comment.

2.251 In section 251 of the Criminal Procedure Act, reference is made to "stamp duty". The Stamp Duties Act 77 of 1968 was repealed by the Revenue Laws Amendment Act 60 of 2008, and the Department therefore recommends that this section be repealed.

2.252 The Commission does not support the proposal in the paragraph above. The fact that stamp duty was repealed in 2008 does not mean that such documentary evidence cannot be the subject of evidence. If section 251 is deleted, such evidence would be subject to an admissibility enquiry, whereas the section as it stands now makes it clear that the fact that evidence has not been stamped does not make it inadmissible. The recommendation therefore is not supported.

(bb) SALRC recommendations

2.253 It is recommended that sections 240 to 250 be amended as outlined below; no amendment is proposed to section 251:

240. Evidence on charge of receiving stolen property

(1) At criminal proceedings at which an accused is charged with receiving stolen property which he or she knew to be stolen property, evidence may be given at any stage of the proceedings that the accused was, within the period of twelve months immediately preceding the date on which he or she first appeared in a magistrate's court in respect of such charge, found in possession of other stolen property: Provided that no such evidence shall be given against the accused unless at least three days' notice in writing has been given to him or her that it is intended to adduce such evidence against him or her.

(2) ...

(3) Where the accused is proved to have received the property which is the subject of the charge, from a person under the age of eighteen years, he or she shall be presumed to have known at the time when he or she received such property that it was stolen property, unless it is proved -

- (a) that the accused was at that time under the age of twenty-one years; or
- (b) that the accused had good cause, other than the mere statement of the person from whom he or she received such property, to believe, and that he or she did believe, that such person had the right to dispose of such property.

241. Evidence of previous conviction on charge of receiving stolen property

If at criminal proceedings at which an accused is charged with receiving stolen property which he or she knew to be stolen property, it is proved that such property was found in the possession of the accused, evidence may at any stage of the proceedings be given that the accused was, within the five years immediately preceding the date on which he or she first appeared in a magistrate's court in respect of such charge, convicted of an offence involving fraud or dishonesty, and such evidence may be taken into consideration for the purpose of proving that the accused knew that the property found in his or her possession was stolen property: Provided that not less than three days' notice in writing shall be given to the accused that it is intended to adduce evidence of such previous conviction.

243. Evidence of receipt of money or property and general deficiency on charge of theft

(1) At criminal proceedings at which an accused is charged with theft -

- (a) while employed in any capacity in the service of the State, of money or of property which belonged to the State or which came into the possession of the accused by virtue of his or her employment;
- (b) while a clerk, servant or agent, of money or of property which belonged to his or her employer or principal or which came into the possession of the accused on account of his or her employer or principal,

an entry in any book of account kept by the accused or kept under or subject to his or her charge or supervision, and which purports to be an entry of the receipt of

money or of property, shall be proof that such money or such property was received by the accused.

(2) ...

244. Evidence on charge relating to seals and stamps

At criminal proceedings at which an accused is charged with any offence relating to any seal or stamp used for the purposes of the public revenue or of the post office in any foreign country, a despatch purporting to be from the officer administering the government of such country and transmitting to the **[State]** President any stamp, mark or impression and stating it to be a genuine stamp, mark or impression of a die-plate or other instrument provided or made or used by or under the direction of the proper authority of such country for the purpose of denoting stamp duty or postal charge, shall on its mere production at such proceedings be prima facie proof of the facts stated in the despatch.

247. Presumptions relating to absence from Republic of certain persons

Any document, including any newspaper, periodical, book, pamphlet, letter, circular letter, list, record, placard or poster, on the face whereof it appears that a person of a name corresponding to that of an accused person has at any particular time been outside the Republic or has at any particular time made any statement outside the Republic, shall, upon the mere production thereof by the prosecution at criminal proceedings, be prima facie proof that the accused was outside the Republic at such time or, as the case may be, that the accused made such statement outside the Republic at such time, if such document is accompanied by a certificate, purporting to have been signed by the **[Secretary for Foreign Affairs]** Director-General of International Relations and Cooperation, to the effect that he or she is satisfied that such document is of foreign origin.

248. Presumption that accused possessed particular qualification or acted in particular capacity

(1) If an act or an omission constitutes an offence only when committed by a person possessing a particular qualification or quality, or vested with a particular authority or acting in a particular capacity, an accused charged with such an offence upon a charge alleging that he or she possessed such qualification or quality or was vested with such authority or was acting in such capacity, shall, at criminal proceedings, be deemed to have possessed such qualification or quality or to have been vested with such authority or to have been acting in such capacity at the time of the commission of the offence, unless such allegation is at any time during the criminal proceedings expressly denied by the accused or is disproved.

(2) ...

250. Presumption of lack of authority

(1) If a person would commit an offence if he or she -

- (a) carried on any occupation or business;
- (b) performed any act;
- (c) owned or had in his or her possession or custody or used any article;

- (d) or
was present at or entered any place,

without being the holder of a licence, permit, permission or other authority or qualification (in this section referred to as the “necessary authority”), an accused shall, at criminal proceedings upon a charge that he or she committed such an offence, be deemed not to have been the holder of the necessary authority, unless the contrary is proved.

- (2) (a) Any peace officer and, where any fee payable for the necessary authority would accrue to the National Revenue Fund or the Railway and Harbour Fund as referred to in section 36(4) of the Legal Succession to the South African Transport Services Act, 1989 (Act 9 of 1989) or a provincial revenue fund, any person authorized thereto in writing by the head of the relevant department or sub-department or by the officer in charge of the relevant office, may demand the production from a person referred to in subsection (1) of the necessary authority which is appropriate.
- (b) Any peace officer, other than a police official in uniform, and any person authorized under paragraph (a) shall, when demanding the necessary authority from any person, produce at the request of that person, his or her authority to make the demand.
- (3) ...

(h) Sections 252 to 281

(aa) Comments by the Department

2.254 This section discusses the Department’s comments and recommendations, and the SALRC’s responses to those comments.

2.255 The Department notes that the SALRC must take cognizance of the Judicial Matters Amendment Bill, 2011, which was passed by Parliament in 2013.³⁵ This Amendment Act introduced sections 271DA and 271DB in the Act to provide for matters relating to expungement. The Department also draws attention to the draft Second Judicial Matters Amendment Bill, 2011, which will be introduced into Parliament. This Bill proposes to amend section 274(2) of the Act by swapping the positions of the words "accused" and "prosecution".

2.256 The SALRC must also be aware that the Judicial Matters Amendment Bill, 2011, which

³⁵ Act 42/2013 w.e.f. 22 January 2014.

has been passed in Parliament,³⁶ proposes an amendment to section 276A in the Act. This would bring the Act in line with the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

2.257 The amendments above are noted, and do not affect the Commission's recommendations in this discussion paper.

2.258 The Department proposes the repeal of section 281 of the Act because it is obsolete. This section is printed below. The Commission does not support its repeal, as there is no basis to say that it is redundant. We submit that it cannot be accepted as fact that all the offences referred to in section 81 no longer exist, and that the provision to clarify punishment in such cases is no longer needed in this section.

281. Interpretation of certain provisions in laws relating to imprisonment and fines

In construing any provision of any law (not being an Act of Parliament passed on or after the first day of September, 1959, or anything enacted by virtue of powers conferred by such an Act), in so far as it prescribes or confers the powers to prescribe a punishment for any offence, any reference in that law -

- (a) to imprisonment with or without any form of labour, shall be construed as a reference to imprisonment only;
- (b) to any period of imprisonment of less than three months which may not be exceeded in imposing or prescribing a sentence of imprisonment, shall be construed as a reference to a period of imprisonment of three months;
- (c) to any fine of less than fifty rand which may not be exceeded in imposing or prescribing a fine, shall be construed as a reference to a fine of fifty rand

(bb) SALRC recommendations

2.259 It is recommended that sections 252A to 271 be amended as follows:

252A Authority to make use of traps and undercover operations and admissibility of evidence so obtained

- (1) ...
- (2) ...

³⁶ Act 42/2013 w.e.f. 22 January 2014

- (a) Whether, prior to the setting of a trap or the use of an undercover operation, approval, if it was required, was obtained from the **[attorney-general] Director of Public Prosecutions** to engage such investigation methods and the extent to which the instructions or guidelines issued by the **[attorney-general] Director of Public Prosecutions** were adhered to;

271 Previous convictions may be proved

(1) The prosecution may, after an accused has been convicted but before sentence has been imposed upon him or her, produce to the court for admission or denial by the accused a record of previous convictions alleged against the accused.

(2) The court shall ask the accused whether he or she admits or denies any previous conviction referred to in subsection (1).

(i) Sections 285 to 297

(aa) Recommendation in the Consultation Paper

2.260 The SALRC recommended that sections 285 be amended as follows:

285 Periodical imprisonment

(1) ...

(2) (a) The court which imposes a sentence of periodical imprisonment upon any person shall cause to be served upon **[him] that person** a notice in writing directing him or her to surrender **[himself]** on a date and at a time specified in the notice or (if prevented from doing so by circumstances beyond his or her control) as soon as possible thereafter, to the officer in charge of a place so specified, whether within or outside the area of jurisdiction of the court, for the purpose of undergoing such imprisonment.

(b) ...

(3) ...

(4) Any person who-

(a) without lawful excuse, the proof whereof shall be on such person, fails to comply with a notice issued under subsection (2); or

(b) when surrendering him or herself for the purpose of undergoing periodical imprisonment, is under the influence of intoxicating liquor or drugs or the like; or

- (c) impersonates or falsely represents him or herself to be a person who has been directed to surrender him or herself for the purpose of undergoing periodical imprisonment,

shall be guilty of an offence and liable on conviction to imprisonment for a period not exceeding three months.

- (5) ...

(bb) Comments and recommendations by the Department

2.261 This section discusses the Department's comments and recommendations, and the SALRC's responses to those comments.

2.262 The Department notes that section 286B of the Act contains references to "he", "him", "Commissioner", and "attorney-general", which must be amended. Similarly, section 287 of the Act contains references to "Supreme Court", "he", "him", and "Commissioner", which must be amended. Section 296 of the Act contains a reference to the Prevention and Treatment of Drug Dependency Act, 1992. This Act was repealed by section 66(1) of the Prevention of and Treatment for Substance Abuse Act 70 of 2008), which will come into operation on a date to be fixed by the President by proclamation in the *Gazette*. The comment is noted and supported. In addition section 286A is added to the list of recommended amendments because of exclusive references to "he", "him" and "his". It is recommended that the sections 286, 286A, 286B, 287, 288 and 296 be amended as follows:

(cc) SALRC recommendation

286. Declaration of certain persons as habitual criminals

(1) Subject to the provisions of subsection (2), a superior court or a regional court which convicts a person of one or more offences, may, if it is satisfied that the said person habitually commits offences and that the community should be protected against him or her, declare him or her an habitual criminal, in lieu of the imposition of any other punishment for the offence or offences of which he or she is convicted.

- (2) No person shall be declared an habitual criminal -
- (a) if he or she is under the age of eighteen years; or
 - (b) ...

- (c) if in the opinion of the court the offence warrants the imposition of punishment which by itself or together with any punishment warranted or required in respect of any other offence of which the accused is simultaneously convicted, would entail imprisonment for a period exceeding 15 years.

(3) A person declared an habitual criminal shall be dealt with in accordance with the laws relating to **[prisons]** correctional centres.

286A. Declaration of certain persons as dangerous criminals

(1) Subject to the provisions of subsections (2), (3) and (4), a superior court or a regional court which convicts a person of one or more offences, may, if it is satisfied that the said person represents a danger to the physical or mental well-being of other persons and that the community should be protected against him or her, declare him or her a dangerous criminal.

(2) (a) ...

(b) Before the court commits an accused for an enquiry in terms of subsection (3), the court shall inform such accused of its intention and explain to him or her the provisions of this section and of section 286B as well as the gravity of those provisions.

(3) (a) Where a court issues a direction under subsection (2)(a), the relevant enquiry shall be conducted and be reported on -

(i) ...

(ii) by a psychiatrist appointed by the accused if he or she so wishes.

(b) (i) The court may for the purposes of such enquiry commit the accused to a psychiatric hospital or other place designated by the court, for such periods, not exceeding 30 days at a time, as the court may from time to time determine, and if an accused is in custody when he or she is so committed, he or she shall, while he or she is so committed, be deemed to be in the lawful custody of the person or the authority in whose custody he or she was at the time of such committal.

(ii) When the period of committal is extended for the first time under subparagraph (i), such extension may be granted in the absence of the accused unless the accused or his or her legal representative requests otherwise.

(c) The relevant report shall be in writing and shall be submitted in triplicate to the registrar or the clerk of the court, as the case may be, who shall make a copy thereof available to the prosecutor and the accused or his or her legal representative.

(d) ...

(e) If the persons conducting the enquiry are not unanimous in their finding under paragraph (d)(ii), such fact shall be mentioned in the report and

each of such persons shall give his or her finding on the matter in question.

- (f) ...
 - (i) Where the list compiled and kept in terms of section 79(9) does not include a sufficient number of psychiatrists who may conveniently be appointed for any enquiry under this subsection, a psychiatrist may be appointed for the purposes of such enquiry notwithstanding that his or her name does not appear on such list.
 - (j) A psychiatrist designated or appointed under paragraph (a) and who is not in the full-time service of the State, shall be compensated for his or her services in connection with the enquiry, including giving evidence, from public funds in accordance with a tariff determined by the Minister in consultation with the Minister of **[State Expenditure]** Finance.
 - (k) For the purposes of this subsection a psychiatrist means a person registered as a psychiatrist under the **[Medical, Dental and Supplementary]** Health **[Service]** Professions Act, 1974 (Act No. 56 of 1974).
- (4) (a) ...
 - (b) ...
 - (c) ...

286B. Imprisonment for indefinite period

- (1) ...
- (2) A person sentenced under subsection (1) to undergo imprisonment for an indefinite period shall, notwithstanding the provisions of subsection (1)(b) but subject to the provisions of subsection (3), within seven days after the expiration of the period contemplated in subsection (1)(b) be brought before the court which sentenced him or her in order to enable such court to reconsider the said sentence: Provided that in the absence of the judicial officer who sentenced the person any other judicial officer of that court may, after consideration of the evidence recorded and in the presence of the person, make such order as the judicial officer who is absent could lawfully have made in the proceedings in question if he or she had not been absent.
- (3) (a) The National Commissioner may, if he or she is of the opinion that owing to practical or other considerations it is desirable that a court other than the court which sentenced the person should reconsider such sentence after the expiration of the period contemplated in subsection (1) (b), with the concurrence of the **[attorney-general]** Director of Public Prosecutions in whose jurisdiction such other court is situated, apply to the registrar or to the clerk of the court, as the case may be, of the other court to have such person appear before the other court for that purpose: Provided that such sentence shall only be reconsidered by a court with jurisdiction equal to that of the court which sentenced the person.
- (b) On receipt of any application referred to in paragraph (a), the registrar or the clerk of the court, as the case may be, shall, after consultation with

the prosecutor, set the matter down for a date which shall not be later than seven days after the expiration of the period contemplated in subsection (1) (b).

(c) The registrar or the clerk of the court, as the case may be, shall for the purpose of the reconsideration of the sentence -

(i) within a reasonable time before the date contemplated in paragraph (b) submit the case record to the judicial officer who is to reconsider the sentence; and

(ii) inform the National Commissioner in writing of the date for which the matter has been set down.

(4) (a) Whenever a court reconsiders a sentence in terms of this section, it shall have the same powers as it would have had if it were considering sentence after conviction of a person and the procedure adopted at such proceedings shall apply *mutatis mutandis* during such reconsideration: Provided that the court shall make no finding before it has considered a report of a parole board as contemplated in section **[5C of the Correctional Services Act, 1959 (Act No. 8 of 1959)]** 75 of the Correctional Services Act, 1998 (Act No 111 of 1998).

(b) ...

(5) A court which has converted the sentence of a person under subsection (4)(b)(ii) may, whether differently constituted or not -

(a) at any time, if it is found from a motivated recommendation by the National Commissioner that that person is not fit to be subject to correctional supervision; or

(b) after such person has been brought before the court in terms of section **[84B] 75(1)** of the Correctional Services Act, **[1959 (Act No. 8 of 1959)]**, 1998 (Act No. 111 of 1998) reconsider that sentence and -

(i) confirm the sentence of imprisonment for an indefinite period, in which case the court shall direct that such person be brought before the court on the expiration of a further period determined by it, which shall not exceed the jurisdiction of the court; release the person unconditionally or on such conditions as it deems fit; or

(ii) where the person is brought before the court in terms of paragraph (b), again place the person under correctional supervision on the conditions it deems fit and for a period which shall not exceed the unexpired portion of the period of correctional supervision as converted in terms of subsection (4)(b)(ii).

...

287. Imprisonment in default of payment of fine

(1)

(2) Whenever a court has imposed upon any person a fine without an alternative sentence of imprisonment and the fine is not paid in full or is not recovered in full in

terms of section 288, the court which passed sentence on such person (or if that court was a circuit local division of the **[Supreme] High** Court, then the **[provincial or local]** division of the **[Supreme] High** Court within whose area of jurisdiction such sentence was imposed) may issue a warrant directing that the person **[he]** be arrested and brought before the court, which may thereupon sentence **[him]** that person to such term of imprisonment as could have been imposed **[]** as an alternative punishment in terms of subsection (1).

(3) ...

(4) Unless the court which has imposed a period of imprisonment as an alternative to a fine has directed otherwise, the **National** Commissioner or a parole board may in **[his or its]** their discretion at the commencement of the alternative punishment or at any point thereafter, if it does not exceed five years -

- (a) act as if the person were sentenced to imprisonment as referred to in section 276(1)(i); or
- (b) apply in accordance with the provisions of section 276A(3) for the sentence to be reconsidered by the court a quo, and thereupon the provisions of section 276A(3) shall apply *mutatis mutandis* to such a case.

288. Recovery of fine

(1) (a) Whenever a person is sentenced to pay a fine, the court passing the sentence may, in its discretion, issue a warrant addressed to the sheriff or messenger of the court authorizing him or her to levy the amount of the fine by attachment and sale of any movable property belonging to such person although the sentence directs that, in default of payment of the fine, such person shall be imprisoned.

- (b) The amount which may be levied shall be sufficient to cover, in addition to the fine, the costs and expenses of the warrant and of the attachment and sale thereunder.

(2) ...

(3) When a person is sentenced only to a fine or, in default of payment of the fine, imprisonment and the court issues a warrant under this section, it may suspend the execution of the sentence of imprisonment and may release the person upon his or her executing a bond with or without sureties as the court thinks fit, on condition that he or she appears before such court or some other court on the day appointed for the return of such warrant, such day being not more than fifteen days from the time of executing the bond, and in the event of the amount of the fine not being recovered, the sentence of imprisonment may be carried into execution forthwith or may be suspended as before for a further period or periods of not more than fifteen days, as the court may deem fit.

(4) In any case in which an order for the payment of money is made on non-recovery whereof imprisonment may be ordered, and the money is not paid forthwith, the court may require the person ordered to make such payment to enter into a bond as prescribed in subsection (3), and in default of his or her doing so, may at once pass sentence of imprisonment as if the money had not been recovered.

296. Committal to treatment centre

(1) A court convicting any person of any offence may, in addition to or in lieu of any sentence in respect of such offence, order that the person be detained at a treatment centre established under the Prevention of and Treatment **[of Drug Dependency]** for Substance Abuse Act, **[1992] 2008 (Act 70 of 2008)** if the court is satisfied from the evidence or from any other information placed before it, which shall in either of the said cases include the report of a probation officer, that such person is a person as is described in **section [21] 33** (1) of the said Act, [and such order shall for the purposes of the said Act be deemed to have been made under section **[22] 35** thereof: Provided that such order shall not be made in addition to any sentence of imprisonment (whether direct or as an alternative to a fine) unless the operation of the whole of such sentence is suspended.

297 Conditional or unconditional postponement or suspension of sentence, and caution or reprimand

(1) Where a court convicts a person of any offence, other than an offence in respect of which any law prescribes a minimum punishment, the court may in its discretion -

(a) postpone for a period not exceeding five years the passing of sentence and release the person concerned -

(i) on one or more conditions, whether as to -

(aa) ...

(cc) the performance without remuneration and outside the **[prison] correctional centre** of some service for the benefit of the community under the supervision or control of an organization or institution which, or person who, in the opinion of the court, promotes the interests of the community (in this section referred to as community service);

...

(2) Where a court has under paragraph (a) (i) of subsection (1) postponed the passing of sentence and the court, whether differently constituted or not, is at the expiration of the relevant period satisfied that the person concerned has observed the conditions imposed under that paragraph, the court shall discharge him or her without passing sentence, and such discharge shall have the effect of an acquittal, except that the conviction shall be recorded as a previous conviction.

(3) ...

(8) A court which has-

(a) postponed the passing of sentence under paragraph (a) (i) of subsection (1); or

(b) suspended the operation of a sentence under subsection (1) (b) or under subsection (4),

on condition that the person concerned perform community service or that he or she submit himself or herself to instruction or treatment or to the supervision or control of a probation officer or that he or she attend or reside at a specified

centre for a specified purpose, may, whether or not the court is constituted differently than it was at the time of such postponement or suspension, at any time during the period of postponement or suspension on good cause shown amend any such condition or substitute any other competent condition for such condition, or cancel the order of postponement or suspension and impose a competent sentence or put the suspended sentence into operation, as the case may be.

- (8A) (a) A court which under this section has imposed a condition according to which the person concerned is required to perform community service, to undergo instruction or treatment or to attend or reside at a specified centre for a specified purpose, shall cause to be served upon the person concerned a notice in writing directing him or her to report on a date and time specified in the notice or (if prevented from doing so by circumstances beyond his or her control) as soon as practicable thereafter, to the person specified in that notice, whether within or outside the area of jurisdiction of the court, in order to perform that community service, to undergo that instruction or treatment or to attend that centre or to reside thereat, as the case may be.

(b) ...

(8B) Any person who-

(a) when he or she reports to perform community service, to undergo instruction or treatment or to attend or reside at a specified centre for a specified purpose, is under the influence of intoxicating liquor or drugs or the like; or

(b) impersonates or falsely represents himself or herself to be the person who has been directed to perform the community service in question, to undergo the instruction or treatment in question or to attend or reside at the specified centre for the specified purpose,

shall be guilty of an offence and liable on conviction to imprisonment for a period not exceeding three months.

(9) ...

(j) Sections 297A to 309D

(aa) Comments and recommendations by the Department

2.263 This section discusses the Department's comments and recommendations, and the SALRC's responses to those comments.

2.264 The Department commented as follows (numbering ours):

- 1) Section 297A of the Act contains a reference to "Director-General: Justice" that must be amended to "Director-General: Justice and Constitutional Development".
- 2) Section 297B of the Act contains references to "State President" that must be amended.
- 3) Section 299A of the Act contains references to "Commissioner of Correctional Services" that must be amended.
- 4) Section 301 of the Act contains references to "he", "him" and "his", which must be amended.
- 5) In section 302(1)(a)(i) of the Act, reference is made to "the Children's Act, 2005 (Act No. 32 of 2005)". Act No. 32 of 2005 is in fact the Revenue Laws Second Amendment Act, 2005. The reference should be to Act No. 38 of 2005.
- 6) Sections 303, 304 and 304A of the Act contain references to "provincial or local division", "he" and "his", which must be amended.
- 7) Section 306 of the Act contains references to "provincial or local division" and "attorney-general", which must be amended.
- 8) Section 307 of the Act contains references to "he" and "his" that must be amended.
- 9) The SALRC must take cognizance of the Judicial Matters Amendment Bill, 2011, which will be introduced to Parliament. This Bill proposes amendments to sections 309, 309B and 309D of the Act to bring it in line with the Child Justice Act, 2008.

2.265 The Commission notes the comment on the Bill in point 9 above, but the amendments referred to do not affect the recommendations in this investigation. We agree with the other comments (points 1 to 8) and have included the relevant amendments in our recommendations.

(bb) SALRC recommendations

2.266 It is recommended that sections 297A to 309D be amended as follows:

297A. Liability for patrimonial loss arising from performance of community service

- (1) If patrimonial loss may be recovered from an accused on the ground of a delict committed by him or her in the performance of community service in terms of section 297, that loss may, subject to subsection (3), be recovered from the State.

(2) ...

(5) If any person as a result of the performance of community service in terms of section 297 has suffered patrimonial loss which cannot be recovered from the State in terms of subsection (1), the Director-general: Justice and Constitutional Development may, with the concurrence of the Treasury, as an act of grace pay such amount as he or she may deem reasonable to that person.

297B. Agreement on operation of suspended sentences

(1) The **[State]** President may, on such conditions as he or she may deem necessary, enter into an international agreement with any state, so as to provide, on a reciprocal basis, for the putting into operation of suspended sentences in respect of persons convicted, within the jurisdiction of the Republic or of such state, of an offence mentioned in the agreement.

(2) The **[State]** President may, if the parties agree, amend such an agreement to the extent which he or she deems necessary.

(3) If an application is made for a suspended sentence, imposed by a court of a state referred to in subsection (1), to be put into operation, the court at which the application is made shall, subject to the terms of the agreement, proceed with that application as if the suspended sentence was imposed by a court in the Republic.

(4) (a) An agreement referred to in subsection (1), or any amendment thereof, shall only be in force after it has been published by the **[State]** President by proclamation in the *Gazette*.

(b) The **[State]** President may at any time and in like manner withdraw any such agreement.

299. Warrant for the execution of sentence

A warrant for the execution of any sentence may be issued by the judge or judicial officer who passed the sentence or by any other judge or judicial officer of the court in question, or, in the case of a regional court, by any magistrate, and such warrant shall commit the person concerned to the **[prison]** correctional centre for the magisterial district in which such person is sentenced.

299A. Right of complainant to make representations in certain matters with regard to placement on parole, on day parole, or under correctional supervision

(1) ...

(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 National Commissioner of Correctional Services thereof in writing;

- (ii) to provide the said National Commissioner with his or her postal and physical address in writing; and
- (iii) to inform the said National Commissioner in writing of any change of address.

(3) The National 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 National 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 National 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.

300. Court may award compensation where offence causes damage to or loss of property

(1) ...

(4) Where money of the person convicted is taken from him or her upon his or her arrest, the court may order that payment be made forthwith from such money in satisfaction or on account of the award.

(5) ...

301. Compensation to innocent purchaser of property unlawfully obtained

Where a person is convicted of theft or of any other offence whereby he or she has unlawfully obtained any property, and it appears to the court on the evidence that such person sold such property or part thereof to another person who had no knowledge that the property was stolen or unlawfully obtained, the court may, on the application of such purchaser and on restitution of such property to the owner thereof, order that, out of any money of such convicted person taken from him or her on his or her arrest, a sum not exceeding the amount paid by the purchaser be returned to him or her.

302. Sentences subject to review in the ordinary course

(1) (a) Any sentence imposed by a magistrate's court -

- (i) which, in the case of imprisonment (including detention in a child and youth care centre providing a programme contemplated in section 191(2)(j) of the Children's Act, 2005 (Act No. **[32] 38** of 2005)), exceeds a period of three months, if imposed by a judicial officer who has not held the substantive rank of magistrate or higher for a period of seven years, or which exceeds a period of

six months, if imposed by a judicial officer who has held the substantive rank of magistrate or higher for a period of seven years or longer;

...

303. Transmission of record

The clerk of the court in question shall within one week after the determination of a case referred to in paragraph (a) of section 302(1) forward to the registrar of the **[provincial] Division** or local **[d]Division of the High Court as referred to in section 6 of the Superior Courts Act 10 of 2013** having jurisdiction the record of the proceedings in the case or a copy thereof certified by such clerk, together with such remarks as the presiding judicial officer may wish to append thereto, and with any written statement or argument which the person convicted may within three days after imposition of the sentence furnish to the clerk of the court, and such registrar shall, as soon as possible, lay the same in chambers before a judge of that division for his or her consideration

304. Procedure on review

(1) If, upon considering the proceedings referred to in section 303 and any further information or evidence which may, by direction of the judge, be supplied or taken by the magistrate's court in question, it appears to the judge that the proceedings are in accordance with justice, he or she shall endorse his certificate to that effect upon the record thereof, and the registrar concerned shall then return the record to the magistrate's court in question.

(2) (a) If, upon considering the said proceedings, it appears to the judge that the proceedings are not in accordance with justice or that doubt exists whether the proceedings are in accordance with justice, **[he] the judge** shall obtain from the judicial officer who presided at the trial a statement setting forth **[his] the** reasons for convicting the accused and for the sentence imposed, and shall thereupon lay the record of the proceedings and the said statement before the court of the **[provincial] Division** or local **[d]Division of the High Court as referred to in section 6 of the Superior Courts Act 10 of 2013** having jurisdiction for consideration by that court as a court of appeal: Provided that where the judge concerned is of the opinion that the conviction or sentence imposed is clearly not in accordance with justice and that the person convicted may be prejudiced if the record of the proceedings is not forthwith placed before the **[provincial] Division** or local **[d]Division of the High Court as referred to in section 6 of the Superior Courts Act 10 of 2013** having jurisdiction, the judge may lay the record of the proceedings before that court without obtaining the statement of the judicial officer who presided at the trial.

(b) ...

(c) Such court, whether or not it has heard evidence, may, subject to the provisions of section 312 -

(i) ...

(v) remit the case to the magistrate's court with instructions to deal with any matter in such manner as the **[provincial] Division** or local **[d]Division of the High Court as referred to in section 6 of the Superior Courts Act 10 of 2013** may think fit; and

- (vi) make any such order in regard to the suspension of the execution of any sentence against the person convicted or the admission of such person to bail, or, generally, in regard to any matter or thing connected with such person or the proceedings in regard to such person as to the court seems likely to promote the ends of justice.

(3) If the court desires to have a question of law or of fact arising in any case argued, it may direct such question to be argued by the **[attorney-general]** Director of Public Prosecutions and by such counsel as the court may appoint.

(4) If in any criminal case in which a magistrate's court has imposed a sentence which is not subject to review in the ordinary course in terms of section 302 or in which a regional court has imposed any sentence, it is brought to the notice of the **[provincial] Division** or local **[d]Division of the High Court as referred to in section 6 of the Superior Courts Act 10 of 2013 having jurisdiction or any judge thereof that the proceedings in which the sentence was imposed were not in accordance with justice, such court or judge shall have the same powers in respect of such proceedings as if the record thereof had been laid before such court or judge in terms of section 303 or this section.**

304A. Review of proceedings before sentence

(a) If a magistrate or regional magistrate after conviction but before sentence is of the opinion that the proceedings in respect of which he or she brought in a conviction are not in accordance with justice, or that doubt exists whether the proceedings are in accordance with justice, he or she shall, without sentencing the accused, record the reasons for his or her opinion and transmit them, together with the record of the proceedings, to the registrar of the **[provincial] [d]Division of the High Court as referred to in Section 6 of the Superior Courts Act 10 of 2013 having jurisdiction, and such registrar shall, as soon as practicable, lay the same for review in chambers before a judge, who shall have the same powers in respect of such proceedings as if the record thereof had been laid before him or her in terms of section 303.**

(b) When a magistrate or a regional magistrate acts in terms of paragraph (a), he or she shall inform the accused accordingly and postpone the case to some future date pending the outcome of the review proceedings and, if the accused is in custody, the magistrate or regional magistrate may make such order with regard to the detention or release of the accused as he or she may deem fit.

306. Accused may set down case for argument

(1) A magistrate's court imposing sentence which under section 302 is subject to review, shall forthwith inform the person convicted that the record of the proceedings will be transmitted within one week, and such person may then inspect and make a copy of such record before transmission or whilst in the possession of the **[provincial] Division** or local **[d]Division of the High Court as referred to in section 6 of the Superior Courts Act 10 of 2013**, and may set down the case for argument before the **[provincial] Division** or local **[d]Division of the High Court as referred to in section 6 of the Superior Courts Act 10 of 2013** having jurisdiction in like manner as if the record had been returned or transmitted to such **[provincial or local] [d] Division** in compliance with any order made by it for the purpose of bringing in review the proceedings of a magistrate's court.

(2) Whenever a case is so set down, whether the offence in question was prosecuted at the instance of the State or at the instance of a private prosecutor, a

written notice shall be served, by or on behalf of the person convicted, upon the **[attorney-general]** Director of Public Prosecutions at his or her office not less than seven days before the day appointed for the argument, setting forth the name and number of the case, the court before which it was tried, the date for which the case has been set down for argument and the grounds or reasons upon which the judgment is sought to be reversed or altered.

(3) Whether such judgment is confirmed or reversed or altered, no costs shall in respect of the proceedings on review be payable by the prosecution to the person convicted or by the person convicted to the prosecution.

307. Execution of sentence not suspended unless bail granted

(1) Subject to the provisions of section 308, the execution of any sentence shall not be suspended by the transmission of or the obligation to transmit the record for review unless the court which imposed the sentence releases the person convicted on bail.

(2) If the court releases such person on bail, the court may -

- (a) if the person concerned was released on bail under section 59 or 60, extend the bail, either in the same amount or any other amount; or
- (b) if such person was not so released on bail, release him or her on bail on condition that he or she deposits with the clerk of the court or with a member of the Department of Correctional Services at the **[prison]** correctional centre where such person is in custody or with any police official at the place where such convicted person is in custody, the sum of money determined by the court in question; or
- (c) on good cause shown, permit such person to furnish a guarantee, with or without sureties, that he or she will pay and forfeit to the State the sum of money determined under paragraph (b), in circumstances under which such sum, if it had been deposited, would be forfeited to the State.

(3) It shall be a condition of the release of the person convicted that he or she shall -

- (a) at a time and place specified by the court; and
- (b) upon service, in the manner prescribed by the rules of court, of a written order upon him or her at a place specified by the court,

surrender him or herself in order that effect may be given to any sentence in respect of the proceedings in question.

(3A) (a) If the order contemplated in subsection (3)(b) is not served on the convicted person within 14 days of the issuing thereof because **[he or she]** that person cannot be found at the address **[given by him or her]** which he or she gave at the time of the granting of bail **[to him or her]**, the bail shall be provisionally cancelled and the bail money provisionally forfeited and a warrant for his or her arrest shall be issued.

(b) The provisions of section 67(2) in respect of the confirmation or the lapsing of the provisional cancellation of bail or the forfeiture of bail money, and making final the provisional forfeiture of bail money, the provisions of section 67(3) in respect of the hearing of evidence, and the

provisions of section 70 in respect of the remission of forfeited bail money, shall *mutatis mutandis* apply in respect of bail pending review.

(4) ...

(k) Sections 310 to 310A

(aa) SALRC recommendations

2.267 It is recommended that sections 310 to be amended as follows:

310 Appeal from lower court by prosecutor

(1) When a lower court has in criminal proceedings given a decision in favour of the accused on any question of law, including an order made under section 85 (2), the **[attorney-general] Director of Public Prosecutions** or, if a body or a person other than the **[attorney-general] Director of Public Prosecutions** or his or her representative, was the prosecutor in the proceedings, then such other prosecutor may require the judicial officer concerned to state a case for the consideration of the provincial or local division having jurisdiction, setting forth the question of law and his or her decision thereon and, if evidence has been heard, his or her findings of fact, in so far as they are material to the question of law.

...

310A Appeal by **[attorney-general] Director of Public Prosecutions against sentence of lower court**

(1) The **[attorney-general] Director of Public Prosecutions** may appeal against a sentence imposed upon an accused in a criminal case in a lower court, to the **[provincial] Division** or local **[d]Division of the High Court** having jurisdiction, provided that an application for leave to appeal has been granted by a judge in chambers.

- (2) (a) A written notice of such an application shall be lodged with the registrar of the **[provincial] Division** or local **[d]Division of the High Court** concerned by the **[attorney-general] Director of Public Prosecutions**, within a period of 30 days of the passing of sentence or within such extended period as may on application on good cause be allowed.
- (b) The notice shall state briefly the grounds for the application.

(3) The **[attorney-general] Director of Public Prosecutions** shall, at least 14 days before the day appointed for the hearing of the application, cause to be served by the deputy sheriff upon the accused in person a copy of the notice, together with a written statement of the rights of the accused in terms of subsection (4): Provided that if the deputy sheriff is not able so to serve a copy of the notice, it may be served in any other manner that may on application be allowed.

(4) An accused may, within a period of 10 days of the serving of such a notice upon him or her, lodge a written submission with the registrar concerned, and the registrar shall submit it to the judge who is to hear the application, and shall send a copy thereof to the **[attorney-general]** Director of Public Prosecutions.

(5) ...

(l) Section 311

(aa) Comment by the Department

2.268 The Department notes that section 311 of the Act contains references to "provincial or local division" that must be amended.

(bb) SALRC recommendation

2.269 The comment is supported and we recommend that the section be amended accordingly, as follows:

311 Appeal to **[Appellate Division] Supreme Court of Appeal**

(1) Where the **[provincial]** Division or local **[d]**Division of the High Court as referred to in section 6 of the Superior Courts Act 10 of 2013 on appeal, whether brought by the **[attorney-general]** Director of Public Prosecutions or other prosecutor or the person convicted, gives a decision in favour of the person convicted on a question of law, the **[attorney-general]** Director of Public Prosecutions or other prosecutor against whom the decision is given may appeal to the **[Appellate Division of the]** Supreme Court of Appeal, which shall, if it decides the matter in issue in favour of the appellant, set aside or vary the decision appealed from and, if the matter was brought before the **[provincial]** Division or local [d]Division of the High Court as referred to in section 6 of the Superior Courts Act 10 of 2013 in terms of-

(a) section 309 (1), re-instate the conviction, sentence or order of the lower court appealed from, either in its original form or in such a modified form as the said **[Appellate Division]** Supreme Court of Appeal may consider desirable; or

(b) ...

(2) If an appeal brought by the **[attorney-general] Director of Public Prosecutions** or other prosecutor under this section or section 310 is dismissed, the court dismissing the appeal may order that the appellant pay the respondent the costs to which the respondent may have been put in opposing the appeal, taxed according to the scale in civil cases of that court: Provided that where the **[attorney-general] Director of Public Prosecutions** is the appellant, the costs which he or she is so ordered to pay shall be paid by the State.

(m) Sections 312 to 314

(aa) SALRC recommendations

2.270 It is recommended that sections 312 to 314 be amended as follows:

312 Review or appeal and failure to comply with subsection (1) (b) or (2) of section 112

(1) ...

(2) When the provision referred to in subsection (1) is complied with and the judicial officer is after such compliance not satisfied as is required by section 112 (1) (b) or 112 (2), he or she shall enter a plea of not guilty whereupon the provisions of section 113 shall apply with reference to the matter.

314 Obtaining presence of convicted person in lower court after setting aside of sentence or order

(1) Where a sentence or order imposed or made by a lower court is set aside on appeal or review and the person convicted is not in custody and the court setting aside the sentence or order remits the matter to the lower court in order that a fresh sentence or order may be imposed or made, the presence before that court of the person convicted may be obtained by means of a written notice addressed to that person calling upon him or her to appear at a stated place and time on a stated date in order that such sentence or order may be imposed or made.

(2) ...

(n) Section 315

(aa) Comment by the Department

2.271 The Department proposes that section 315, subsections (3) and (5), must be amended to bring them in line with the provisions of the Superior Courts Act, 2013.

(bb) SALRC evaluation and recommendation

2.272 The comment is supported and we have proposed amendments accordingly. The Superior Courts Act does away with the former “provincial” divisions; and instead section 6(1) of the Act renames the divisions in the provinces by referring to the seats of the divisions, Apart from these divisions in the provinces, one or more local divisions can be established by the Minister after consultation with the Judicial Service Commission, by notice in the *Gazette*. These divisions are additional to the main seats of the divisions in the provinces referred to in section 6(1) of the Act, In terms of the Act the Minister can determine the area under the jurisdiction of such a local divisions. Section 6(4) provides that if a division has one or more local seats, the main seat of that division has **concurrent appeal jurisdiction** over the area of jurisdiction of any local seat of that division. The Judge President of the division may direct that an appeal against a decision of a single judge or of a magistrates’ court within that area of jurisdiction, may be heard at the main seat of the division. Section 1 of the Act provides that “full court”, in relation to any division, means a court consisting of three judges; which means that appeals may also be heard in local divisions.

2.273 Section 14(2) of the Superior Courts Act provides that for the hearing of any criminal case as a court of first instance, a court of a division must be constituted in the manner prescribed in the applicable law relating to the procedure in criminal matters. This proviso therefore includes the provisions of the Criminal Procedure Act. The proviso is confirmed in subsection (3) of the Superior Court Act which provides that, except where it is in terms of any law required or permitted to be otherwise constituted, a court of a division must be constituted before two judges for the hearing of any civil or criminal appeal. The Judge President or, in the absence of both the Judge President and the Deputy Judge President, a senior available judge, may, where the judges hearing the appeal is not in agreement, at any time before a judgment is handed down, direct that a third judge be added to hear the appeal.

2.274 Section 16 provides that an appeal against any decision of a division as a court of first instance lies, upon leave having been granted by a single judge, either to the Supreme Court of Appeal or to a full court of that division,.. If the court consisted of more than one judge, the appeal lies to the Supreme Court of Appeal. An appeal against any decision of a division on appeal to it, lies to the Supreme Court of Appeal subject to special leave having been granted by the Supreme Court of Appeal.

2.275 Section 17 of the Act deals with leave to appeal, It provides that leave to appeal may only be given where the judge or judges concerned are of the opinion that the appeal would have a reasonable prospect of success or where there is some other compelling reason why the appeal should be heard. Such compelling reasons include conflicting judgments on the matter under consideration; the decision sought on appeal does not fall within the ambit of section 16(2)(a); and, where the decision sought to be appealed, does not dispose of all the issues in the case. Leave to appeal may be granted by the judge or judges against whose decision an appeal is lodged. If the judge or judges are not readily available, leave may be granted by any other judge or judges of the same court or division. If leave to appeal is refused, it may be granted by the Supreme Court of Appeal on application filed with the registrar of that court. The Supreme Court of Appeal may vary any order as to costs made by the judge or judges concerned in refusing leave. Such application must be considered by two judges of the Supreme Court of Appeal designated by the President of the Supreme Court of Appeal.,in the case of a difference of opinion, the application for leave to appeal must also be considered by the President of the Supreme Court of Appeal or any other judge of the Supreme Court of Appeal designated to do so. The judges considering the application may dispose of it without the hearing of oral argument. However, if they are of the opinion that the circumstances so require, they may order that it be argued before them and they may grant or refuse the application or refer it to the court for consideration. The decision of the majority of the judges considering an application for leave to appeal or the decision of the court to grant or refuse the application is final. The President of the Supreme Court of Appeal may, in exceptional circumstances, refer the decision to the court for reconsideration and, if necessary, variation.

2.276 The power to grant leave to appeal is not only limited by the fact that the matter in dispute is incapable of being valued in terms of money. The power is also subject to limitations of any right to appeal specifically imposed by provisions of any other law. Any leave to appeal may be granted subject to the conditions the court concerned may determine. If leave is granted to appeal against a decision of a Division as a court of first instance consisting of a single judge, the judge granting leave must direct that the appeal be heard by a full court of that Division, unless the decision to be appealed involves a question of law of importance. In such

cases granting of leave to appeal may include a consideration of the general application of the question of law in respect of which a decision of the Supreme Court of Appeal is required and whether or not the administration of justice requires consideration of the decision by the Supreme Court of Appeal. In these cases the judge(s) must direct that the appeal be heard by the Supreme Court of Appeal.

2.277 Any direction by the court of a division may be set aside by the Supreme Court of Appeal of its own accord, or on application by any interested party filed with the registrar within one month after the direction was given, and may be replaced by another direction.

2.278 The SALRC recommends that subsections 315(3) and 315(5) be amended to refer to Divisions of the High Court as contemplated in the Superior Courts Act 10 of 2013. In other words, that appeals lie to the Divisions of the High Court having jurisdiction, and that the reference to the appeal procedure in the Witwatersrand Local Division as a separate arrangement for appeals in Gauteng be deleted. Subsection (5) is amended to refer to “full court” as contemplated in the Superior Courts Act 10 of 2013. The proposed wording is as follows:

315. Court of appeal in respect of superior court judgments

(1) (a) ...

(3) An appeal which is to be heard by a full court in terms of a direction under paragraph (a) of subsection (2) which has not been set aside under paragraph (b) of that subsection, shall be heard -

- (a) in the case of an appeal in a criminal case heard by a single judge of a **[provincial d]Division**, by the full court of the **[provincial d] Division** concerned;
- (b) in the case of an appeal in a criminal case heard by a single judge of a local division **[other than the Witwatersrand Local Division]**, by the full court of the **[provincial d]Division** which exercises concurrent jurisdiction in the area of jurisdiction of the local division concerned; or
- (c) in the case of an appeal in a criminal case heard by a single judge of **[the Witwatersrand] a [L]local [D]division**, by the full court of the local division concerned or a full court of a local division designated by the relevant judge president.
 - [(i) by the full court of the Transvaal Provincial Division, unless a direction by the judge president of that provincial division under subparagraph (ii) applies to it; or**

(ii) **by the full court of the said local division if the said judge president has so directed in the particular instance.]**

(4) ...

(5) In this Chapter -

(a) "court of appeal" means, in relation to an appeal which in terms of subsection (3) is heard or is to be heard by a full court, the full court concerned and, in relation to any other appeal, the Supreme Court of Appeal;

(b) "full court" means the court of a **[provincial d]Division [, or the Witwatersrand Local Division,]** sitting as a court of appeal and constituted before three judges as referred to in the Superior Courts Act 10 of 2013.

(o) Sections 316 to 340

(aa) Comments and recommendations by the Department

2.279 This section discusses the Department's comments and recommendations, and the SALRC's responses to those comments.

2.280 The Department makes the following recommendations (numbering ours):

- 1) Section 316B of the Act contains references to "attorney-general" and "Appellate Division" that must be amended.
- 2) Section 317 of the Act contains references to "provincial or local division" that must be amended.
- 3) Sections 318 and 319 of the Act contain references to "attorney-general", "provincial or local division", and "Appellate Division", which must be amended.
- 4) Sections 325 and 327 of the Act contain references to "State President" that must be amended.
- 5) Section 329 of the Act contains a reference to "deputy messenger" that is obsolete, and must be amended.
- 6) Section 331 of the Act contains a reference to "he" that must be amended.
- 7) Sections 334 and 335B of the Act contain references to "he" and "him" that must be amended.

8) Section 338 of the Act contains references to "his" that must be amended.

2.281 The SALRC agrees with all the above comments, and our recommendations include the proposed amendments.

2.282 The Department commented that section 338 also contains references to a fine in specific monetary terms or alternatively imprisonment. The Department proposes that this subsection be amended in keeping with many other current penalty provisions, by deleting the monetary value so that the provision refers only to a fine or imprisonment for a certain period. The Adjustment of Fines Act 101 of 1991 would then apply. The Commission has stated in similar recommendations earlier in this discussion paper that we do not support the Department's recommendation to amend the penalty clauses to bring them in line with the Adjustment of Fines Act.

(bb) SALRC recommendations

2.283 The SALRC recommends that sections 316B to 340 be amended as follows:

316B. Appeal by attorney-general against sentence of superior court

(1) Subject to subsection (2), the **[attorney-general] Director of Public Prosecutions** may appeal to the **[Appellate Division] Supreme Court of Appeal** against a sentence imposed upon an accused in a criminal case in a superior court.

(2) The provisions of section 316 in respect of an application or appeal referred to in that section by an accused, shall apply *mutatis mutandis* with reference to a case in which the **[attorney-general] Director of Public Prosecutions** appeals in terms of subsection (1) of this section.

(3) Upon an appeal in terms of subsection (1) or an application referred to in subsection (2), brought by the **[attorney-general] Director of Public Prosecutions**, the court may order that the State pay the accused concerned the whole or any part of the costs to which the accused may have been put in opposing the appeal or application, taxed according to the scale in civil cases of that court.

317. Special entry of irregularity or illegality

(1) If an accused is of the view that any of the proceedings in connection with or during his or her trial before a High Court are irregular or not according to law, he or she may, either during his or her trial or within a period of 14 days after his or her conviction or within such extended period as may upon application (in this section referred to as an application for condonation) on good cause be allowed, apply for a special entry to be

made on the record (in this section referred to as an application for a special entry) stating in what respect the proceedings are alleged to be irregular or not according to law, and such a special entry shall, upon such application for a special entry, be made unless the court to which or the judge to whom the application for a special entry is made is of the opinion that the application is not made *bona fide* or that it is frivolous or absurd or that the granting of the application would be an abuse of the process of the court.

(2) Save as hereinafter provided, an application for condonation or for a special entry shall be made to the judge who presided at the trial or, if he or she is not available, or, if in the case of a conviction before a circuit court the said court is not sitting, to any other judge of the **[provincial] Division** or local **[d]Division** of which that judge was a member when he or she so presided.

(3) ...

(4) The terms of a special entry shall be settled by the court which or the judge who grants the application for a special entry.

(5) If an application for condonation or for a special entry is refused, the accused may within a period of twenty-one days of such refusal or within such extended period as may on good cause be allowed, by petition addressed to the Chief Justice, apply to the **[Appellate Division] Supreme Court of Appeal** for condonation or for a special entry to be made on the record stating in what respect the proceedings are alleged to be irregular or not according to law, as the case may be, and thereupon the provisions of subsections (7), (8), (9) and (10) of section 316 shall *mutatis mutandis* apply.

318. Appeal on special entry under section 317

(1) If a special entry is made on the record, the person convicted may appeal to the **[Appellate Division] Supreme Court of Appeal** against his or her conviction on the ground of the irregularity stated in the special entry if, within a period of twenty-one days after entry is so made or within such extended period as may on good cause be allowed, notice of appeal has been given to the registrar of the **[Appellate Division] Supreme Court of Appeal** and to the registrar of the **[provincial] Division** or local **[d] Division**, other than a circuit court, within whose area of jurisdiction the trial took place, and of which the judge who presided at the trial was a member when he or she so presided.

(2) The registrar of such **[provincial] Division** or local **[d] Division** shall forthwith after receiving such notice give notice thereof to the **[attorney-general] Director of Public Prosecutions** and shall transmit to the registrar of the **[Appellate Division] Supreme Court of Appeal** a certified copy of the record, including copies of the evidence, whether oral or documentary, taken or admitted at the trial and of the special entry: Provided that with the consent of the accused and the attorney-general, the registrar concerned may, instead of transmitting the whole record, transmit copies, one of which shall be certified, of such parts of the record as may be agreed upon by the attorney-general and the accused to be sufficient, in which event the Appellate Division may nevertheless call for the production of the whole record.

319. Reservation of question of law

(1) If any question of law arises on the trial in a superior court of any person for any offence, that court may of its own motion or at the request either of the prosecutor or the accused reserve that question for the consideration of the **[Appellate Division]**

Supreme Court of Appeal, and thereupon the first-mentioned court shall state the question reserved and shall direct that it be specially entered in the record and that a copy thereof be transmitted to the registrar of the **[Appellate Division]** Supreme Court of Appeal.

(2) ...

325. Saving of power of [State] President to extend mercy

Nothing in this Act shall affect the power of the **[State]** President to extend mercy to any person.

327. Further evidence and free pardon or substitution of verdict by [State] President

(1) ...

(6) (a) The **[State]** President may, upon consideration of the finding or advice of the court under subsection (4) -

(i) direct that the conviction in question be expunged from all official records by way of endorsement on such records, and the effect of such a direction and endorsement shall be that the person concerned be given a free pardon as if the conviction in question had never occurred; or

(ii) substitute for the conviction in question a conviction of lesser gravity and substitute for the punishment imposed for such conviction any other punishment provided by law; or

(iii) ...

(b) The **[State]** President shall direct the Minister to advise the person concerned in writing of any decision taken under paragraph (a), other than a decision taken under subparagraph (iii) of that paragraph, and to publish a notice in the *Gazette* in which such decision, other than a decision taken under the said subparagraph (iii), is set out.

(7) No appeal, review or other proceedings of whatever nature shall lie in respect of

(a) a refusal by the Minister to issue a direction under subsection (1) or by the **[State]** President to act upon the finding or advice of the court under subsection (4) (a); or

(b) any aspect of the proceedings, finding or advice of the court under this section.

329. Court process may be served or executed by police official

Any police official shall, subject to the rules of court, be as qualified to serve or execute any subpoena or summons or other document under this Act as if he or she had been appointed deputy sheriff **[or deputy messenger]** or other like officer of the court.

331. Irregular warrant or process

Any person who acts under a warrant or process which is bad in law on account of a defect in the substance or form thereof shall, if he or she has no knowledge that such warrant or process is bad in law and whether or not such defect is apparent on the face of the warrant or process, be exempt from liability in respect of such act as if the warrant or process were good in law.

332. Prosecution of corporations and members of associations

(1) For the purpose of imposing upon a corporate body criminal liability for any offence, whether under any law or at common law -

(a) ...

(b) the omission, with or without a particular intent, of any act which ought to have been but was not performed by or on instructions given by a director or servant of that corporate body,

in the exercise of his powers or in the performance of his or her duties as such director or servant or in furthering or endeavouring to further the interests of that corporate body, shall be deemed to have been performed (and with the same intent, if any) by that corporate body or, as the case may be, to have been an omission (and with the same intent, if any) on the part of that corporate body.

(2) In any prosecution against a corporate body, a director or servant of that corporate body shall be cited, as representative of that corporate body, as the offender, and thereupon the person so cited may, as such representative, be dealt with as if he or she were the person accused of having committed the offence in question: Provided that -

(a) if the said person pleads guilty, other than by way of admitting guilt under section 57, the plea shall not be valid unless the corporate body authorized him or her to plead guilty;

(b) ..

(c) if the said person, as representing the corporate body, is convicted, the court convicting him or her shall not impose upon him or her in his or her representative capacity any punishment, whether direct or as an alternative, other than a fine, even if the relevant law makes no provision for the imposition of a fine in respect of the offence in question, and such fine shall be payable by the corporate body and may be recovered by attachment and sale of property of the corporate body in terms of section 288;

(d) ...

(3) In criminal proceedings against a corporate body, any record which was made or kept by a director, servant or agent of the corporate body within the scope of his or her activities as such director, servant or agent, or any document which was at any time in the custody or under the control of any such director, servant or agent within the scope of his or her activities as such director, servant or agent, shall be admissible in evidence against the accused.

(4) For the purposes of subsection (3) any record made or kept by a director, servant or agent of a corporate body or any document which was at any time in his or her custody or under his control, shall be presumed to have been made or kept by him or her or to have been in his or her custody or under his or her control within the scope of his or her activities as such director, servant or agent, unless the contrary is proved.

(5) When an offence has been committed, whether by the performance of any act or by the failure to perform any act, for which any corporate body is or was liable to prosecution, any person who was, at the time of the commission of the offence, a director or servant of the corporate body shall be deemed to be guilty of the said offence, unless it is proved that he or she did not take part in the commission of the offence and that he or she could not have prevented it, and shall be liable to prosecution therefor, either jointly with the corporate body or apart therefrom, and shall on conviction be personally liable to punishment therefor.

(6) In criminal proceedings against a director or servant of a corporate body in respect of an offence -

(a) ...

(b) whether or not such corporate body is or was liable to prosecution for the said offence, any document, memorandum, book or record which was drawn up, entered up or kept in the ordinary course of business of that corporate body or which was at any time in the custody or under the control of any director, servant or agent, of such corporate body, in his or her capacity as director, servant or agent, shall be prima facie proof of its contents and admissible in evidence against the accused, unless he or she is able to prove that at all material times he or she had no knowledge of the said document, memorandum, book or record, in so far as its contents are relevant to the offence charged, and was in no way party to the drawing up of such document or memorandum or the making of any relevant entries in such book or record.

(7) When a member of an association of persons, other than a corporate body, has, in carrying on the business or affairs of that association or in furthering or in endeavouring to further its interests, committed an offence, whether by the performance of any act or by the failure to perform any act, any person who was, at the time of the commission of the offence, a member of that association, shall be deemed to be guilty of the said offence, unless it is proved that he or she did not take part in the commission of the offence and that he or she could not have prevented it: Provided that if the business or affairs of the association are governed or controlled by a committee or other similar governing body, the provisions of this subsection shall not apply to any person who was not at the time of the commission of the offence a member of that committee or other body.

(8) In any proceedings against a member of an association of persons in respect of an offence mentioned in subsection (7) any record which was made or kept by any member or servant or agent of the association within the scope of his or her activities as such member, servant or agent, or any document which was at any time in the custody or under the control of any such member, servant or agent within the scope of his or her activities as such member, servant or agent, shall be admissible in evidence against the accused.

(9) For the purposes of subsection (8) any record made or kept by a member or servant or agent of an association, or any document which was at any time in his or her

custody or under his or her control, shall be presumed to have been made or kept by him or her or to have been in his or her custody or under his or her control within the scope of his or her activities as such member or servant or agent, unless the contrary is proved.

...

333. Minister may invoke decision of [Appellate Division] Supreme Court of Appeal on question of law

Whenever the Minister has any doubt as to the correctness of any decision given by any superior court in any criminal case on a question of law, or whenever a decision in any criminal case on a question of law is given by any division of the [**Supreme**] High Court which is in conflict with a decision in any criminal case on a question of law given by any other division of the [**Supreme**] High Court, the Minister may submit such decision or, as the case may be, such conflicting decisions to the [**Appellate Division of the**] Supreme Court of Appeal and cause the matter to be argued before that Court in order that it may determine such question of law for the future guidance of all courts.

334. Minister may declare certain persons peace officers for specific purposes

- (1) (a) The Minister may by notice in the *Gazette* declare that any person who, by virtue of his or her office, falls within any category defined in the notice, shall, within an area specified in the notice, be a peace officer for the purpose of exercising, with reference to any provision of this Act or any offence or any class of offences likewise specified, the powers defined in the notice.
- (b) The powers referred to in paragraph (a) may include any power which is not conferred upon a peace officer by this Act.
- (2) (a) No person who is a peace officer by virtue of a notice issued under subsection (1) shall exercise any power conferred upon him or her under that subsection unless he or she is at the time of exercising such power in possession of a certificate of appointment issued by his or her employer, which certificate shall be produced on demand.
- (b) A power exercised contrary to the provisions of paragraph (a) shall have no legal force or effect.

...

335. Person who makes statement entitled to copy thereof

Whenever a person has in relation to any matter made to a peace officer a statement in writing or a statement which was reduced to writing, and criminal proceedings are thereafter instituted against such person in connection with that matter, the person in possession of such statement shall furnish the person who made the statement, at his or her request, with a copy of such statement.

338. Production of document by accused in criminal proceedings

Where any law requires any person to produce any document at any criminal proceedings at which such person is an accused, and such person fails to produce such

document at such proceedings, such person shall be guilty of an offence, and the court may in a summary manner enquire into his or her failure to produce the document and, unless such person satisfies the court that his or her failure was not due to any fault on his or her part, sentence him or her to any punishment provided for in such law, or, if no punishment is so provided, to a fine not exceeding R300 or to imprisonment for a period not exceeding three months.

339 Removal of accused from one prison to another for purpose of attending at criminal proceedings

Whenever an accused is in custody and it becomes necessary that he or she be removed from one prison to another prison for the purpose of attending his or her trial, the magistrate of the district in which the accused is in custody shall issue a warrant for the removal of the accused to such other prison.

340 Prison list of unsentenced prisoners and witnesses detained

Every head of a [**prison**] correctional centre within the area for which any session or circuit of any superior court is held for the trial of criminal cases shall deliver to that court at the commencement of each such session or circuit a list-

- (a) of the unsentenced prisoners who, at such commencement, have been detained within his or her prison for a period of ninety days or longer; and
- (b) of witnesses detained under section 184 or 185 and who, at such commencement, are being detained within his or her [**prison**] correctional centre,

and such list shall, in the case of each such prisoner and each such witness, specify the date of his or her admission to the [**prison**] correctional centre and the authority for his or her detention which shall, in the case of a witness, state whether the detention is under section 184 or 185, and shall further specify, in the case of each such prisoner, the cause of his or her detention.

(p) Sections 341 to 342

(aa) Comments and recommendation by the Department

2.284 The SALRC must take cognizance of the second Judicial Matters Amendment Bill, 2011 which will be introduced into Parliament. This Bill proposes amendments to section 341, to provide that the amount concerned will be specified by the magistrate of a district.

(bb) SALRC evaluation and recommendations

2.285 The amendment proposed by the Department does not affect the recommendations in this investigation, and is not included here.

2.286 Sections 341 and 342A contain references to “he” and to outdated terminology, which should be corrected. We recommend that sections 341 and 342 be amended as follows:

341 Compounding of certain minor offences

(1) If a person receives from any peace officer a notification in writing alleging that such person has committed, at a place and upon a date and at a time or during a period specified in the notification, any offence likewise specified, of any class mentioned in Schedule 3, and setting forth the amount of the fine which a court trying such person for such offence would probably impose upon him or her, such person may within thirty days after the receipt of the notification deliver or transmit the notification, together with a sum of money equal to the said amount, to the magistrate of the district or area wherein the offence is alleged to have been committed, and thereupon such person shall not be prosecuted for having committed such offence.

(2) (a) ...

(d) If the magistrate finds that the amount specified in the notification exceeds the amount determined in terms of subsection (5) in respect of the offence in question, he or she shall notify the local authority of the amount whereby the amount specified in the notification exceeds the amount so determined and the local authority concerned shall immediately refund the amount of such excess to the person concerned.

(e) For the purpose of this subsection '**local authority**' means any institution or body contemplated in section **[84 (1) (f) of the Provincial Government Act, 1961 (Act 32 of 1961), and includes-**

(i) a regional services council established under section 3 of the Regional Services Councils Act, 1985 (Act 109 of 1985);

(ii) any institution or body established under the Rural Areas Act, (House of Representatives), 1987 (Act 9 of 1987);

(iii) a local authority as defined in section 1 of the Black Local Authorities Act, 1982 (Act 102 of 1982);

(iv) a local government body contemplated in section 30 (2)

(a) of the Black Administration Act, 1927 (Act 38 of 1927); and

(v) any committee referred to in section 17 (1) of the Promotion of Local Government Affairs Act, 1983 (Act 91 of 1983).] 155 of the Constitution and Chapter 2 of the Local Government: Municipal Structures Act, 1998 (Act No.117 of 1998);

(3) ...

342A Unreasonable delays in trials

(1) ...

(3) ...

(a) ...

(b) ...

(c) where the accused has not yet pleaded to the charge, that the case be struck off the roll and the prosecution not be resumed or instituted *de novo* without the written instruction of the **[attorney-general]** Director of Public Prosecutions;

(4) (a) ...

(b) The **[attorney-general]** Director of Public Prosecutions and the accused may appeal against an order contemplated in subsection (3) (d) and the provisions of sections 310A and 316 in respect of an application or appeal referred to in that section by an accused, shall apply *mutatis mutandis* with reference to a case in which the **[attorney-general]** Director of Public Prosecutions appeals and, in the case of an appeal by the accused, the provisions of section 309 and 316 shall apply *mutatis mutandis*.

(q) Schedules to the Act

(aa) Comment by the Department

2.287 Schedule 5 of the Act contains a reference to the Arms and Ammunition Act 75 of 1969, which was repealed and replaced by the Firearms Control Act 60 of 2000.

2.288 The monetary amounts prescribed for the purpose of the Drugs and Drug Trafficking Act 140 of 1992 and the Prevention and Combating of Corrupt Activities Act 12 of 2004 might need to be increased.

(bb) SALRC evaluation and recommendation

2.289 The SALRC agrees with the comment about Schedule 5. We have recommended the necessary amendment so that the Schedule will reflect the Firearms Control Act 60 of 2000.

2.290 The proposed amendment to the monetary amounts falls outside the scope of this investigation. The SALRC recommends that the Department should consider the appropriate amendments.

2.291 The SALRC recommends that Schedule 5 be amended as follows:

Schedule 5

(Sections 58 and 60 (11) and (11A) and Schedule 6)

Treason.

Murder.

Attempted murder involving the infliction of grievous bodily harm.

Rape or compelled rape as contemplated in section 3 or 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively, in circumstances other than those referred to in Schedule 6.

Any trafficking related offence by a commercial carrier as contemplated in section 71(6) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007.

Any offence referred to in section 13(f) of the Drugs and Drug Trafficking Act, 1992 (Act No. 140 of 1992), if it is alleged that –

- (a) the value of the dependence-producing substance in question is more than R50 000,00; or
- (b) the value of the dependence-producing substance in question is more than R10 000,00 and that the offence was committed by a person, group of persons, syndicate or any enterprise acting in the execution or furtherance of a common purpose or conspiracy; or
- (c) the offence was committed by any law enforcement officer.

Any offence relating to the dealing in or smuggling of ammunition, firearms, explosives or armament, or the possession of an automatic or semi-automatic firearm, explosives or armament.

Any offence in contravention of section **[36 of the Arms and Ammunition Act, 1969 (Act No. 75 of 1969),]**~~91 of the Firearms Control Act, 2000 (Act No 60 of 2000)~~ on account of being in possession of more than **[1 000]**~~200~~ rounds of ammunition intended for firing in an arm contemplated in **[section 39(2)(a)(i)]**~~Chapter 6~~ of that Act.

Any offence relating to exchange control, extortion, fraud, forgery, uttering, theft, or any offence referred to in Part 1 to 4, or section 17, 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004 -

- (a) involving amounts of more than R500 000,00; or
- (b) involving amounts of more than R100 000,00, if it is alleged that the offence was committed by a person, group of persons, syndicate or any enterprise acting in the execution or furtherance of a common purpose or conspiracy; or
- (c) if it is alleged that the offence was committed by any law enforcement officer -
 - (i) involving amounts of more than R10 000,00; or
 - (ii) as a member of a group of persons, syndicate or any enterprise acting in the execution or furtherance of a common purpose or conspiracy.

...

CHAPTER 3

THE COMMISSION'S INVESTIGATION INTO THE APPLICATION OF THE BILL OF RIGHTS TO CRIMINAL LAW, CRIMINAL PROCEDURE, SENTENCING AND THE LAW OF EVIDENCE (PROJECT 101)

BACKGROUND

3.1 The Commission's current investigation has its origin in 2003. In that year, Cabinet approved that the Minister of Justice and Constitutional Development should co-ordinate and mandate the SALRC to review provisions in the legislative framework that would result in discrimination as defined by section 9 of the Constitution. Section 9 prohibits unfair discrimination on the basis of race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

3.2 In 2004 the SALRC included in its law reform programme an investigation into statutory law revision, which entails a revision of all statutes from 1910 to date. While the emphasis in the previous investigations was to identify obsolete and redundant provisions for repeal, the emphasis in the current investigation is on compliance with the Constitution. However, all redundant and obsolete provisions identified in the course of the current investigation will also be recommended for repeal. Furthermore, it should be stated from the outset that the constitutional inquiry is limited to statutory provisions that blatantly violate the provisions of section 9 (the equality clause) of the Constitution. Thus the scope of the current investigation is limited to the unconstitutionality of legislation which infringes the equality clause. The scope, however, does extend to a review of provisions which are redundant or

obsolete. However, in 2001 the Commission had already completed a report for its investigation which reviewed the constitutionality of the Criminal Procedure Act in general.³⁷

3.3 This investigation had its origin during the budget vote speech to the National Assembly and the Senate in 1994, where the Minister of Justice touched on a number of issues that should be addressed. He stated, among other things, that he believed that the judicial system is in need of fundamental changes to make it more accessible to the public. Legal procedures should be simplified, terminology should be less technical, and the judicial system should serve the community – and should reflect the schools of thought in the community. The Minister also expressed concern for the unprecedented crime wave in South Africa. In this regard he stated that we needed innovative thinking and a new approach to solve the problems. He requested the Commission to give urgent attention to the problems arising from the application of the Bill of Rights to criminal law, criminal procedure and sentencing. A new investigation was consequently included in the Commission's programme (Project 101: *The application of the Bill of Rights to the criminal law, criminal procedure and sentencing*).

3.4 A Bill of Rights was included in the Interim Constitution, which came into operation on 27 April 1994. An amended Bill of Rights forms part of the new Constitution, which was approved by the Constitutional Assembly during May 1996; the certification of the Constitution by the Constitutional Court was finalised thereafter.

3.5 In light of the Minister's further requests, and because the new Constitution had come into operation, the Commission needed to redefine the content of its investigation. In order to proceed meaningfully with the investigation, the project committee's first priority was to identify specific areas in need of reform, and to proceed incrementally with investigations in that regard. A new project committee was appointed during September 1996, which was restructured during 1998 and again in 1999.

3.6 In this investigation, the Commission's point of departure was that it should focus only on those sections of the law which are clearly unconstitutional. It was argued that the Law Reform Commission or the Project Committee should not usurp the function of the Constitutional Court and decide on the constitutionality of those sections of the Act which are only arguably unconstitutional. Although the Commission mainly focussed on provisions which it considered to be clearly unconstitutional, it did also consider the constitutionality of certain other provisions and whether they should be amended. In other words, the scope of the

³⁷ SA Law Reform Commission, Project 101, *The Application of the Bill of Rights to the criminal procedure, criminal law, the law of evidence and sentencing.* RP118/2001 ISBN 0 62131451 X.

investigation was at times debated. In the latter instances, the provisions and a motivation for their possible amendment were included in the discussion paper, for the purpose of inviting public and departmental comments.

3.7 In the first phase of the investigation, the Committee invited all role players to submit proposals for legislative amendment, with relevant motivations, to the Committee for consideration. In the second phase, the Commission's researcher (Mr MHL Kganakga) with the assistance of Professor Steytler (committee member) studied the Criminal Procedure Act with the aim of identifying provisions that might have been unconstitutional. They made recommendations for amendments in those instances. In the third phase, the Committee obtained the services of Professor PJ Schwikkard, who drafted the discussion paper. She gave due regard to the comments submitted to the Commission and the discussion document prepared by the Commission's researcher.

3.8 The discussion paper was published in January 2000 for general information and comment. The closing date for comments was 31 March 2000, extended until 30 April 2000. The Commission's report was finalised in 2001 and was submitted to the Minister of Justice in April 2001. However, since publication of the Commission's report, the Department has not yet promoted any legislation based on the recommendations in the Commission's report. The legislative programme for 2010 indicated that legislation would be promoted when circumstances permitted. The Commission is of the view that because an investigation on the constitutionality of provisions in the Criminal Procedure Act 51 of 1977 had already been completed, and in view of the fact that legislation has not yet been passed following those recommendations, it is appropriate to include the Commission's recommendations from that earlier work in the current investigation for Project 25. The current investigation in Project 25, the review of statute law, also deals with the constitutionality of provisions of the Criminal Procedure Act, although on the limited ground of conflict with the section 9 of the Constitution (the right to equality). For purposes of the current consultation paper, the Commission's recommendations from Project 101 were therefore repeated. The aim of this repetition was to obtain the Department's views on the issues previously raised, and if needs be to make recommendations on provisions in the Criminal Procedure Act which are unconstitutional for reasons other than infringement of the equality clause (section 9 of the Constitution). In addition, we have made recommendations on provisions that should be repealed because subsequent legislation (that is, laws passed after the Criminal Procedure Act) may have amended certain terms, phrases or definitions.

3.9 The Commission's earlier report was attached as Annexure A to the consultation

paper, and the Department was requested to consider and comment on these recommendations. **The Department indicated that it had considered the Commission's recommendations in the report, and that draft legislation would be introduced into Parliament as soon as possible. In view of this comment, the Commission's recommendations are therefore not repeated for purposes of the discussion paper in this investigation, and the report is not attached to this paper for further comment.**

REPUBLIC OF SOUTH AFRICA

CRIMINAL PROCEDURE ACT

AMENDMENT BILL

(As introduced)

(MINISTER FOR JUSTICE AND CONSTITUTIONAL DEVELOPMENT)
[B 2014]

REPUBLIEK VAN SUID-AFRIKA

STRAFPROSESWYSIGINGS- WETSONTWERP

(Soos ingedien)

(MINISTER VAN JUSTISIE EN STAATKUNDIGE ONTWIKKELING)
W 2014]

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.

AMENDMENT BILL

To amend the Criminal Procedure Act, 1977 so as to bring the provisions of the Act into line with the Constitution; and to provide for matters connected therewith.

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

1. Section 1 of the Principal Act is hereby amended by the substitution for the following definitions of the following definitions in the section:

1 Definitions

...

“**bank**” means a bank defined in section 1 of the Banks Act, 1990 (Act 94 of 1990), and includes a bank as defined by the Land and Agricultural Development Bank Act, 2002 (Act 15 of 2002)**[the Land and Agricultural Bank of South Africa referred to in section 3 of the Land Bank Act, 1944 (Act 13 of 1944), and a mutual building society as defined in section 1 of the Mutual Building Societies Act, 1965 (Act 24 of 1965)]**;

“**Commissioner**”**[,]** means the National Commissioner of Correctional Services as defined in section 1 of the Correctional Services Act, 1998, or a person authorized by him or her;

...

“**correctional supervision**” means a community based sentence to which a person is subject in accordance with Chapter **[V and]** VI of the Correctional Service Act, 1998, and the regulations made under that Act if–

[(a) he or she has been placed under that section 6 (1) (c)];

(b) correctional supervision **[it]** has been imposed on him or her under section 276 (1)(h) or (i) and he or she, in the latter case, has been placed under **[that] correctional supervision** ;

(c) his or her sentence has been converted into **[that] correctional supervision** under section 276A (3) (e) (ii), 286B (4) (b) (ii) or 287 (4) (b) or he or she has been placed under that section in terms of sections 286B (5) (iii) or 287 (4) (a);

(d) correctional supervision **[it]** is a condition on which the passing of his or her sentence has been postponed and he or she has been released under section 297 (1) (a) (i) (ccA); or

(e) it is a condition on which the operation of–

- (i) the whole or any part; or
- (ii) any part, of his or her sentence has been suspended under section 297 (1) (b) or (4), respectively;

...

'**local division**' means a local division of the **[Supreme]High Court** established under the **[Supreme Court]Superior Courts Act, [1959]2013 (Act [59]10 of [1959]2013)**;

...

'**Minister**' means the Minister of Justice and Correctional Services;

...

'**[provincial] D[d]ivision**' means a **[provincial]D[d]ivision** of the **[Supreme]High Court** established under the **[Supreme Court]Superior Courts Act, [1959](Act [59]10 of [1959]2013)**.

...

'**superior court**' means a **[provincial]Division** or local **[d]Division** of the **[Supreme Court]High Court** established under the **[Supreme Court Act, 1959 (Act 59 of 1959)] Superior Courts Act, (10 of 2013)**;

'**supreme court**' means the **[Supreme]High Court** of South Africa established under the **[Supreme Court Act, 1959 (Act 59 of 1959)]Superior Courts Act, (10 of 2013)**;

...

2. Section 6 of the Principal Act is hereby amended by the substitution for the section of the following section:

6 Power to withdraw charge or stop prosecution

A[n attorney-general] Director of Public Prosecutions or any person conducting a prosecution at the instance of the State or anybody or person conducting a prosecution under section 8, may-

- (a) before an accused pleads to a charge, withdraw that charge, in which event the accused shall not be entitled to a verdict of acquittal in respect of that charge;
- (b) at any time after an accused has pleaded, but before conviction, stop the prosecution in respect of that charge, in which event the court trying the accused shall acquit the accused in respect of that charge: Provided that where a prosecution is conducted by a person other than a **[n attorney-general] Director of Public Prosecutions** or a body or person referred to in section 8, the prosecution shall not be stopped unless the **[attorney-general] Director of Public Prosecutions** or any person authorized thereto by the **[attorney-general] Director of Public Prosecutions**, whether in general or in any particular case, has consented thereto.

3. Section 7 of the Principal Act is hereby amended by the substitution for the section of the following section:

7 Private prosecution on certificate *nolle prosequi*

(1) In any case in which a **[n attorney-general]** Director of Public Prosecutions declines to prosecute for an alleged offence-

- (a) any private person who proves some substantial and peculiar interest in the issue of the trial arising out of some injury which he or she individually suffered in consequence of the commission of the said offence;
- (b) a husband, if the said offence was committed in respect of his or her wife;
- (c) the wife or child or, if there is no wife or child, any of the next of kin of any deceased person, if the death of such person is alleged to have been caused by the said offence; or
- (d) the legal guardian or curator of a minor or **[lunatic]**mental health care user as defined in section 1 of the Mental Health Care Act, 2002, if the said offence was committed against his or her ward,

may, subject to the provisions of section 9 and section 59(2) of the Child Justice Act, 2008, either in person or by a legal representative, institute and conduct a prosecution in respect of such offence in any court competent to try that offence.

(2) (a) No private prosecutor under this section shall obtain the process of any court for summoning any person to answer any charge unless such private prosecutor produces to the officer authorized by law to issue such process a certificate signed by the **[attorney-general]** Director of Public Prosecutions that he or she has seen the statements or affidavits on which the charge is based and that he or she declines to prosecute at the instance of the State.

(b) The **[attorney-general]** Director of Public Prosecutions shall, in any case in which he or she declines to prosecute, at the request of the person intending to prosecute, grant the certificate referred to in paragraph (a).

(c) ...

4. Section 8 of the Principal Act is hereby amended by the substitution for the section of the following section:

8 Private prosecution under statutory right

(1) ...

(2) A body which or a person who intends exercising a right of prosecution under subsection (1), shall exercise such right only after consultation with the **[attorney-**

general] Director of Public Prosecutions concerned and after the **[attorney-general]** Director of Public Prosecutions has withdrawn his or her right of prosecution in respect of any specified offence or any specified class or category of offences with reference to which such body or person may by law exercise such right of prosecution.

(3) A**[n attorney-general]** Director of Public Prosecutions may, under subsection (2), withdraw his or her right of prosecution on such conditions as he or she may deem fit, including a condition that the appointment by such body or person of a prosecutor to conduct the prosecution in question shall be subject to the approval of the **[attorney-general]** Director of Public Prosecutions, and that the **[attorney-general]** Director of Public Prosecutions may at any time exercise with reference to any such prosecution any power which he or she might have exercised if he or she had not withdrawn his or her right of prosecution.

5. Section 9 of the Principal Act is hereby amended by the substitution for the section of the following section:

9 Security by private prosecutor

(1) No private prosecutor referred to in section 7 shall take out or issue any process commencing the private prosecution unless he or she deposits with the magistrate's court in whose area of jurisdiction the offence was committed-

(a) the amount* the Minister may from time to time determine by notice in the *Gazette* as security that he or she will prosecute the charge against the accused to a conclusion without undue delay; and

(b) ...

(2) The accused may, when he or she is called upon to plead to the charge, apply to the court hearing the charge to review the amount determined under subsection (1) (b), whereupon the court may, before the accused pleads-

6. Section 11 of the Principal Act is hereby amended by the substitution for the section of the following section:

11 Failure of private prosecutor to appear

(1) If the private prosecutor does not appear on the day set down for the appearance of the accused in the magistrate's court or for the trial of the accused, the charge against the accused shall be dismissed unless the court has reason to believe that the private prosecutor was prevented from being present by circumstances beyond his or her control, in which event the court may adjourn the case to a later date.

(2) Where the charge is so dismissed, the accused shall forthwith be discharged from custody and may not in respect of that charge be prosecuted privately again, but the **[attorney-general]** Director of Public Prosecutions or a public prosecutor with the consent of the **[attorney-general]** Director of Public Prosecutions may at the instance of the State prosecute the accused in respect of that charge.

7. Section 12 of the Principal Act is hereby amended by the substitution for the section of the following section:

12 Mode of conducting private prosecution

(1) A private prosecution shall, subject to the provisions of this Act, be proceeded with in the same manner as if it were a prosecution at the instance of the State: Provided that the person in respect of whom the private prosecution is instituted shall be brought before the court only by way of summons in the case of a lower court, or an indictment in the case of a superior court, except where he or she is under arrest in respect of an offence with regard to which a right of private prosecution is vested in any body or person under section 8.

(2) ...

8. Section 13 of the Principal Act is hereby amended by the substitution for the section of the following section:

13 [Attorney-general] Director of Public Prosecutions may intervene in private prosecution

A[n attorney-general Director of Public Prosecutions or a local public prosecutor acting on the instructions of the [attorney-general] Director of Public Prosecutions may, in respect of any private prosecution, apply by motion to the court before which the private prosecution is pending to stop all further proceedings in the case in order that a prosecution for the offence in question may be instituted or, as the case may be, continued at the instance of the State, and the court shall make such an order.

9. Section 16 of the Principal Act is hereby amended by the substitution for the section of the following section:

16 Costs of accused in private prosecution

(1) ...

(2) Where the court is of the opinion that a private prosecution was unfounded and vexatious, it shall award to the accused at his or her request such costs and expenses incurred in connection with the prosecution, as it may deem fit.

10. Section 21 of the Principal Act is hereby amended by the substitution for the section of the following section:

21 Article to be seized under search warrant

(1) Subject to the provisions of sections 22, 24 and 25, an article referred to in section 20 shall be seized only by virtue of a search warrant issued-

(a) by a magistrate or justice, if it appears to such magistrate or justice from information on oath that there are reasonable grounds for believing that any

such article is in the possession or under the control of or upon any person or upon or at any premises within his or her area of jurisdiction; or

...

(4) A police official executing a warrant under this section or section 25 shall, after such execution, upon demand of any person whose rights in respect of any search or article seized under the warrant have been affected, hand to him or her the warrant.

11. Section 22 of the Principal Act is hereby amended by the substitution for the section of the following section:

22 Circumstances in which article may be seized without search warrant

A police official may without a search warrant search any person or container or premises for the purpose of seizing any article referred to in section 20-

(a) ...

(b) if he or she on reasonable grounds believes-

(i) that a search warrant will be issued to him or her under paragraph (a) of section 21 (1) if he or she applies for such warrant; and

12. Section 23 of the Principal Act is hereby amended by the substitution for the section of the following section:

23 Search of arrested person and seizure of article

(1) On the arrest of any person, the person making the arrest may-

(a) if he or she is a peace officer, search the person arrested and seize any article referred to in section 20 which is found in the possession of or in the custody or under the control of the person arrested, and where such peace officer is not a police official, he or she shall forthwith deliver any such article to a police official; or

(b) if he or she is not a peace officer, seize any article referred to in section 20 which is in the possession of or in the custody or under the control of the person arrested and shall forthwith deliver any such article to a police official.

(2) On the arrest of any person, the person making the arrest may place in safe custody any object found on the person arrested and which may be used to cause bodily harm to him or herself or others.

13. Section 24 of the Principal Act is hereby amended by the substitution for the section of the following section:

24 Search of premises

Any person who is lawfully in charge or occupation of any premises and who reasonably suspects that stolen stock or produce, as defined in any law relating to the theft of stock or produce, is on or in the premises concerned, or that any article has been placed

thereon or therein or is in the custody or possession of any person upon or in such premises in contravention of any law relating to intoxicating liquor, dependence-producing drugs, arms and ammunition or explosives, may at any time, if a police official is not readily available, enter such premises for the purpose of searching such premises and any person thereon or therein, and if any such stock, produce or article is found, he or she shall take possession thereof and forthwith deliver it to a police official.

14. Section 25 of the Principal Act is hereby amended by the substitution for the section of the following section:

25 Power of police to enter premises in connection with State security or any offence

(1) If it appears to a magistrate or justice from information on oath that there are reasonable grounds for believing-

- (a) that the internal security of the Republic or the maintenance of law and order is likely to be endangered by or in consequence of any meeting which is being held or is to be held in or upon any premises within his or her area of jurisdiction; or
- (b) that an offence has been or is being or is likely to be committed or that preparations or arrangements for the commission of any offence are being or are likely to be made in or upon any premises within his area of jurisdiction,

he or she may issue a warrant authorizing a police official to enter the premises in question at any reasonable time for the purpose-

- (i) ...

(3) A police official may without warrant act under subparagraphs (i), (ii) and (iii) of subsection (1) if he or she on reasonable grounds believes-

- (a) that a warrant will be issued to him or her under paragraph (a) or
- (b) of subsection (1) if he or she applies for such warrant; and
- (b) that the delay in obtaining such warrant would defeat the object thereof.

15. Section 26 of the Principal Act is hereby amended by the substitution for the section of the following section:

26 Entering of premises for purposes of obtaining evidence

Where a police official in the investigation of an offence or alleged offence reasonably suspects that a person who may furnish information with reference to any such offence is on any premises, such police official may without warrant enter such premises for the purpose of interrogating such person and obtaining a statement from him or her: Provided that such police official shall not enter any private dwelling without the consent of the occupier thereof.

16. Section 27 of the Principal Act is hereby amended by the substitution for the section of the following section:

27 Resistance against entry or search

(1) A police official who may lawfully search any person or any premises or who may enter any premises under section 26, may use such force as may be reasonably necessary to overcome any resistance against such search or against entry of the premises, including the breaking of any door or window of such premises: Provided that such police official shall first audibly demand admission to the premises and notify the purpose for which he or she seeks to enter such premises.

(2) ...

17. Section 31 of the Principal Act is hereby amended by the substitution for the section of the following section:

31 Disposal of article where no criminal proceedings are instituted or where it is not required for criminal proceedings

(1) (a) ...

(2) The person who may lawfully possess the article in question shall be notified by registered post at his or her last-known address that he or she may take possession of the article and if such person fails to take delivery of the article within thirty days from the date of such notification, the article shall be forfeited to the State.

18. Section 32 of the Principal Act is hereby amended by the substitution for the section of the following section:

32 Disposal of article where criminal proceedings are instituted and admission of guilt fine is paid

(1) If criminal proceedings are instituted in connection with any article referred to in section 30 (c) and the accused admits his or her guilt in accordance with the provisions of section 57, the article shall be returned to the person from whom it was seized, if such person may lawfully possess such article, or, if such person may not lawfully possess such article, to the person who may lawfully possess such article, or, if such person may not lawfully possess such article, to the person who may lawfully possess it, whereupon the provisions of section 31 (2) shall apply with reference to any such person.

(2) ...

19. Section 34 of the Principal Act is hereby amended by the substitution for the section of the following section:

34 Disposal of article after commencement of criminal proceedings

(1) ...

(3) If the judge or judicial officer concerned does not, at the conclusion of the relevant proceedings, make an order under subsection (1), such judge or judicial officer or, if he or she is not available, any other judge or judicial officer of the court in question,

may at any time after the conclusion of the proceedings make any such order, and for that purpose hear such additional evidence, whether by affidavit or orally, as he or she may deem fit.

(4) ...

20. Section 35 of the Principal Act is hereby amended by the substitution for the section of the following section:

35 Forfeiture of article to State

(1) A court which convicts an accused of any offence may, without notice to any person, declare-

(a) any weapon, instrument or other article by means whereof the offence in question was committed or which was used in the commission of such offence; or

(b) if the conviction is in respect of an offence referred to in Part 1 of Schedule 2, any vehicle, container or other article which was used for the purpose of or in connection with the commission of the offence in question or for the conveyance or removal of the stolen property,

and which was seized under the provisions of this Act, forfeited to the State: Provided that such forfeiture shall not affect any right referred to in subparagraph (i) or (ii) of subsection (4) (a) if it is proved that the person who claims such right did not know that such weapon, instrument, vehicle, container or other article was being used or would be used for the purpose of or in connection with the commission of the offence in question or, as the case may be, for the conveyance or removal of the stolen property in question, or that he or she could not prevent such use, and that he or she may lawfully possess such weapon, instrument, vehicle, container or other article, as the case may be.

(4) (a) The court in question or, if the judge or judicial officer concerned is not available, any judge or judicial officer of the court in question, may at any time within a period of three years with effect from the date of declaration of forfeiture, upon the application of any person, other than the accused, who claims that any right referred to in subparagraph (i) or (ii) of this paragraph is vested in him or her, inquire into and determine any such right, and if the court finds that the weapon, instrument, vehicle, container or other article in question-

(i) ...

(ii) was sold to the accused in pursuance of a contract under which he or she becomes the owner of such weapon, instrument, vehicle, container or other article, as the case may be, upon the payment of a stipulated price, whether by instalments or otherwise, and under which the seller becomes entitled to the return of such weapon, instrument, vehicle, container or other article upon default of payment of the stipulated price or any part thereof-

(aa) the court shall direct that the weapon, instrument, vehicle, container or other article in question be sold by public auction and that the said seller be paid out of the proceeds of the sale an amount equal to the value of his or her rights under the contract to the weapon, instrument, vehicle, container or other article, but not exceeding the proceeds of the sale; or

(bb) if the State has disposed of the weapon, instrument, vehicle, container or other article in question, the court shall direct that the said seller be likewise compensated.

(b) If a determination by the court under paragraph (a) is adverse to the applicant, he or she may appeal therefrom as if it were a conviction by the court making the determination, and such appeal may be heard either separately or jointly with an appeal against the conviction as a result whereof the declaration of forfeiture was made, or against a sentence imposed as a result of such conviction.

(c) ...

21. Section 37 of the Principal Act is hereby amended by the substitution for the section of the following section:

37 Powers in respect of prints and bodily appearance of accused

(1) Any police official may-

...

(c) take such steps as he or she may deem necessary in order to ascertain whether the body of any person referred to in paragraph (a) (i) or (ii) has any mark, characteristic or distinguishing feature or shows any condition or appearance; Provided that no police official shall take any blood sample of the person concerned, nor shall a police official make any examination of the body of the person concerned where that person is a female and the police official concerned is not a female.

...

(5) Finger-prints, palm-prints or foot-prints, photographs and the record of steps taken under this section shall be destroyed if the person concerned is found not guilty at his or her trial or if his or her conviction is set aside by a superior court or if he or she is discharged at a preparatory examination or if no criminal proceedings with reference to which such prints or photographs were taken or such record was made are instituted against the person concerned in any court or if the prosecution declines to prosecute such person.

22. Section 39 of the Principal Act is hereby amended by the substitution for the section of the following section:

39 Manner and effect of arrest

(1) An arrest shall be effected with or without a warrant and, unless the person to be arrested submits to custody, by actually touching his or her body or, if the circumstances so require, by forcibly confining his or her body.

(2) The person effecting an arrest shall, at the time of effecting the arrest or immediately after effecting the arrest, inform the arrested person of the cause of the arrest or, in the case of an arrest effected by virtue of a warrant, upon demand of the person arrested hand him or her a copy of the warrant.

(3) The effect of an arrest shall be that the person arrested shall be in lawful custody and that he or she shall be detained in custody until he or she is lawfully discharged or released from custody.

23. Section 40 of the Principal Act is hereby amended by the substitution for the section of the following section:

40 Arrest by peace officer without warrant

(1) A peace officer may without warrant arrest any person-

(a) who commits or attempts to commit any offence in his or her presence;

(b) whom he or she reasonably suspects of having committed an offence referred to in Schedule 1, other than the offence of escaping from lawful custody;

(c) who has escaped or who attempts to escape from lawful custody;

(d) who has in his or her possession any implement of housebreaking or carbreaking as contemplated in section 82 of the General Law Third Amendment Act, 1993, and who is unable to account for such possession to the satisfaction of the peace officer;

...

(j) who wilfully obstructs him or her in the execution of his or her duty;

(k) who has been concerned in or against whom a reasonable complaint has been made or credible information has been received or a reasonable suspicion exists that he or she has been concerned in any act committed outside the Republic which, if committed in the Republic, would have been punishable as an offence, and for which he or she is, under any law relating to extradition or fugitive offenders, liable to be arrested or detained in custody in the Republic;

24. Section 41 of the Principal Act is hereby amended by the substitution for the section of the following section:

41 Name and address of certain persons and power of arrest by peace officer without warrant

(1) A peace officer may call upon any person-

(a) whom he or she has power to arrest;

...

(c) who, in the opinion of the peace officer, may be able to give evidence in regard to the commission or suspected commission of any offence,

to furnish such peace officer with his full name and address, and if such person fails to furnish his or her full name and address, the peace officer may forthwith and without warrant arrest him or her, or, if such person furnishes to the peace officer a name or address which the peace officer reasonably suspects to be false, the peace officer may arrest him or her without warrant and detain him or her for a period not exceeding twelve hours until such name or address has been verified.

25. Section 42 of the Principal Act is hereby amended by the substitution for the section of the following section:

42 Arrest by private person without warrant

(1) Any private person may without warrant arrest any person-

- (a) who commits or attempts to commit in his or her presence or whom he or she reasonably suspects of having committed an offence referred to in Schedule 1;
- (b) whom he or she reasonably believes to have committed any offence and to be escaping from and to be freshly pursued by a person whom such private person reasonably believes to have authority to arrest that person for that offence;
- (c) whom he or she is by any law authorized to arrest without warrant in respect of any offence specified in that law;
- (d) whom he or she sees engaged in an affray.

26. Section 43 of the Principal Act is hereby amended by the substitution for the section of the following section:

43 Warrant of arrest may be issued by magistrate or justice

(1) Any magistrate or justice may issue a warrant for the arrest of any person upon the written application of a [n attorney-general] Director of Public Prosecutions, a public prosecutor or a commissioned officer of police-

...

27. Section 45 of the Principal Act is hereby amended by the substitution for the section of the following section:

45 Arrest on telegraphic or electronic communication authority

(1) A telegraphic or similar written or printed communication, or an electronic communication as contemplated in section 1 and in compliance with the provisions of the Electronic Communications and Transactions Act, 25 of 2002, from any magistrate, justice or peace officer stating that a warrant has been issued for the arrest of any person, shall be sufficient authority to any peace officer for the arrest and detention of that person.

...

28. Section 48 of the Principal Act is hereby amended by the substitution for the section of the following section:

48 Breaking open premises for purpose of arrest

Any person who may lawfully arrest another in respect of any offence and who knows or reasonably suspects such other person to be on any premises, may, if he or she first audibly demands entry into such premises and notifies the purpose for which he or she seeks entry and fails to gain entry, break open, enter and search such premises for the purpose of effecting the arrest.

29. Section 54 of the Principal Act is hereby amended by the substitution for the section of the following section:

54. Summons as method of securing attendance of accused in magistrate's court

(1) Where the prosecution intends prosecuting an accused in respect of any offence and the accused is not in custody in respect of that offence and no warrant has been or is to be issued for the arrest of the accused for that offence, the prosecutor may secure the attendance of the accused for a summary trial in a lower court having jurisdiction by drawing up the relevant charge and handing such charge, together with information relating to the name and, where known and where applicable, the residential address and occupation or status of the accused, to the clerk of the court who shall -

- (a) issue a summons containing the charge and the information handed to him or her by the prosecutor, and specifying the place, date and time for the appearance of the accused in court on such charge; and
- (b) deliver such summons, together with so many copies thereof as there are accused to be summoned, to a person empowered to serve a summons in criminal proceedings.

(2) (a) Except where otherwise expressly provided by any law, the summons shall be served by a person referred to in subsection (1) (b) by delivering it to the person named therein or, if he or she cannot be found, by delivering it at his or her residence or place of employment or business to a person apparently over the age of sixteen years and apparently residing or employed there.

- (b) A return by the person who served the summons that the service thereof has been effected in terms of paragraph (a), may, upon the failure of the person concerned to attend the relevant proceedings, be handed in at such proceedings and shall be prima facie proof of such service.

(3) A summons under this section shall be served on an accused so that he or she is in possession thereof at least fourteen days (Sundays and public holidays excluded) before the date appointed for the trial.

30. Section 55 of the Principal Act is hereby amended by the substitution for the section of the following section:

55 Failure of accused to appear on summons

...

(2) The court may, if satisfied from the return of service referred to in paragraph (b) of section 54 (2) that the summons was served on the accused in terms of paragraph (a) of that section and that the accused has failed to appear at the place and on the date and at the time specified in the summons, or if satisfied that the accused has failed to remain in attendance at the proceedings in question, issue a warrant for his or her arrest and, when he or she is brought before the court, in a summary manner enquire into his or her failure so to appear or so to remain in attendance and unless the accused satisfies the court that his or her failure was not due to any fault on his or her part, convict him or her of the offence referred to in subsection (1) and sentence him or her to a fine not exceeding R300 or to imprisonment for a period not exceeding three months: Provided that where a warrant is issued for the arrest of an accused who has failed to appear in answer to the summons, the person executing the warrant-

- (a) may, where it appears to him or her that the accused received the summons in question and that the accused will appear in court in accordance with a warning under section 72; or
- (b) shall, where it appears to him or her that the accused did not receive the summons in question or that the accused has paid an admission of guilt fine in terms of section 57 or that there are other grounds on which it appears that the failure of the accused to appear on the summons was not due to any fault on the part of the accused, for which purpose he or she may require the accused to furnish an affidavit or affirmation, release the accused on warning under section 72 in respect of the offence of failing to appear in answer to the summons, whereupon the provisions of that section shall mutatis mutandis apply with reference to the said offence.

...

- (3) (a) If, in any case in which a warrant of arrest is issued, it was permissible for the accused in terms of section 57 to admit **[his]** guilt in respect of the summons on which he or she failed to appear and to pay a fine in respect thereof without appearing in court, and the accused is arrested under such warrant in the area of jurisdiction of a magistrate's court other than the magistrate's court which issued the warrant of arrest, such other magistrate's court may, notwithstanding any provision of this Act or any other law to the contrary, and if satisfied that the accused has, since the date on which he or she failed to appear on the summons in question, admitted his or her guilt in respect of that summons and has paid a fine in respect thereof without appearing in court, in a summary manner enquire into his or her failure to appear on such summons and, unless the accused satisfies the court that his or her failure was not due to any fault on his or her part, convict him of the offence referred to in subsection (1) and sentence him or her to a fine not exceeding R300 or to imprisonment for a period not exceeding three months.

...

31. Section 57 of the Principal Act is hereby amended by the substitution for the section of the following section:

57 Admission of guilt and payment of fine without appearance in court

(1) Where-

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

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

...

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

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

(b) ...
(c) ...

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

...

(c) Notwithstanding the provisions of subsection (1), an accused referred to in paragraph (a) (iii) may pay the admission of guilt fine in question to the clerk of the court where he or she appears in consequence of such warrant, and if the said clerk of the court is not the clerk of the magistrate's court referred to in subsection (1), he or she shall transfer such admission of guilt fine to the latter clerk of the magistrate's court.

(4) ...

(5) ...

(6) ...

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

32. Section 58 of the Principal Act is hereby amended by the substitution for the section of the following section:

58. Effect of bail

The effect of bail granted in terms of the succeeding provisions is that an accused who is in custody shall be released from custody upon payment of, or the furnishing of a guarantee to pay, the sum of money determined for his bail, and that he shall appear at the place and on the date and at the time appointed for his or her trial or to which the proceedings relating to the offence in respect of which the accused is released on bail are adjourned, and that the release shall, unless sooner terminated under the said provisions, endure until a verdict is given by a court in respect of the charge to which the offence in question relates, or, where sentence is not imposed forthwith after verdict and the court in question extends bail, until sentence is imposed: Provided that where a court convicts an accused of an offence contemplated in Schedule 5 or 6, the court shall, in considering the question whether the accused's bail should be extended, apply the provisions of section 60 (11) (a) or (b), as the case may be, and the court shall take into account -

- (a) the fact that the accused has been convicted of that offence; and
- (b) the likely sentence which the court might impose.

33. Section 59A of the Principal Act is hereby amended by the substitution for the section of the following section:

59A [Attorney-general] Director of Public Prosecutions may authorise release on bail

(1) **[An attorney-general]** A Director of Public Prosecutions, or a prosecutor authorised thereto in writing by the **[attorney-general]** Director of Public Prosecutions concerned, may, in respect of the offences referred to in Schedule 7 and in consultation with the police official charged with the investigation, authorise the release of an accused on bail.

(2) For the purposes of exercising the functions contemplated in subsections (1) and (3) a**[n attorney-general]** Director of Public Prosecutions may, after consultation with the Minister, issue directives.

- (3) ...
- (a) ..

(b) subject to reasonable conditions imposed by the **[attorney-general]** Director of Public Prosecutions or prosecutor concerned; or

(c) .

(4) An accused released in terms of subsection (3) shall appear on the first court day at the court and at the time determined by the **[attorney-general]** Director of Public Prosecutions or prosecutor concerned and the release shall endure until he or she so appears before the court on the first court day.

34. Section 60(11A) of the Principal Act is hereby amended by the substitution for the section of the following section:

60 Bail application of accused in court

...

(11A) (a) If the **[attorney-general]** Director of Public Prosecutions intends charging any person with an offence referred to in Schedule 5 or 6 the **[attorney-general]** Director of Public Prosecutions may, irrespective of what charge is noted on the charge sheet, at any time before such person pleads to the charge, issue a written confirmation to the effect that he or she intends to charge the accused with an offence referred to in Schedule 5 or 6.

35. Section 62 of the Principal Act is hereby amended by the substitution for the section of the following section:

62. Court may add further conditions of bail

Any court before which a charge is pending in respect of which bail has been granted, may at any stage, whether the bail was granted by that court or any other court, on application by the prosecutor, add any further condition of bail –

(a) ...

(d) with regard to the place at which any document may be served on him or her under this Act;

36. Section 63A of the Principal Act is hereby amended by the substitution for the section of the following section:

63A. Release or amendment of bail conditions of accused on account of prison conditions

(1) If a Head of **[Prison]** Correctional Centre contemplated in the Correctional Services Act, 1998 (Act No. 111 of 1998), is satisfied that the **[prison]** correctional centre population of a particular **[prison]** correctional centre is reaching such proportions that it constitutes a material and imminent threat to the human dignity, physical health or safety of an accused-

(a) ...

- (c) who is not also in detention in respect of any other offence falling outside the category of offences referred to in paragraph (a), that Head of **[Prison] Correctional Centre** may apply to the said court for the-
 - (aa) release of the accused on warning in lieu of bail; or
 - (bb) amendment of the bail conditions imposed by that court on the accused.

- (2) (a) *An application contemplated in subsection (1) must be lodged in writing with the clerk of the court, and must-*
 - (i) contain an affidavit or affirmation by the Head of **[Prison] Correctional Centre** to the effect that he or she is satisfied that the **[prison] correctional centre** population of the **[prison] correctional centre** concerned is reaching such proportions that it constitutes a material and imminent threat to the human dignity, physical health or safety of the accused concerned; and
 - (ii) ...

- (3) (a) If the magistrate or regional magistrate is satisfied that the application complies with the requirements set out in subsection (2)(a), he or she may-
 - (i) ...
 - (b) If the accused is absent when an order referred to in paragraph (a)(i) is made or when bail conditions are amended in terms of paragraph (a)(ii), a correctional official duly authorised by the Head of the **[prison] correctional centre** where the accused is in custody must-
 - (i) ...

- (4) (a) The National Director of Public Prosecutions may, in consultation with the National Commissioner of Correctional Services, issue directives regarding-
 - (i) the establishment of monitoring and consultative mechanisms for bringing an application contemplated in subsection (1); and
 - (ii) the procedure to be followed by a Head of **[Prison] Correctional Centre** and a Director of Public Prosecutions whenever it appears that it is necessary to bring an application contemplated in subsection (1).
- (b) ...

37. Section 65 of the Principal Act is hereby amended by the substitution for the section of the following section:

65 Appeal to superior court with regard to bail

- (1) (a) An accused who **[considers himself]** is aggrieved by the refusal by a lower court to admit him to bail or by the imposition by such court of a condition of bail, including a condition relating to the amount of bail money and including an amendment or supplementation of a condition of bail, may appeal against such refusal or the imposition of such condition

to the superior court having jurisdiction or to any judge of that court if the court is not then sitting.

- (b) The appeal may be heard by a single judge.
- (c) A local division of the **[Supreme Court] High Court** as defined in section (6)(3) of the Superior Courts Act, 2013 shall have jurisdiction to hear an appeal under paragraph (a) if the area of jurisdiction of the lower court in question or any part thereof falls within the area of jurisdiction of such local division.

...

(3) The accused shall serve a copy of the notice of appeal on the **[attorney-general] Director of Public Prosecutions** and on the magistrate or, as the case may be, the regional magistrate, and the magistrate or regional magistrate shall forthwith furnish the reasons for his or her decision to the court or judge, as the case may be.

(4) The court or judge hearing the appeal shall not set aside the decision against which the appeal is brought, unless such court or judge is satisfied that the decision was wrong, in which event the court or judge shall give the decision which in its or his or her opinion the lower court should have given.

38. Section 65A of the Principal Act is hereby amended by the substitution for the section of the following section:

65A Appeal by **[attorney-general] Director of Public Prosecutions against decision of court to release accused on bail**

- (1) (a) The **[attorney-general] Director of Public Prosecutions** may appeal to the superior court having jurisdiction, against the decision of a lower court to release an accused on bail or against the imposition of a condition of bail as contemplated in section 65 (1) (a).
- (b) The provisions of section 310A in respect of an application or appeal referred to in that section by an **[attorney-general] Director of Public Prosecutions**, and the provisions of section 65 (1) (b) and (c) and (2), (3) and (4) in respect of an appeal referred to in that section by an accused, shall apply mutatis mutandis with reference to a case in which the **[attorney-general] Director of Public Prosecutions** appeals in terms of paragraph (a) of this subsection.
- (2) (a) The **[attorney-general] Director of Public Prosecutions** may appeal to the **[Appellate Division] Supreme Court of Appeal** against a decision of a **[superior court] High Court** to release an accused on bail.
- (b) The provisions of section 316 in respect of an application or appeal referred to in that section by an accused, shall apply mutatis mutandis with reference to a case in which the **[attorney-general] Director of Public Prosecutions** appeals in terms of paragraph (a) of this subsection.
- (c) Upon an appeal in terms of paragraph (a) or an application referred to in paragraph (b) brought by an **[attorney-general] Director of Public**

Prosecutions, the court may order that the State pay the accused concerned the whole or any part of the costs to which the accused may have been put in opposing the appeal or application, taxed according to the scale in civil cases of that court.

(3) If the appeal of the **[attorney-general]** Director of Public Prosecutions in terms of subsection (1) (a) or (2) (a) is successful, the court hearing the appeal shall issue a warrant for the arrest of the accused.

39. Section 66 of the Principal Act is hereby amended by the substitution for the section of the following section:

66. Failure by accused to observe condition of bail

(1) ...

(2) If the accused is not present when the prosecutor applies to the court under subsection (1), the court may issue a warrant for the arrest of the accused, and shall, when the accused appears before the court and denies that he or she failed to comply with the condition in question or that his or her failure to comply with such condition was due to fault on his or her part, proceed to hear such evidence as the prosecutor and the accused may place before it.

(3) If the accused admits that he or she failed to comply with the condition in question or if the court finds that he or she failed to comply with such condition, the court may, if it finds that the failure by the accused was due to fault on his or her part, cancel the bail and declare the bail money forfeited to the State.

(4) ...

40. Section 67 of the Principal Act is hereby amended by the substitution for the section of the following section:

67. Failure of accused on bail to appear

(1) If an accused who is released on bail -

(a) fails to appear at the place and on the date and at the time -

(i) appointed for his or her trial; or

(ii) to which the proceedings relating to the offence in respect of which the accused is released on bail are adjourned; or

(b) ...

(2) (a) If the accused appears before court within fourteen days of the issue under subsection (1) of the warrant of arrest, the court shall confirm the provisional cancellation of the bail and the provisional forfeiture of the bail money, unless the accused satisfies the court that his or her failure under subsection (1) to appear or to remain in attendance was not due to fault on his or her part.

- (b) If the accused satisfies the court that his or her failure was not due to fault on his or her part, the provisional cancellation of the bail and the provisional forfeiture of the bail money shall lapse.
- (c) ...

41. Section 68 of the Principal Act is hereby amended by the substitution for the section of the following section:

68. Cancellation of bail

(1) Any court before which a charge is pending in respect of which bail has been granted may, whether the accused has been released or not, upon information on oath that -

- (a) the accused is about to evade justice or is about to abscond in order to evade justice;
- (b) ...
- (g) it is in the interests of justice to do so,

issue a warrant for the arrest of the accused and make such order as it may deem proper, including an order that the bail be cancelled and that the accused be committed to **[prison]** a correctional centre until the conclusion of the relevant criminal proceedings.

(2) Any magistrate may, in circumstances in which it is not practicable to obtain a warrant of arrest under subsection (1), upon the application of any peace officer and upon a written statement on oath by such officer that -

- (a) he or she has reason to believe that -
 - (i) ...
- (d) it is in the interests of justice to do so,

issue a warrant for the arrest of the accused, and may, if satisfied that the ends of justice may be defeated if the accused is not placed in custody, cancel the bail and commit the accused to **[prison]** a correctional centre, which committal shall remain of force until the conclusion of the relevant criminal proceedings unless the court before which the proceedings are pending sooner reinstates the bail.

42. Section 72 of the Principal Act is hereby amended by the substitution for the section of the following section:

72 Accused may be released on warning in lieu of bail

(1) If an accused is in custody in respect of any offence and a police official or a court may in respect of such offence release the accused on bail under section 59 or

60, as the case may be, such police official or such court, as the case may be, may, in lieu of bail and if the offence is not, in the case of such police official, an offence referred to in Part II or Part III of Schedule 2-

- (a) release the accused from custody and warn him or her to appear before a specified court at a specified time on a specified date in connection with such offence or, as the case may be, to remain in attendance at the proceedings relating to the offence in question, and the said court may, at the time of such release or at any time thereafter, impose any condition referred to in section 62 in connection with such release;
- (b) in the case of an accused under the age of eighteen years who is released under paragraph (a), place the accused in the care of the person in whose custody he or she is, and warn such person to bring the accused or cause the accused to be brought before a specified court at a specified time on a specified date and to have the accused remain in attendance at the proceedings relating to the offence in question and, if a condition has been imposed in terms of paragraph (a), to see to it that the accused complies with that condition.

(2) ...

(3)...

- (b) A court which releases an accused under subsection (1) shall, at the time of releasing the accused, record or cause the relevant proceedings to be recorded in full, and where such court is a magistrate's court or a regional court, any document purporting to be an extract from the record of proceedings of that court and purporting to be certified as correct by the clerk of the court and which sets out the warning relating to the court before which, the time at which and the date on which the accused is to appear or the conditions on which he or she was released, shall, on its mere production in any court in which the relevant charge is pending, be prima facie proof of such warning.

(4) The court may, if satisfied that an accused referred to in subsection (2) (a) or a person referred to in subsection (2) (b), was duly warned in terms of paragraph (a) or, as the case may be, paragraph (b) of subsection (1), and that such accused or such person has failed to comply with such warning or to comply with a condition imposed, issue a warrant for his or her arrest, and may, when he or she is brought before the court, in a summary manner enquire into his or her failure and, unless such accused or such person satisfies the court that there is a reasonable possibility that his or her failure was not due to fault on his or her part, sentence him or her to a fine not exceeding R300 or to imprisonment for a period not exceeding three months.

43. Section 75 of the Principal Act is hereby amended by the substitution for the section of the following section:

75 Summary trial and court of trial

(1) When an accused is to be tried in a court in respect of an offence, he or she shall, subject to the provisions of sections 119, 122A and 123, be tried at a summary trial in—

- (a) a court which has jurisdiction and in which he or she appeared for the first time in respect of such offence in accordance with any method referred to in section 38;
- (b) a court which has jurisdiction and to which he or she was referred to under subsection (2); or
- (c) any other court which has jurisdiction and which has been designated by the attorney-general or any person authorized thereto by the **[attorney-general] Director of Public Prosecutions**, whether in general or in any particular case, for the purposes of such summary trial.

44. Section 77 of the Principal Act is hereby amended by the substitution for the section of the following section:

77. Capacity of accused to understand proceedings

(1) ...

(1A) At proceedings in terms of sections 77(1) and 78(2) the court may, if it is of the opinion that substantial injustice would otherwise result, order that the accused be provided with the services of a legal practitioner in terms of section 3B of the Legal Aid **[Amendment] Act, [1996 (Act No. 20 of 1996)] 1969, Act 22 of 1969.**

...

45. Section 85 of the Principal Act is hereby amended by the substitution for the section of the following section:

85 Objection to charge

(1) An accused may, before pleading to the charge under section 106, object to the charge on the ground-

...

- (d) that the charge does not contain sufficient particulars of any matter alleged in the charge: Provided that such an objection may not be raised to a charge when he or she is required in terms of section 119 or 122A to plead thereto in the magistrate's court;

(e) ...

Provided that the accused shall give reasonable notice to the prosecution of his or her intention to object to the charge and shall state the grounds upon which he or she bases his or her objection: Provided further that the requirement of such notice may be waived by the **[attorney-general] Director of Public Prosecutions** or the prosecutor, as the case may be, and the court may, on good cause shown, dispense with such notice or adjourn the trial to enable such notice to be given.

46. Section 106 of the Principal Act are hereby amended by the substitution for the sections of the following sections:

106. Pleas.—

- (1) When an accused pleads to a charge he or she may plead—
- (a) that he or she is guilty of the offence charged or of any offence of which he or she may be convicted on the charge; or
 - (b) that he or she is not guilty; or
 - (c) that he or she has already been convicted of the offence with which he or she is charged; or
 - (d) that he or she has already been acquitted of the offence with which he or she is charged; or
 - (e) that he or she has received a free pardon under section 327 (6) from the [State] President for the offence charged; or
 - (f) ...
 - (g) that he or she has been discharged under the provisions of section 204 from prosecution for the offence charged; or ...
 - (h) ...

(3) An accused shall give reasonable notice to the prosecution of his or her intention to plead a plea other than the plea of guilty or not guilty, and shall in such notice state the ground on which he or she bases this plea: Provided that the requirement of such notice may be waived by the [attorney-general] Director of Public Prosecutions or the prosecutor, as the case may be, and the court may, on good cause shown, dispense with such notice or adjourn the trial to enable such notice to be given.

(4) An accused who pleads to a charge, other than a plea that the court has no jurisdiction to try the offence, or an accused on behalf of whom a plea of not guilty is entered by the court, shall, save as is otherwise expressly provided by this Act or any other law, be entitled to demand that he or she be acquitted or be convicted.

47. Section 108 of the Principal Act is hereby amended by the substitution for the section of the following section:

108. Issues raised by plea to be tried

If an accused pleads a plea other than a plea of guilty, he or she shall, subject to the provisions of sections 115, 122, and 141(3), by such plea be deemed to demand that the issues raised by the plea be tried.

48. Section 110A of the Principal Act is hereby amended by the substitution for the section of the following section:

110A. Jurisdiction in respect of offences committed by certain persons outside Republic

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

...

(3) At the conclusion of the trial against a person under this section, a copy of the proceedings, certified by the clerk of the court or registrar, together with any remarks as the prosecutor may wish to append thereto, must be submitted to the Minister of **[Foreign Affairs] International Relations and Cooperation**.

49. Section 111 of the Principal Act is hereby amended by the substitution for the section of the following section:

111 Minister may remove trial to jurisdiction of another [attorney-general] Director of Public Prosecutions

(1) (a) The direction of the National Director of Public Prosecutions contemplated in section 179(1)(a) of the Constitution of the Republic of South Africa **[, 1996 (Act No.108 of 1996)]**, shall state the name of the accused, the relevant offence, the place at which (if known) and the Director in whose area of jurisdiction the relevant investigation and criminal proceedings shall be conducted and commenced.

50. Section 112 of the Principal Act is hereby amended by the substitution for the section of the following section:

112. Plea of guilty.

(1) Where an accused at a summary trial in any court pleads guilty to the offence charged, or to an offence of which he or she may be convicted on the charge and the prosecutor accepts that plea—

(a)...

(2) If an accused or his or her legal adviser hands a written statement by the accused into court, in which the accused sets out the facts which he or she admits and on which he or she has pleaded guilty, the court may, in lieu of questioning the accused under subsection (1) (b), convict the accused on the strength of such statement and sentence him or her as provided in the said subsection if the court is satisfied that the accused is guilty of the offence to which he or she has pleaded guilty: Provided that the court may in its discretion put any question to the accused in order to clarify any matter raised in the statement.

51. Section 114 of the Principal Act is hereby amended by the substitution for the section of the following section:

114. Committal by magistrate's court of accused for sentence by regional court after plea of guilty

...

(3) (a) Unless the regional court concerned—
(i) is satisfied that a plea of guilty or an admission by the accused which is material to his or her guilt was incorrectly recorded; or
(ii) is not satisfied that the accused is guilty of the offence of which he or she has been convicted and in respect of which he or she has been committed for sentence,
the court shall make a formal finding of guilty and sentence the accused.

(b) If the court is satisfied that a plea of guilty or any admission by the accused which is material to his or her guilt was incorrectly recorded, or if the court is not satisfied that the accused is guilty of the offence of which he or she has been convicted and in respect of which he or she has been committed for sentence or that he or she has no valid defence to the charge, the court shall enter a plea of not guilty and proceed with the trial as a summary trial in that court: Provided that any admission by the accused the recording of which is not disputed by the accused, shall stand as proof of the fact thus admitted.

52. Section 116 of the Principal Act is hereby amended by the substitution for the section of the following section:

116. Committal of accused for sentence by regional court after trial in magistrate's court

...

(b) If a regional magistrate acts under the proviso to paragraph (a), he or she shall inform the accused accordingly and postpone the case to some future date pending the outcome of the review proceedings, and, if the accused is in custody, the regional magistrate may make such order with regard to the detention or release of the accused as he or she may deem fit.

53. Section 117 of the Principal Act is hereby amended by the substitution for the section of the following section:

117. Committal to superior court in special case.-

Where an accused in a lower court pleads not guilty to the offence charged against him or her and a ground of his or her defense is the alleged invalidity of a provincial ordinance or a proclamation of the [State] President on which the charge against him or her is founded and upon the validity of which a magistrate's court is in terms of section 110 of the Magistrates' Courts Act, 1944 (Act 32 of 1944), not competent to pronounce, the accused shall be committed for a summary trial before a superior court having jurisdiction.

54. Section 119 of the Principal Act is hereby amended by the substitution for the section of the following section:

119. Accused to plead in magistrate's court on instructions of [attorney-general] the Director of Public Prosecutions.

When an accused appears in a magistrate's court and the alleged offence may be tried by a superior court only or is of such a nature or magnitude that it merits punishment in excess of the jurisdiction of a magistrate's court, the prosecutor may, notwithstanding the provisions of section 75, on the instructions of the [attorney-general] Director of Public Prosecutions, whether in general or in any particular case, put the charge, as well as any other charge which shall, in terms of section 82, be disposed of in a superior court, to the accused in the magistrate's court, and the accused shall, subject to the provisions of sections 77 and 85, be required by the magistrate to plead thereto forthwith.

55. Section 121 of the Principal Act is hereby amended by the substitution for the section of the following section:

121. Plea of guilty

(1) Where an accused under section 119 pleads guilty to the offence charged, the presiding magistrate shall question him or her in terms of the provisions of paragraph (b) of section 112 (1).

(2) (a) If the magistrate is satisfied that the accused admits the allegations stated in the charge, he or she shall stop the proceedings.

(b) If the magistrate is not satisfied as provided in paragraph (a), he or she shall record in what respect he or she is not so satisfied and enter a plea of not guilty and deal with the matter in terms of section 122 (1): Provided that an allegation with reference to which the magistrate is so satisfied and which has been recorded as an admission, shall stand at the trial of the accused as proof of such allegation.

(3) If the magistrate is satisfied as provided in subsection (2) (a), he or she shall adjourn the proceedings pending the decision of the **[attorney-general]** Director of Public Prosecutions, who may-

(a) arraign the accused for sentence before a superior court or any other court having jurisdiction, including the magistrate's court in which the proceedings were stopped under subsection (2) (a) ;

(b) decline to arraign the accused for sentence before any court but arraign him or her for trial on any charge at a summary trial before a **[superior] High [c]Court** or any other court having jurisdiction, including the magistrate's court in which the proceedings were stopped under subsection (2) (a) ;

(c) institute a preparatory examination against the accused.

(4) The magistrate or any other magistrate of the magistrate's court concerned shall advise the accused of the decision of the **[attorney-general]** Director of Public Prosecutions and, if the decision is that the accused be arraigned for sentence-

(a) in the magistrate's court concerned, dispose of the case on the charge on which the accused is arraigned; or

(b) in a regional court or **[superior] High [c]Court**, adjourn the case for sentence by the regional court or **[superior] High [c]Court** concerned.

(5) (a) ...

(b) Unless the accused satisfies the court that a plea of guilty or an admission was incorrectly recorded or unless the court is not satisfied that the accused is guilty of the offence to which he or she has pleaded guilty or that the accused has no valid defence to the charge, the court may convict the accused on his or her plea of guilty of the offence to which he or she has pleaded guilty and impose any competent sentence.

(6) If the accused satisfies the court that the plea of guilty or an admission which is material to his or her guilt was incorrectly recorded, or if the court is not satisfied that the

accused is guilty of the offence to which he or she has pleaded guilty or that the accused has no valid defence to the charge, the court shall record a plea of not guilty and proceed with the trial as a summary trial in that court: Provided that an admission by the accused the recording of which is not disputed by the accused, shall stand as proof of the fact thus admitted.

56. Section 122 of the Principal Act is hereby amended by the substitution for the section of the following section:

122 Plea of not guilty.

(1) Where an accused under section 119 pleads not guilty to the offence charged, the court shall act in terms of section 115 and when that section has been complied with, the magistrate shall stop the proceedings and adjourn the case pending the decision of the **[attorney-general] Director of Public Prosecutions**.

(2) Where the proceedings have been adjourned under subsection (1), the **[attorney-general] Director of Public Prosecutions** may—

- (i) arraign the accused on any charge at a summary trial before a **[superior] High [c]Court** or any other court having jurisdiction, including the magistrate's court in which the proceedings were adjourned under subsection (1); or
- (ii) institute a preparatory examination against the accused, and the **[attorney-general] Director of Public Prosecutions** shall advise the magistrate's court concerned of his or her decision.

(3) The magistrate, who need not be the magistrate before whom the proceedings under section 119 or 122 (1) were conducted, shall advise the accused of the decision of the **[attorney-general] Director of Public Prosecutions**, and if the decision is that the accused be arraigned—

- (a) ...
 - (b) in a regional court or a **[superior] High [c]Court**, commit the accused for a summary trial before the court concerned.
- (4) ...

57. Section 122C of the Principal Act is hereby amended by the substitution for the section of the following section:

122C Plea of guilty.

(1) Where an accused under section 122A pleads guilty to the offence charged, the presiding magistrate shall question him or her in terms of the provisions of paragraph (b) of section 112 (1).

- (2) (a) If the magistrate is satisfied that the accused admits the allegations stated in the charge, he or she shall adjourn the case for sentence by the regional court concerned.
- (b) If the magistrate is not satisfied as provided in paragraph (a), he or she shall record in what respect he or she is not so satisfied and enter a plea of not guilty and deal with the matter in terms of section 122D (1): Provided that an

allegation with reference to which the magistrate is so satisfied and which has been recorded as an admission, shall stand at the trial of the accused as proof of such allegation.

(3) ...

(b) Unless the accused satisfies the court that the plea of guilty or an admission was incorrectly recorded or unless the court is not satisfied that the accused is guilty of the offence to which he or she has pleaded guilty or that the accused has no valid defence to the charge, the court may convict the accused on his or her plea of guilty of the offence to which he or she has pleaded guilty, and impose any competent sentence.

(4) If the accused satisfies the court that the plea of guilty or an admission which is material to his or her guilt was incorrectly recorded, or if the court is not satisfied that the accused is guilty of the offence to which he or she has pleaded guilty or that the accused has no valid defence to the charge, the court shall record a plea of not guilty and proceed with the trial as a summary trial in that court: Provided that an admission by the accused the recording of which is not disputed by the accused, shall stand as proof of the fact thus admitted.

58. Section 123 of the Principal Act is hereby amended by the substitution for the section of the following section:

123. [Attorney-general] The Director of Public Prosecutions may instruct that preparatory examination be held

If a[n attorney-general] Director of Public Prosecutions is of the opinion that it is necessary for the more effective administration of justice -

- (a) that a trial in a superior court be preceded by a preparatory examination in a magistrate's court into the allegations against the accused, he or she may, where he or she does not follow the procedure under section 119, or, where he or she does follow it and the proceedings are adjourned under section 121(3) or 122(1) pending the decision of the [attorney-general,] Director of Public Prosecutions, instruct that a preparatory examination be instituted against the accused;
- (b) that a trial in a magistrate's court or a regional court be converted into a preparatory examination, he or she may at any stage of the proceedings, but before sentence is passed, instruct that the trial be converted into a preparatory examination.

59. Section 125 of the Principal Act is hereby amended by the substitution for the section of the following section:

125. [Attorney-general] The Director of Public Prosecutions may direct that preparatory examination be conducted at a specified place.

(1) Where [an attorney-general] a Director of Public Prosecutions instructs that a preparatory examination be instituted or that a trial be converted into a preparatory examination, he or she may, if it appears to him or her expedient on account of the number of accused involved or of excessive inconvenience or of possible disturbance of the public order, that the preparatory examination be held within his or her area of jurisdiction in a court other than the court in which the relevant proceedings were

commenced, direct that the preparatory examination be instituted in such court or, where a trial has been converted into a preparatory examination, be continued in such other court.

(2) The magistrate or regional magistrate shall, after advice of the decision of the **[attorney-general] Director of Public Prosecutions**, advise the accused of the decision of the **[attorney-general] Director of Public Prosecutions** and adjourn the proceedings of such other court, and thereafter forward a copy of the record of the proceedings, certified as correct by the clerk of the court, to the court to which the proceedings have been adjourned.

(3) ...

60. Section 126 of the Principal Act is hereby amended by the substitution for the section of the following section:

126. Procedure to be followed by magistrate at preparatory examination

Where a[n] **[attorney-general] Director of Public Prosecutions** instructs that a preparatory examination be held against an accused, the magistrate or regional magistrate shall, after advice of the decision of the **[attorney-general] Director of Public Prosecutions**, advise the accused of the decision of the **[attorney-general] Director of Public Prosecutions** and proceed in the manner hereinafter described to enquire into the charge against the accused.

61. Section 127 of the Principal Act is hereby amended by the substitution for the section of the following section:

127. Recalling of witnesses after conversion of trial into preparatory examination

Where **[an attorney-general] a Director of Public Prosecutions** instructs that a trial be converted into a preparatory examination, it shall not be necessary for the magistrate or regional magistrate to recall any witness who has already given evidence at the trial, but the record of the evidence thus given, certified as correct by the magistrate or regional magistrate, as the case may be, or, if such evidence was recorded in shorthand or by mechanical means, any document purporting to be the transcription of the original record of such evidence and purporting to be certified as correct under the hand of the person who transcribed it, shall have the same legal force and effect and shall be admissible in evidence in the same circumstances as the evidence given in the course of a preparatory examination: Provided that if it appears to the magistrate or regional magistrate concerned that it may be in the interests of justice to have a witness already examined recalled for further examination, then such witness shall be recalled and further examined and the evidence given by him or her shall be recorded in the same manner as other evidence given at a preparatory examination.

62. Section 132 of the Principal Act is hereby amended by the substitution for the section of the following section:

132. Procedure after plea

(1) (a) Where an accused who has been required under section 131 to plead to a charge to which he or she has not pleaded before, pleads guilty to the

offence charged, the presiding judicial officer shall question him or her in accordance with the provisions of paragraph (b) of section 112 (1).

- (b) If the presiding judicial officer is not satisfied that the accused admits all the allegations in the charge, he or she shall record in what respect he or she is not so satisfied and enter a plea of not guilty: Provided that an allegation with reference to which the said judicial officer is so satisfied and which has been recorded as an admission, shall stand at the trial of the accused as proof of such allegation.

(2) Where an accused who has been required under section 131 to plead to a charge to which he or she has not pleaded before, pleads not guilty to the offence charged, the presiding judicial officer shall act in accordance with the provisions of section 115.

63. Section 133 of the Principal Act is hereby amended by the substitution for the section of the following section:

133. Accused may testify at preparatory examination

An accused may, after the provisions of section 132 have been complied with but subject to the provisions of section 151 (1) (b) which shall mutatis mutandis apply, give evidence or make an unsworn statement in relation to a charge put to him or her under section 130, and the record of such evidence or statement shall be received in evidence before any court in criminal proceedings against the accused upon its mere production without further proof.

64. Section 135 of the Principal Act is hereby amended by the substitution for the section of the following section:

135. Discharge of accused at conclusion of preparatory examination

As soon as a preparatory examination is concluded and the magistrate or regional magistrate, as the case may be, is upon the whole of the evidence of the opinion that no sufficient case has been made out to put the accused on trial upon any charge put to the accused under section 130 or upon any charge in respect of an offence of which the accused may on such charge be convicted, he or she may discharge the accused in respect of such charge.

65. Section 137 of the Principal Act is hereby amended by the substitution for the section of the following section:

137. Magistrate to transmit record of preparatory examination to [attorney-general] the Director of Public Prosecutions

The magistrate or regional magistrate, as the case may be, shall, at the conclusion of a preparatory examination and whether or not the accused is under section 135 discharged in respect of any charge, send a copy of the record of the preparatory examination to the attorney-general and, where the accused is not discharged in respect of all the charges put to him or her under section 13, adjourn the proceedings pending the decision of the [attorney-general] Director of Public Prosecutions.

66. Section 139 of the Principal Act is hereby amended by the substitution for the section of the following section:

139. [Attorney-general] The Director of Public Prosecutions may arraign accused for sentence or trial

After considering the record of a preparatory examination transmitted to him under section 137, the **[attorney-general] Director of Public Prosecutions** may—

- (a) ...
- (b) arraign the accused for trial before any court having jurisdiction, whether the accused has under section 131 pleaded guilty or not guilty to any charge and whether or not he or she has been discharged under section 135;
- (c) ...

and the **[attorney-general] Director of Public Prosecutions** shall advise the lower court concerned of his or her decision.

67. Section 140 of the Principal Act is hereby amended by the substitution for the section of the following section:

140. Procedure where accused arraigned for sentence

(1) Where an accused is under section 139(a) arraigned for sentence, any magistrate or regional magistrate of the court in which the preparatory examination was held shall advise the accused of the decision of the **[attorney-general] Director of Public Prosecutions** and, if the decision is that the accused be arraigned -

- (a) ...
- (2) (a) ...
(b) Unless the accused satisfies the court that the plea of guilty or an admission was incorrectly recorded or unless the court is not satisfied that the accused is guilty of the offence to which he or she has pleaded guilty or that the accused has no valid defence to the charge, the court may convict the accused on his or her plea of guilty of the offence to which he or she has pleaded guilty and impose any competent sentence.
- (3) If the accused satisfies the court that the plea of guilty or an admission which is material to his or her guilt was incorrectly recorded, or if the court is not satisfied that the accused is guilty of the offence to which he or she has pleaded guilty or that the accused has no valid defence to the charge, the court shall record a plea of not guilty and proceed with the trial as a summary trial in that court: Provided that an admission by the accused the recording of which is not disputed by the accused, shall stand as proof of the fact thus admitted.
- (4) ...

68. Section 142 of the Principal Act is hereby amended by the substitution for the section of the following section:

142. Procedure where [attorney-general] the Director of Public Prosecutions declines to prosecute

Where [an attorney-general] a Director of Public Prosecutions under section 139(c) declines to prosecute an accused, he or she shall advise the magistrate of the district in which the preparatory examination was held of his or her decision, and such magistrate shall forthwith have the accused released from custody or, if the accused is not in custody, advise the accused in writing of the decision of the [attorney-general] the Director of Public Prosecutions, whereupon no criminal proceedings shall again be instituted against the accused in respect of the charge in question.

69. Section 143 of the Principal Act is hereby amended by the substitution for the section of the following section:

143. Accused may inspect preparatory examination record and is entitled to copy thereof

(1) An accused who is arraigned for sentence or for trial under section 139 may, without payment, inspect the record of the preparatory examination at the time of his or her arraignment before the court.

(2) ...

70. Section 144 of the Principal Act is hereby amended by the substitution for the section of the following section:

144. Charge in [superior c]Court to be laid in an indictment

(1) Where [an attorney-general] a Director of Public Prosecutions arraigns an accused for sentence or trial by a [superior c]Court, the charge shall be contained in a document called an indictment, which shall be framed in the name of the [attorney-general] Director of Public Prosecutions.

...

(3) (a) Where [an attorney-general] a Director of Public Prosecutions under section 75, 121 (3) (b) or 122 (2) (i) arraigns an accused for a summary trial in a [superior c]Court, the indictment shall be accompanied by a summary of the substantial facts of the case that, in the opinion of the [attorney-general] the Director of Public Prosecutions are necessary to inform the accused of the allegations against him or her and that will not be prejudicial to the administration of justice or the security of the State, as well as a list of the names and addresses of the witnesses the [attorney-general] Director of Public Prosecutions intends calling at the summary trial on behalf of the State: Provided that this provision shall not be so construed that the State shall be bound by the contents of the summary; the [attorney-general] Director of Public Prosecutions may withhold the name and address of a witness if he or she is of the opinion that such witness may be tampered with or be intimidated or that it would be in the interest of the security of the State that the name and address of such witness be withheld; the omission of the name or address of a witness from such list shall in no way affect the validity of the trial.

- (b) Where the evidence for the State at the trial of the accused differs in a material respect from the summary referred to in paragraph (a), the trial court may, at the request of the accused and if it appears to the court that the accused might be prejudiced in his or her defence by reason of such difference, adjourn the trial for such period as to the court may seem adequate.

...

- (4) (a) An indictment, together with a notice of trial referred to in the rules of court, shall, unless an accused agrees to a shorter period, be served on an accused at least ten days (Sundays and public holidays excluded) before the date appointed for the trial—

(i) in accordance with the procedure and manner laid down by the rules of court, by handing it to him or her personally, or, if he or she cannot be found, by delivering it at his or her place of residence or place of employment or business to a person apparently over the age of sixteen years and apparently residing or employed there, or, if he or she has been released on bail, by leaving it at the place determined under section 62 for the service of any document on him or her; or

(ii) by the magistrate or regional magistrate committing him or her to the **[superior c]**Court, by handing it to him or her.

...

71. Section 145 of the Principal Act is hereby amended by the substitution for the section of the following section:

145. Trial in **[superior c] High Court by judge sitting with or without assessors**

- (1) (a) Except as provided in section 148, an accused arraigned before a **[superior c]**High Court shall be tried by a judge of that court sitting with or without assessors in accordance with the provisions set out hereunder.

(b) An assessor for the purposes of this section means a person who, in the opinion of the judge who presides at a trial, has experience in the administration of justice or skill in any matter which may be considered at the trial.

- (2) Where **[an attorney-general]** a Director of Public Prosecutions arraigns an accused before a **[superiorc]**High Court—

(a) for trial and the accused pleads not guilty; or

(b) for sentence, or for trial and the accused pleads guilty, and a plea of not guilty is entered at the direction of the presiding judge, the presiding judge may summon not more than two assessors to assist him or her at the trial.

(3) No assessor shall hear any evidence unless he or she first takes an oath or, as the case may be, makes an affirmation, administered by the presiding judge, that he or she will, on the evidence placed before **[him]** the court give a true verdict upon the issues to be tried.

(4) An assessor who takes an oath or makes an affirmation under subsection (3) shall be a member of the court: Provided that—

- (a) subject to the provisions of paragraphs (b) and (c) of this proviso and of section 217 (3) (b), the decision or finding of the majority of the members of the court upon any question of fact or upon the question referred to in the said paragraph (b) shall be the decision or finding of the court, except when the presiding judge sits with only one assessor, in which case the decision or finding of the judge shall, in the case of a difference of opinion, be the decision or finding of the court;
- (b) if the presiding judge is of the opinion that it would be in the interests of the administration of justice that the assessor or the assessors assisting him or her do not take part in any decision upon the question whether evidence of any confession or other statement made by an accused is admissible as evidence against him or her, the judge alone shall decide upon such question, and he or she may for this purpose sit alone;
- (c) the presiding judge alone shall decide upon any other question of law or upon any question whether any matter constitutes a question of law or a question of fact, and he or she may for this purpose sit alone.

(5) If an assessor is not in the full-time employment of the State, he or she shall be entitled to such compensation as the Minister, in consultation with the Minister of Finance, may determine in respect of expenses incurred by him or her in connection with his or her attendance at the trial, and in respect of his or her services as assessor.

72. Section 146 of the Principal Act is hereby amended by the substitution for the section of the following section:

146. Reasons for decision by [superior] High [c]Court in criminal trial

A judge presiding at a criminal trial in a [superior] High [c]Court shall—

- (a) where he or she decides any question of law, including any question under paragraph (c) of the proviso to section 145 (4) whether any matter constitutes a question of law or a question of fact, give the reasons for his or her decision;
- (b) whether he or she sits with or without assessors, give the reasons for the decision or finding of the court upon any question of fact;
- (c) where he or she sits with assessors, give the reasons for the decision or finding of the court upon the question referred to in paragraph (b) of the proviso to section 145(4);
- (d) where he or she sits with assessors and there is a difference of opinion upon any question of fact or upon the question referred to in paragraph (b) of the proviso to section 145 (4), give the reasons for the decision or finding of the member of the court who is in the minority or, where the presiding judge sits with only one assessor, of such an assessor.

73. Section 150 of the Principal Act is hereby amended by the substitution for the section of the following section:

150. Prosecutor may address court and adduce evidence

(1) The prosecutor may at any trial, before any evidence is adduced, address the court for the purpose of explaining the charge and indicating, without comment, to the court what evidence he or she intends adducing in support of the charge.

(2) (a) The prosecutor may then examine the witnesses for the prosecution and adduce such evidence as may be admissible to prove that the accused committed the offence referred to in the charge or that he or she committed an offence of which he or she may be convicted on the charge.

...

74. Section 151 of the Principal Act is hereby amended by the substitution for the section of the following section:

151. Accused may address court and adduce evidence

(1) (a) If an accused is not under section 174 discharged at the close of the case for the prosecution, the court shall ask him or her whether he or she intends adducing any evidence on behalf of the defence, and if he or she answers in the affirmative, he or she may address the court for the purpose of indicating to the court, without comment, what evidence he or she intends adducing on behalf of the defence.

(b) The court shall also ask the accused whether **[himself]** he or she intends giving evidence on behalf of the defence, and –

(i) if the accused answers in the affirmative, he or she shall, except where the court on good cause shown allows otherwise, be called as a witness before any other witness for the defence; or

(ii) if the accused answers in the negative but decides, after other evidence has been given on behalf of the defence, to give evidence **[himself]** in his or her own defence, the court may draw such inference from the accused's conduct as may be reasonable in the circumstances.

(2) (a) ...

(b) Where any document may be received in evidence before any court upon its mere production and the accused wishes to place such evidence before the court, he or she shall read out the relevant document in court unless the prosecutor is in possession of a copy of such document or dispenses with the reading out thereof.

75. Section 153 of the Principal Act is hereby amended by the substitution for the section of the following section:

153. Circumstances in which criminal proceedings shall not take place in open court

(1) ...

(2) If it appears to any court at criminal proceedings that there is a likelihood that harm might result to any person, other than an accused, if he or she testifies at such proceedings, the court may direct –

- (a) that such person shall testify behind closed doors and that no person shall be present when such evidence is given unless **[his]** that person's presence is necessary in connection with such proceedings or is authorized by the court;
 - (b) that the identity of such person shall not be revealed or that it shall not be revealed for a period specified by the court.
- (3) In criminal proceedings relating to a charge that the accused committed or attempted to commit –
- (a) any sexual offence as contemplated in section 1 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, towards or in connection with any other person;
 - (b) any act for the purpose of furthering the commission of a sexual offence as contemplated in section 1 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, towards or in connection with any other person; or
 - (c) extortion or any statutory offence of demanding from any other person some advantage which was not due and, by inspiring fear in the mind of such other person, compelling him or her to render such advantage,

the court before which such proceedings are pending may, at the request of such other person or, if he or she is a minor, at the request of his or her parent or guardian, direct that any person whose presence is not necessary at the proceedings or any person or class of persons mentioned in the request, shall not be present at the proceedings: Provided that judgment shall be delivered and sentence shall be passed in open court if the court is of the opinion that the identity of the other person concerned would not be revealed thereby.

(3A) Any person whose presence is not necessary at criminal proceedings referred to in paragraphs (a) and (b) of subsection (3), shall not be admitted at such proceedings while the other person referred to in those paragraphs is giving evidence, unless such other person or, if he or she is a minor, his or her parent or guardian or a person in *loco parentis*, requests otherwise.

(4) ...
[Subs. (4) deleted by s. 99 of Act 75/2008]

(5) Where a witness at criminal proceedings before any court is under the age of eighteen years, the court may direct that no person, other than such witness and his or her parent or guardian or a person in *loco parentis*, shall be present at such proceedings, unless such person's presence is necessary in connection with such proceedings or is authorized by the court.

(6) The court may direct that no person under the age of eighteen years shall be present at criminal proceedings before the court, unless he or she is a witness referred to in subsection (5) and is actually giving evidence at such proceedings or his or her presence is authorized by the court.

76. Section 154 of the Principal Act is hereby amended by the substitution for the section of the following section:

154. Prohibition of publication of certain information relating to criminal proceedings

(1) Where a court under section 153 (1) on any of the grounds referred to in that subsection directs that the public or any class thereof shall not be present at any proceedings or part thereof, the court may direct that no information relating to the proceedings or any part thereof held behind closed doors shall be published in any manner whatever: Provided that a direction by the court shall not prevent the publication of information relating to the name and personal particulars of the accused, the charge against him or her, the plea, the verdict and the sentence, unless the court is of the opinion that the publication of any part of such information might defeat the object of its direction under section 153 (1), in which event the court may direct that such part shall not be published.

(2) (a) Where a court under section 153 (3) directs that any person or class of persons shall not be present at criminal proceedings or where any person is in terms of section 153 (3A) not admitted at criminal proceedings, no person shall publish in any manner whatever any information which might reveal the identity of any complainant in the proceedings: Provided that the presiding judge or judicial officer may authorize the publication of such information if he or she is of the opinion that such publication would be just and equitable.

(b) ...

(3) No person shall publish in any manner whatever any information which reveals or may reveal the identity of an accused under the age of eighteen years or of a witness at criminal proceedings who is under the age of eighteen years: Provided that the presiding judge or judicial officer may authorize the publication of so much of such information as he or she may deem fit if the publication thereof would in his or her opinion be just and equitable and in the interest of any particular person.

77. Section 156 of the Principal Act is hereby amended by the substitution for the section of the following section:

156. Persons committing separate offences at same time and place may be tried together

Any number of persons charged in respect of separate offences committed at the same place and at the same time or at about the same time, may be charged and tried together in respect of such offences if the prosecutor informs the court that evidence admissible at the trial of one of such persons will, in his or her opinion, also be admissible as evidence at the trial of any other such person or such persons.

78. Section 159 of the Principal Act is hereby amended by the substitution for the section of the following section:

159. Circumstances in which criminal proceedings may take place in absence of accused

(1) If an accused at criminal proceedings conducts himself or herself in a manner which makes the continuance of the proceedings in his or her presence impracticable, the

court may direct that **[he]** the accused be removed and that the proceedings continue in his or her absence.

- (2) If two or more accused appear jointly at criminal proceedings and -
- (a) the court is at any time after the commencement of the proceedings satisfied, upon application made to it by any accused in person or by his or her representative -
- (i) that the physical condition of that accused is such that he or she is unable to attend the proceedings or that it is undesirable that he or she should attend the proceedings; or
- (ii) that circumstances relating to the illness or death of a member of the family of that accused make his or her absence from the proceedings necessary; or
- (b) ...

(3) Where an accused becomes absent from the proceedings in the circumstances referred to in subsection (2), the court may, in lieu of directing that the proceedings be proceeded with in the absence of the accused concerned, upon the application of the prosecution direct that the proceedings in respect of the absent accused be separated from the proceedings in respect of the accused who are present, and thereafter, when such accused is again in attendance, the proceedings against him or her shall continue from the stage at which he or she became absent, and the court shall not be required to be differently constituted merely by reason of such separation.

(4) If an accused who is in custody in terms of an order of court cannot, by reason of his or her physical indisposition or other physical condition, be brought before a court for the purposes of obtaining an order for his or her further detention, the court before which the accused would have been brought for purposes of such an order if it were not for the indisposition or other condition, may, upon application made by the prosecution at any time prior to the expiry of the order for his or her detention wherein the circumstances surrounding the indisposition or other condition are set out, supported by a certificate from a medical practitioner, order, in the absence of such an accused, that he or she be detained at a place indicated by the court and for the period which the court deems necessary in order that he or she can recover and be brought before the court so that an order for his or her further detention for the purposes of his or her trial can be obtained.

79. Section 160 of the Principal Act is hereby amended by the substitution for the section of the following section:

160. Procedure at criminal proceedings where accused is absent

(1) If an accused referred to in section 159(1) or (2) again attends the proceedings in question, he or she may, unless he or she was legally represented during his or her absence, examine any witness who testified during his or her absence, and inspect the record of the proceedings or require the court to have such record read over to him or her.

(2) ...

(3) (a) ...

- (b) If it appears to the court that the presence of an absent accused cannot reasonably be obtained, the court may direct that the proceedings in respect of the accused who are present be concluded as if such proceedings had been separated from the proceedings at the stage at which the accused concerned became absent from the proceedings, and when such absent accused is again in attendance, the proceedings against him or her shall continue from the stage at which he or she became absent, and the court shall not be required to be differently constituted merely by reason of such separation.
- (c) When, in the case of a trial, the evidence on behalf of all the accused has been concluded and any accused is absent when the verdict is to be delivered, the verdict may be delivered in respect of all the accused or be withheld until all the accused are present or be delivered in respect of any accused present and withheld in respect of the absent accused until he or she is again in attendance.

80. Section 162 of the Principal Act is hereby amended by the substitution for the section of the following section:

162. Witness to be examined under oath

(1) Subject to the provisions of sections 163 and 164, no person shall be examined as a witness in criminal proceedings unless he or she is under oath, which shall be administered by the presiding judicial officer or, in the case of a [superior] high court, by the presiding judge or the registrar of the court, and which shall be in the following form:—

“I swear that the evidence that I shall give, shall be the truth, the whole truth and nothing but the truth, so help me God.”

(2) If any person to whom the oath is administered wishes to take the oath with uplifted hand, he or she shall be permitted to do so.

81. Section 163 of the Principal Act is hereby amended by the substitution for the section of the following section:

163. Affirmation in lieu of oath

(1) Any person who is or may be required to take the oath and—

(a) ...

(c) who does not consider the oath in the prescribed form to be binding on his or her conscience; or

(d) who informs the presiding judge or, as the case may be, the presiding judicial officer, that he or she has no religious belief or that the taking of the oath is contrary to his or her religious belief,

shall make an affirmation in the following words in lieu of the oath and at the direction of the presiding judicial officer or, in the case of a superior court, the presiding judge or the registrar of the court: -

"I solemnly affirm that the evidence that I shall give, shall be the truth, the whole truth and nothing but the truth".

...

82. Section 164 of the Principal Act is hereby amended by the substitution for the section of the following section:

164. When unsworn or unaffirmed evidence admissible

(1) ...

(2) If such person wilfully and falsely states anything which, if sworn, would have amounted to the offence of perjury or any statutory offence punishable as perjury, he or she shall be deemed to have committed that offence, and shall, upon conviction, be liable to such punishment as is by law provided as a punishment for that offence.

83. Section 165 of the Principal Act is hereby amended by the substitution for the section of the following section:

165. Oath, affirmation or admonition may be administered by or through interpreter or intermediary

Where the person concerned is to give his or her evidence through an interpreter or an intermediary appointed under section 170A (1), the oath, affirmation or admonition under section 162,163 or 164 shall be administered by the presiding judge or judicial officer or the registrar of the court, as the case may be, through the interpreter or intermediary or by the interpreter or intermediary in the presence or under the eyes of the presiding judge or judicial officer, as the case may be.

84. Section 167 of the Principal Act is hereby amended by the substitution for the section of the following section:

167. Court may examine witness or person in attendance

The court may at any stage of criminal proceedings examine any person, other than an accused, who has been subpoenaed to attend such proceedings or who is in attendance at such proceedings, and may recall and re-examine any person, including an accused, already examined at the proceedings, and the court shall examine, or recall and re-examine, the person concerned if his or her evidence appears to the court essential to the just decision of the case.

85. Section 170 of the Principal Act is hereby amended by the substitution for the section of the following section:

170 Failure of accused to appear after adjournment or to remain in attendance

...

(2) The court may, if satisfied that an accused referred to in subsection (1) has failed to appear at the place and on the date and at the time to which the proceedings in question were adjourned or has failed to remain in attendance at such proceedings as so adjourned, issue a warrant for his or her arrest and, when he or she is brought before the court, in a summary manner enquire into his or her failure so to appear or so to

remain in attendance and, unless the accused [**satisfies the court**] raises a reasonable possibility that his or her failure was not due to fault on his or her part, convict him or her of the offence referred to in subsection (1) and sentence him or her to a fine not exceeding R300 or to imprisonment for a period not exceeding three months.

86. Section 174 of the Principal Act is hereby amended by the substitution for the section of the following section:

174. Accused may be discharged at close of case for prosecution

If, at the close of the case for the prosecution at any trial, the court is of the opinion that there is no evidence that the accused committed the offence referred to in the charge or any offence of which he or she may be convicted on the charge, it may return a verdict of not guilty.

87. Section 175 of the Principal Act is hereby amended by the substitution for the section of the following section:

175. Prosecution and defence may address court at conclusion of evidence.—

(1) ...

(2) The prosecutor may reply on any matter of law raised by the accused in his or her address, and may, with leave of the court, reply on any matter of fact raised by the accused in his or her address.

88. Section 178 of the Principal Act is hereby amended by the substitution for the section of the following section:

178. Arrest of person committing offence in court and removal from court of person disturbing proceedings

(1) ...

(2) If any person, other than an accused, who is present at criminal proceedings, disturbs the peace or order of the court, the court may order that such person be removed from the court and that he or she be detained in custody until the rising of the court.

89. Section 179 of the Principal Act is hereby amended by the substitution for the section of the following section:

179 Process for securing attendance of witness

(1) (a)...

(b) If any police official has reasonable grounds for believing that the attendance of any person is or will be necessary to give evidence or to produce any book, paper or document in criminal proceedings in a lower court, and hands to such person a written notice calling upon him or her to attend such criminal proceedings on the date and at the time and place

specified in the notice, to give evidence or to produce any book, paper or document, likewise specified, such person shall, for the purposes of this Act, be deemed to have been duly subpoenaed so to attend such criminal proceedings.

(2) ...

- (3) (a) Where an accused desires to have any witness subpoenaed and he or she satisfies the prescribed officer of the court-
- (i) that he or she is unable to pay the necessary costs and fees; and
 - (ii) that such witness is necessary and material for his or her defence,

such officer shall subpoena such witness.

- (b) In any case where the prescribed officer of the court is not so satisfied, he or she shall, upon the request of the accused, refer the relevant application to the judge or judicial officer presiding over the court, who may grant or refuse the application or defer his or her decision until he or she has heard other evidence in the case.

(4) ...

90. Section 183 of the Principal Act is hereby amended by the substitution for the section of the following section:

183 Witness to keep police informed of whereabouts

(1) Any person who is advised in writing by any police official that he or she will be required as a witness in criminal proceedings, shall, until such criminal proceedings have been finally disposed of or until he or she is officially advised that he or she will no longer be required as a witness, keep such police official informed at all times of his or her full residential address or any other address where he or she may conveniently be found.

(2) ...

91. Section 184 of the Principal Act is hereby amended by the substitution for the section of the following section:

184 Witness about to abscond and witness evading service of summons

(1) Whenever any person is likely to give material evidence in criminal proceedings with reference to any offence, other than an offence referred to in Part III of Schedule 2 any magistrate, regional magistrate or judge of the court before which the relevant proceedings are pending may, upon information in writing and on oath that such person is about to abscond, issue a warrant for his or her arrest.

(2) If a person referred to in subsection (1) is arrested, the magistrate, regional magistrate or judge, as the case may be, may warn that person [**him**] to appear at the proceedings in question at a stated place and at a stated time and on a stated date and release him or her on any condition referred to in paragraph (a), (b) or (e) of section 62,

in which event the provisions of subsections (1), (3) and (4) of section 66 shall *mutatis mutandis* apply with reference to any such condition.

(3) (a)...

(b)...

(4) Whenever any person is likely to give material evidence in criminal proceedings, any magistrate, regional magistrate or judge of the court before which the relevant proceedings are pending may, upon information in writing and on oath that such person is evading service of the relevant subpoena, issue a warrant for his or her arrest, whereupon the provisions of subsections (2) and (3) shall *mutatis mutandis* apply with reference to such person.

92. Section 185 of the Principal Act is hereby amended by the substitution for the section of the following section:

185 Detention of witness

(1) (a) Whenever any person is with reference to any offence referred to in Part III of Schedule 2 in the opinion of the **[attorney-general] Director of Public Prosecutions** likely to give evidence on behalf of the State at criminal proceedings in any court, and the **[attorney-general] Director of Public Prosecutions**, from information placed before him or her –

(i) is of the opinion that the personal safety of such person is in danger or that he or she may abscond or that he or she may be tampered with or that he or she may be intimidated; or

(ii) deems it to be in the interests of such person or of the administration of justice that he or she be detained in custody,

the **[attorney-general] Director of Public Prosecutions** may by way of affidavit place such information before a judge in chambers and apply to such judge for an order that the person concerned be detained pending the relevant proceedings.

(b) The **[Attorney-general] Director of Public Prosecutions** may in any case in which he or she is of the opinion that the object of obtaining an order under paragraph (a) may be defeated if the person concerned is not detained without delay, order that such person be detained forthwith but such order shall not endure for longer than seventy-two hours unless the **[attorney-general] Director of Public Prosecutions** within that time by way of affidavit places before a judge in chambers the information on which he or she ordered the detention of the person concerned and such further information as might become available to him or her, and applies to such judge for an order that the person concerned be detained pending the relevant proceedings.

(c) The **[attorney-general] Director of Public Prosecutions** shall, as soon as he or she applies to a judge under paragraph (b) for an order of detention, in writing advise the person in charge of the place where the person concerned is being detained, that he or she has so applied for an order, and shall, where a judge under subsection (2) (a) refuses to issue a warrant for the detention of the person concerned, forthwith advise the

person so in charge of such refusal, whereupon the person so in charge shall without delay release the person detained.

(2) (a) The judge hearing the application under subsection (1) may, if it appears **[to him or her]** from the information placed before him or her by the **[attorney-general] Director of Public Prosecutions** –

(i) that there is a danger that the personal safety of the person concerned may be threatened or that **[he] the person** may abscond, **[or that he]** may be tampered with, or **[that he] [may]** be intimidated; or

(ii) that it would be in the interests of the person concerned or of the administration of justice that he or she be detained in custody,

issue a warrant for the detention of such person.

(b) The decision of a judge under paragraph (a) shall be final: Provided that where a judge refuses an application and further information becomes available to the **[attorney-general] Director of Public Prosecutions** concerning the person in respect of whom the application was refused, the **[attorney-general] Director of Public Prosecutions** may again apply under subsection (1) (a) for the detention of that person.

(3) A person in respect of whom a warrant is issued under subsection (2), shall be taken to the place mentioned in the warrant and, in accordance with regulations which the Minister is hereby authorized to make, be detained there or at any other place determined by any judge from time to time, or, where the person concerned is detained in terms of an order by the **[attorney-general] Director of Public Prosecutions** under subsection (1) (b), such person shall, pending the decision of the judge under subsection (2) (a), be taken to a place determined by the **[attorney-general] Director of Public Prosecutions** and detained there in accordance with the said regulations.

(4) Any person detained under a warrant in terms of subsection (2) shall be detained for the period terminating on the day on which the criminal proceedings concerned are concluded, unless-

(a) the **[attorney-general] Director of Public Prosecutions** orders that he or she be released earlier; or

(b) such proceedings have not commenced within six months from the date on which he or she is so detained, in which case he or she shall be released after the expiration of such period.

(5) No person, other than an officer in the service of the State acting in the performance of his or her official duties, shall have access to a person detained under subsection (2), except with the consent of and subject to the conditions determined by the **[attorney-general] Director of Public Prosecutions** or an officer in the service of the State delegated by him or her.

(6) Any person detained under subsection (2) shall be visited in private at least once during each week by a magistrate of the district or area in which he or she is detained.

(7) For the purposes of section 191 any person detained under subsection (2) of this section shall be deemed to have attended the criminal proceedings in question as a witness for the State during the whole of the period of his or her detention.

- (8) ...
- (9) (a)...
- (b)...

93. Section 187 of the Principal Act is hereby amended by the substitution for the section of the following section:

187. Witness to attend proceedings and to remain in attendance

A witness who is subpoenaed to attend criminal proceedings, shall attend the proceedings and remain in attendance at the proceedings, and a person who is in attendance at criminal proceedings, though not subpoenaed as a witness, and who is warned by the court to remain in attendance at the proceedings, shall remain in attendance at the proceedings, unless such witness or such person is excused by the court: Provided that the court may, at any time during the proceedings in question, order that any person, other than the accused, who is to be called as a witness, shall leave the court and remain absent from the proceedings until he or she is called, and that he or she shall remain in court after he or she has given evidence.

94. Section 189 of the Principal Act is hereby amended by the substitution for the section of the following section:

189 Powers of court with regard to recalcitrant witness

(1) If any person present at criminal proceedings is required to give evidence at such proceedings and refuses to be sworn or to make an affirmation as a witness, or, having been sworn or having made an affirmation as a witness, refuses to answer any question put to him or her or refuses or fails to produce any book, paper or document required to be produced by him or her, the court may in a summary manner enquire into such refusal or failure and, unless the person so refusing or failing has a just excuse for his or her refusal or failure, sentence him or her to imprisonment for a period not exceeding two years or, where the criminal proceedings in question relate to an offence referred to in Part III of Schedule 2, to imprisonment for a period not exceeding five years.

(2) ...

(6) No person shall be bound to produce any book, paper or document not specified in any subpoena served upon him or her, unless he or she has such book, paper or document in court.

95. Section 190 of the Principal Act is hereby amended by the substitution for the section of the following section:

190. Impeachment or support of credibility of witness

(1) ...

(2) Any such party who has called a witness who has given evidence in any such proceedings (whether that witness is or is not, in the opinion of the court, adverse to the party calling him or her), may, after such party or the court has asked the witness whether he or she did or did not previously make a statement with which his or her evidence in the said proceedings is inconsistent, and after sufficient particulars of the alleged previous statement to designate the occasion when it was made have been given to the witness, prove that he or she previously made a statement with which such evidence is inconsistent.

96. Section 191 of the Principal Act is hereby amended by the substitution for the section of the following section:

191 Payment of expenses of witness

(1) Any person who attends criminal proceedings as a witness for the State shall be entitled to such allowance as may be prescribed under subsection (3): Provided that the judicial officer or the judge presiding at such proceedings may, if he or she thinks fit, direct that no such allowance or that only a part of such allowance shall be paid to any such witness.

(2) Subject to any regulation made under subsection (3), the judicial officer or the judge presiding at criminal proceedings may, if he or she thinks fit, direct that any person who has attended such proceedings as a witness for the accused, shall be paid such allowance as may be prescribed by such regulation, or such lesser allowance as such judicial officer or such judge may determine.

...

(5) For the purposes of this section "witness" shall include any person necessarily required to accompany any witness on account of his or her youth, old age or infirmity.

97. Section 194 of the Principal Act is hereby amended by the substitution for the section of the following section:

194. Incompetency due to state of mind

No person appearing or proved to be afflicted with mental illness or to be labouring under any imbecility of mind due to intoxication or drugs or the like, and who is thereby deprived of the proper use of his or her reason, shall be competent to give evidence while so afflicted or disabled.

98. Section 195 of the Principal Act is hereby amended by the substitution for the section of the following section:

195. Evidence for prosecution by husband or wife of accused

(1) The wife or husband of an accused shall be competent, but not compellable, to give evidence for the prosecution in criminal proceedings, but shall be competent and compellable to give evidence for the prosecution at such proceedings where the accused is charged with –

(a) ...

(b) any offence under Chapter 20 [8 of the Child Care Act, 1983 (Act 74 of 1983)] or section 35 of the Children's Act, (Act 38 of 2005), committed in respect of any child of either of them;

(c)...

(2) For the purposes of the law of evidence in criminal proceedings 'marriage' shall include a customary marriage concluded in terms of the Recognition of the Customary Marriages Act, (120 of 1998); [or] a customary marriage or union concluded under the indigenous law and custom of any of the indigenous peoples of the Republic of South Africa; [or] any marriage concluded under any system of religious law or a civil union concluded in terms of the Civil Union Act, (Act 17 of 2006).

99. Section 196 of the Principal Act is hereby amended by the substitution for the section of the following section:

196. Evidence of accused and husband or wife on behalf of accused

(1) An accused and the wife or husband of an accused shall be a competent witness for the defence at every stage of criminal proceedings, whether or not the accused is charged jointly with any other person: Provided that-

(a) an accused shall not be called as a witness except upon his or her own application;

(b) ...

(2) The evidence which an accused may, upon his or her own application, give in his or her own defence at joint criminal proceedings, shall not be inadmissible against a co-accused at such proceedings by reason only that such accused is for any reason not a competent witness for the prosecution against such co-accused.

(3) An accused may not make an unsworn statement at his or her trial in lieu of evidence but shall, if he or she wishes to give evidence, do so on oath or, as the case may be, by affirmation.

100. Section 197 of the Principal Act is hereby amended by the substitution for the section of the following section:

197. Privileges of accused when giving evidence

An accused who gives evidence at criminal proceedings shall not be asked or required to answer any question tending to show that he or she has committed or has been convicted of or has been charged with any offence other than the offence with which he or she is charged, or that he or she is of bad character, unless-

(a) he or she or his or her legal representative asks any question of any witness with a view to establishing his or her own good character or he or she [**himself**] gives evidence of his or her own good character, or the nature or conduct of the defence is such as to involve imputation of the character of the complainant or any other witness for the prosecution;

- (b) he or she gives evidence against any other person charged with the same offence or an offence in respect of the same facts;
- (c) the proceedings against him or her are such as are described in section 240 or 241 and the notice under those sections has been given to him or her; or
- (d) the proof that he or she has committed or has been convicted of such other offence is admissible evidence to show that he or she is guilty of the offence with which he or she is charged.

101. Section 200 of the Principal Act is hereby amended by the substitution for the section of the following section:

200. Witness not excused from answer establishing civil liability [on his part]

A witness in criminal proceedings may not refuse to answer any question relevant to the issue by reason only that the answer establishes or may establish a civil liability on his or her part.

102. Section 201 of the Principal Act is hereby amended by the substitution for the section of the following section:

201. Privilege of legal practitioner

No legal practitioner qualified to practise in any court, whether within the Republic or elsewhere, shall be competent, without the consent of the person concerned, to give evidence at criminal proceedings against any person by whom he or she is professionally employed or consulted as to any fact, matter or thing with regard to which such practitioner would not on the thirtieth day of May, 1961, by reason of such employment or consultation, have been competent to give evidence without such consent: Provided that such legal practitioner shall be competent and compellable to give evidence as to any fact, matter or thing which relates to or is connected with the commission of any offence with which the person by whom such legal practitioner is professionally employed or consulted, is charged, if such fact, matter or thing came to the knowledge of such legal practitioner before he or she was professionally employed or consulted with reference to the defence of the person concerned.

103. Section 203 of the Principal Act is hereby amended by the substitution for the section of the following section:

203. Witness excused from answering incriminating question

No witness in criminal proceedings shall, except as provided by this Act or any other law, be compelled to answer any question which he or she would not on the thirtieth day of May, 1961, have been compelled to answer by reason that the answer may expose him or her to a criminal charge.

104. Section 204 of the Principal Act is hereby amended by the substitution for the section of the following section:

204. Incriminating evidence by witness for prosecution

(1) Whenever the prosecutor at criminal proceedings informs the court that any person called as a witness on behalf of the prosecution will be required by the prosecution to answer questions which may incriminate such witness with regard to an offence specified by the prosecutor-

(a) the court, if satisfied that such witness is otherwise a competent witness for the prosecution, shall inform such witness –

(i) that he or she is obliged to give evidence at the proceedings in question;

(ii) that questions may be put to him or her which may incriminate him or her with regard to the offence specified by the prosecutor;

(iii) that he or she will be obliged to answer any question put to him or her, whether by the prosecution, the accused or the court, notwithstanding that the answer may incriminate him or her with regard to the offence so specified or with regard to any offence in respect of which a verdict of guilty would be competent upon a charge relating to the offence so specified;

(iv) that if he or she answers frankly and honestly all questions put to him or her, he or she shall be discharged from prosecution with regard to the offence so specified and with regard to any offence in respect of which a verdict of guilty would be competent upon a charge relating to the offence so specified; and

(b) such witness shall thereupon give evidence and answer any question put to him or her, whether by the prosecution, the accused or the court, notwithstanding that the reply thereto may incriminate him or her with regard to the offence so specified by the prosecutor or with regard to any offence in respect of which a verdict of guilty would be competent upon a charge relating to the offence so specified.

(2) If a witness referred to in subsection (1), in the opinion of the court, answers frankly and honestly all questions put to him or her –

(a) ...

(b) ...

(3) The discharge referred to in subsection (2) shall be of no legal force or effect if it is given at preparatory examination proceedings and the witness concerned does not at any trial arising out of such preparatory examination, answer, in the opinion of the court, frankly and honestly all questions put to him or her at such trial, whether by the prosecution, the accused or the court.

(4) (a) Where a witness gives evidence under this section and is not discharged from prosecution in respect of the offence in question, such evidence shall not be admissible in evidence against him or her at any trial in respect of such offence or any offence in respect of which a verdict of guilty is competent upon a charge relating to such offence.

(b) The provisions of this subsection shall not apply with reference to a witness who is prosecuted for perjury arising from the giving of the evidence in question, or for a contravention of section 319 (3) of the Criminal Procedure Act, 1955 (Act 56 of 1955).

105. Section 209 of the Principal Act is hereby amended by the substitution for the section of the following section:

209. Conviction may follow on confession by accused

An accused may be convicted of any offence on the single evidence of a confession by such accused that he or she committed the offence in question, if such confession is confirmed in a material respect or, where the confession is not so confirmed, if the offence is proved by evidence, other than such confession, to have been actually committed.

106. Section 212 of the Principal Act is hereby amended by the substitution for the section of the following section:

212. Proof of certain facts by affidavit or certificate

(1) Whenever in criminal proceedings the question arises whether any particular act, transaction or occurrence did or did not take place in any particular department or sub-department of the State or of a provincial administration or in any branch or office of such department or sub-department or in any particular court of law or in any particular bank, or the question arises in such proceedings whether any particular functionary in any such department, sub-department, branch or office did or did not perform any particular act or did or did not take part in any particular transaction, a document purporting to be an affidavit made by a person who in that affidavit alleges –

- (a) that he or she is in the service of the State or a provincial administration or of the bank in question, and that he or she is employed in the particular department or sub-department or the particular branch or office thereof or in the particular court or bank;
- (b) that-
 - (i) ...
 - (ii) ...it would in the ordinary course of events have come to his or her, the deponent's, knowledge and a record thereof, available to him or her, would have been kept; and
- (c) that it has not come to his or her knowledge-
 - (i) that such act, transaction or occurrence took place; or
 - (ii) that such functionary performed such act or took part in such transaction,and that there is no record thereof, shall, upon its mere production at such proceedings, be *prima facie* proof that the act, transaction or occurrence in question did not take place or, as the case may be, that the functionary concerned did not perform the act in question or did not take part in the transaction in question.

(2) Whenever in criminal proceedings the question arises whether any person bearing a particular name did or did not furnish any particular officer in the service of the State or of a provincial administration with any particular information or document, a document purporting to be an affidavit made by a person who in that affidavit alleges that he or she is the said officer and that no person bearing the said name furnished him or her with such information or document, shall, upon its mere production at such

proceedings, be *prima facie* proof that the said person did not furnish the said officer with any such information or document.

(3) Whenever in criminal proceedings the question arises whether any matter has been registered under any law or whether any fact or transaction has been recorded thereunder or whether anything connected therewith has been done thereunder, a document purporting to be an affidavit made by a person who in that affidavit alleges that he or she is the person upon whom the law in question confers the power or imposes the duty to register such matter or to record such fact or transaction or to do such thing connected therewith and that he or she has registered the matter in question or that he or she has recorded the fact or transaction in question or that he or she has done the thing connected therewith or that he or she has satisfied him or herself that the matter in question was registered or that the fact or transaction in question was recorded or that the thing connected therewith was done, shall, upon its mere production at such proceedings, be *prima facie* proof that such matter was registered or, as the case may be, that such fact or transaction was recorded or that the thing connected therewith was done.

(4) (a)...

(5) Whenever the question as to the existence and nature of a precious metal or any precious stone is or may become relevant to the issue in criminal proceedings, a document purporting to be an affidavit made by a person who in that affidavit alleges that he or she is an appraiser of precious metals or precious stones, that he or she is in the service of the State, that such precious metal or such precious stone is indeed a precious metal or a precious stone, as the case may be, that it is a precious metal or a precious stone of a particular kind and appearance and that the mass or value of such precious metal or such precious stone is as specified in that affidavit, shall, upon its mere production at such proceedings, be *prima facie* proof that it is a precious metal or a precious stone of a particular kind and appearance and the mass or value of such precious metal or such precious stone is as so specified.

(6) In criminal proceedings in which the finding of or action taken in connection with any particular finger-print or palm-print is relevant to the issue, a document purporting to be an affidavit made by a person who in that affidavit alleges that he or she is in the service of the State and that he or she in the performance of his or her official duties-

(a) found such finger-print or palm-print at or in the article or in the position or circumstances stated in the affidavit; or

(b) dealt with such finger-print or palm-print in the manner stated in the affidavit,

shall, upon the mere production thereof at such proceedings, be *prima facie* proof that such finger-print or palm-print was so found or, as the case may be, was so dealt with.

(7) In criminal proceedings in which the physical condition or the identity, in or at any hospital, nursing home, ambulance or mortuary, of any deceased person or of any dead body is relevant to the issue, a document purporting to be an affidavit made by a person who in that affidavit alleges –

(a) that he or she is employed at or in connection with the hospital, nursing home, ambulance or mortuary in question; and

(b) that he or she during the performance of his or her official duties observed the physical characteristics or condition of the deceased person or of the dead body in question; and

- (c) that while the deceased person or the dead body in question was under his or her care, such deceased person or such dead body had or sustained the injuries or wounds described in the affidavit, or sustained no injuries or wounds; or
 - (d) that he or she pointed out or handed over the deceased person or the dead body in question to a specified person or that he or she left the deceased person or the dead body in question in the care of a specified person or that the deceased person or the dead body in question was pointed out or handed over to him or her or left in his or her care by a specified person,
- (8) ...
- (9) In criminal proceedings in which it is relevant to prove-
- (a) the details of any consignment of goods delivered to the Railways Administration for conveyance to a specified consignee, a document purporting to be an affidavit made by a person who in that affidavit alleges-
 - (i) that he or she consigned the goods set out in the affidavit to a consignee specified in the affidavit;
 - (ii) that, on a date specified in the affidavit, he or she delivered such goods or caused such goods to be delivered to the Railways Administration for conveyance to such consignee, and that the consignment note referred to in such affidavit relates to such goods,
 shall, upon the mere production thereof at such proceedings, be *prima facie* proof of the matter so alleged; or
 - (b) that the goods referred to in paragraph (a) were received by the Railways Administration for conveyance to a specified consignee or that such goods were handled or transhipped en route by the Railways Administration, a document purporting to be an affidavit made by a person who in that affidavit alleges-
 - (i) that he or she at all relevant times was in the service of the Railways Administration in a stated capacity;
 - (ii) that he or she in the performance of his or her official duties received or, as the case may be, handled or transhipped the goods referred to in the consignment note referred to in paragraph (a) ,
 shall, upon the mere production thereof at such proceedings, be *prima facie* proof of the matter so alleged.
- (10) (a)...
- (11) (a)...
- (b) An affidavit in which the deponent declares that he or she had satisfied him or herself before using the syringe or receptacle in question-
 - (i) that the syringe or receptacle was sealed as provided in paragraph (a) (i) and that the seal was intact immediately before the syringe or receptacle was used for the said purpose; and
 - (ii) that the syringe, receptacle or, as the case may be, the holder contained the endorsement referred to in paragraph (a) (ii),
 shall, upon the mere production thereof at the proceedings in question, be *prima facie* proof that the syringe or receptacle was so sealed, that the seal was so intact and that the syringe, receptacle or holder, as the case may be, was so endorsed.

(c) ...

107. Section 213 of the Principal Act is hereby amended by the substitution for the section of the following section:

213. Proof of written statement by consent

(1) In criminal proceedings a written statement by any person, other than an accused at such proceedings, shall, subject to the provisions of subsection (2), be admissible as evidence to the same extent as oral evidence to the same effect by such person.

(2) (a) The statement shall purport to be signed by the person who made it, and shall contain a declaration by such person to the effect that it is true to the best of his or her knowledge and belief and that he or she made the statement knowing that, if it were tendered in evidence, he or she would be liable to prosecution if he or she wilfully stated in it anything which he or she knew to be false or which he or she did not believe to be true.

(b) If the person who makes the statement cannot read it, it shall be read to him or her before he or she signs it, and an endorsement shall be made thereon by the person who so read the statement to the effect that it was so read.

(c) ...

(f) When the documents referred to in paragraph (c) are served on an accused, the documents shall be accompanied by a written notification in which the accused is informed that the statement in question will be tendered in evidence at his or her trial in lieu of the State calling as a witness the person who made the statement but that such statement shall not without the consent of the accused be so tendered in evidence if he or she notifies the prosecutor concerned, at least two days before the commencement of the proceedings, that he or she objects to the statement so being tendered in evidence.

(3) ...

108. Section 219A of the Principal Act is hereby amended by the substitution for the section of the following section:

219A. Admissibility of admission by accused

(1) Evidence of any admission made extra-judicially by any person in relation to the commission of an offence shall, if such admission does not constitute a confession of that offence and is proved to have been voluntarily made by that person, be admissible in evidence against him or her at criminal proceedings relating to that offence: Provided that where the admission is made to a magistrate and reduced to writing by him or her or is confirmed and reduced to writing in the presence of a magistrate, the admission shall, upon the mere production at the proceedings in question of the document in which the admission is contained-

- (a) be admissible in evidence against such person if it appears from such document that the admission was made by a person whose name corresponds to that of such person and, in the case of an admission made to a magistrate or confirmed in the presence of a magistrate through an interpreter, if a certificate by the interpreter appears on such document to the effect that he or she interpreted truly and correctly and to the best of his or her ability with regard to the contents of the admission and any question put to such person by the magistrate; and

...

109. Section 221 of the Principal Act is hereby amended by the substitution for the section of the following section:

221. Admissibility of certain trade or business records

(1) In criminal proceedings in which direct oral evidence of a fact would be admissible, any statement contained in a document and tending to establish that fact shall, upon production of the document, be admissible as evidence of that fact if-

- (a) ...
- (b) the person who supplied the information recorded in the statement in question is dead or is outside the Republic or is unfit by reason of his or her physical or mental condition to attend as a witness or cannot with reasonable diligence be identified or found or cannot reasonably be expected, having regard to the time which has elapsed since he or she supplied the information as well as all the circumstances, to have any recollection of the matters dealt with in the information he or she supplied.

...

110. Section 234 of the Principal Act is hereby amended by the substitution for the section of the following section:

234. Proof of official documents

(1) It shall, at criminal proceedings, be sufficient to prove an original official document which is in the custody or under the control of any State official by virtue of his or her office, if a copy thereof or an extract therefrom, certified as a true copy or extract by the head of the department concerned or by any State official authorized thereto by such head, is produced in evidence at such proceedings.

- (2) (a) An original official document referred to in subsection (1), other than the record of judicial proceedings, may be produced at criminal proceedings only upon the order of the **[attorney-general]** Director of Public Prosecutions.

...

111. Section 236 of the Principal Act is hereby amended by the substitution for the section of the following section:

236. Proof of entries in accounting records and documentation of banks

(1) The entries in the accounting records of a bank, and any document which is in the possession of any bank and which refers to the said entries or to any business transaction of the bank, shall, upon the mere production at criminal proceedings of a document purporting to be an affidavit made by any person who in that affidavit alleges-

(a) that he or she is in the service of the bank in question;

(b) ...

(2) Any entry in any accounting record referred to in subsection (1) or any document referred to in subsection (1) may be proved at criminal proceedings upon the mere production at such proceedings of a document purporting to be an affidavit made by any person who in that affidavit alleges-

(a) that he or she is in the service of the bank in question;

(b) that he or she has examined the entry, accounting record or document in question; and

(c) that a copy of such entry or document set out in the affidavit or in an annexure thereto is a correct copy of such entry or document.

(3) ...

112. Section 236A of the Principal Act is hereby amended by the substitution for the section of the following section:

236A Proof of entries in accounting records and documentation of banks in countries outside Republic

(1) The entries in the accounting records of an institution in a state or territory outside the Republic which is similar to a bank in the Republic, and any document which is in the possession of such an institution and which refers to the said entries or to any business transaction of the institution, shall, upon the mere production at criminal proceedings of a document purporting to be an affidavit made by any person who in that affidavit alleges-

(a) that he or she is in the service of the institution in question;

(b) ...

(2) Any entry in any accounting record contemplated in subsection (1) or any document contemplated in subsection (1) may be proved at criminal proceedings upon the mere production at such proceedings of a document purporting to be an affidavit made by any person who in that affidavit alleges-

(a) that he or she is in the service of the institution in question;

(b) that he or she has examined the entry, accounting record or document in question; and

(c) that a copy of such entry or document set out in the affidavit or in an annexure thereto is a correct copy of such entry or document.

(3) ...

113. Sections 240, 241, 243, 244, 247, 248 and 250 of the Principal Act are hereby amended by the substitution for the sections of the following sections:

240. Evidence on charge of receiving stolen property

(1) At criminal proceedings at which an accused is charged with receiving stolen property which he or she knew to be stolen property, evidence may be given at any stage of the proceedings that the accused was, within the period of twelve months immediately preceding the date on which he or she first appeared in a magistrate's court in respect of such charge, found in possession of other stolen property: Provided that no such evidence shall be given against the accused unless at least three days' notice in writing has been given to him or her that it is intended to adduce such evidence against him or her.

(2) ...

(3) Where the accused is proved to have received the property which is the subject of the charge, from a person under the age of eighteen years, he or she shall be presumed to have known at the time when he or she received such property that it was stolen property, unless it is proved -

- (a) that the accused was at that time under the age of twenty-one years; or
- (b) that the accused had good cause, other than the mere statement of the person from whom he or she received such property, to believe, and that he or she did believe, that such person had the right to dispose of such property.

241. Evidence of previous conviction on charge of receiving stolen property

If at criminal proceedings at which an accused is charged with receiving stolen property which he or she knew to be stolen property, it is proved that such property was found in the possession of the accused, evidence may at any stage of the proceedings be given that the accused was, within the five years immediately preceding the date on which he or she first appeared in a magistrate's court in respect of such charge, convicted of an offence involving fraud or dishonesty, and such evidence may be taken into consideration for the purpose of proving that the accused knew that the property found in his or her possession was stolen property: Provided that not less than three days' notice in writing shall be given to the accused that it is intended to adduce evidence of such previous conviction.

243. Evidence of receipt of money or property and general deficiency on charge of theft

- (1) At criminal proceedings at which an accused is charged with theft –
 - (a) while employed in any capacity in the service of the State, of money or of property which belonged to the State or which came into the possession of the accused by virtue of his or her employment;
 - (b) while a clerk, servant or agent, of money or of property which belonged to his or her employer or principal or which came into the possession of the accused on account of his or her employer or principal,

an entry in any book of account kept by the accused or kept under or subject to his or her charge or supervision, and which purports to be an entry of the receipt of money or of property, shall be proof that such money or such property was received by the accused.

(2) ...

244. Evidence on charge relating to seals and stamps

At criminal proceedings at which an accused is charged with any offence relating to any seal or stamp used for the purposes of the public revenue or of the post office in any foreign country, a despatch purporting to be from the officer administering the government of such country and transmitting to the **[State]** President any stamp, mark or impression and stating it to be a genuine stamp, mark or impression of a die-plate or other instrument provided or made or used by or under the direction of the proper authority of such country for the purpose of denoting stamp duty or postal charge, shall on its mere production at such proceedings be prima facie proof of the facts stated in the despatch.

247. Presumptions relating to absence from Republic of certain persons

Any document, including any newspaper, periodical, book, pamphlet, letter, circular letter, list, record, placard or poster, on the face whereof it appears that a person of a name corresponding to that of an accused person has at any particular time been outside the Republic or has at any particular time made any statement outside the Republic, shall, upon the mere production thereof by the prosecution at criminal proceedings, be prima facie proof that the accused was outside the Republic at such time or, as the case may be, that the accused made such statement outside the Republic at such time, if such document is accompanied by a certificate, purporting to have been signed by the **[Secretary for Foreign Affairs]** Director-General of International Relations and Cooperation, to the effect that he or she is satisfied that such document is of foreign origin.

248. Presumption that accused possessed particular qualification or acted in particular capacity

(1) If an act or an omission constitutes an offence only when committed by a person possessing a particular qualification or quality, or vested with a particular authority or acting in a particular capacity, an accused charged with such an offence upon a charge alleging that he or she possessed such qualification or quality or was vested with such authority or was acting in such capacity, shall, at criminal proceedings, be deemed to have possessed such qualification or quality or to have been vested with such authority or to have been acting in such capacity at the time of the commission of the offence, unless such allegation is at any time during the criminal proceedings expressly denied by the accused or is disproved.

(2) ...

250. Presumption of lack of authority

(1) If a person would commit an offence if he or she -

(a) carried on any occupation or business;

- (b) performed any act;
- (c) owned or had in his or her possession or custody or used any article;
- or
- (d) was present at or entered any place,

without being the holder of a licence, permit, permission or other authority or qualification (in this section referred to as the “necessary authority”), an accused shall, at criminal proceedings upon a charge that he or she committed such an offence, be deemed not to have been the holder of the necessary authority, unless the contrary is proved.

- (2) (a) Any peace officer and, where any fee payable for the necessary authority would accrue to the National Revenue Fund or the Railway and Harbour Fund as referred to in section 36(4) of the Legal Succession to the South African Transport Services Act, 1989 (Act 9 of 1989) or a provincial revenue fund, any person authorized thereto in writing by the head of the relevant department or sub-department or by the officer in charge of the relevant office, may demand the production from a person referred to in subsection (1) of the necessary authority which is appropriate.
- (b) Any peace officer, other than a police official in uniform, and any person authorized under paragraph (a) shall, when demanding the necessary authority from any person, produce at the request of that person, his or her authority to make the demand.
- (3) ...

114. Section 252A of the Principal Act is hereby amended by the substitution for the section of the following section:

252A. Authority to make use of traps and undercover operations and admissibility of evidence so obtained

- (1) ...
- (2) ...
 - (a) Whether, prior to the setting of a trap or the use of an undercover operation, approval, if it was required, was obtained from the **[attorney-general] Director of Public Prosecutions** to engage such investigation methods and the extent to which the instructions or guidelines issued by the **[attorney-general] Director of Public Prosecutions** were adhered to;

115. Section 271 of the Principal Act is hereby amended by the substitution for the section of the following section:

271. Previous convictions may be proved

- (1) The prosecution may, after an accused has been convicted but before sentence has been imposed upon him or her, produce to the court for admission or denial by the accused a record of previous convictions alleged against the accused.

(2) The court shall ask the accused whether he or she admits or denies any previous conviction referred to in subsection (1).

116. Section 285 of the Principal Act is hereby amended by the substitution for the section of the following section:

285. Periodical imprisonment

(1) ...

(2) (a) The court which imposes a sentence of periodical imprisonment upon any person shall cause to be served upon **[him]** that person a notice in writing directing him or her to surrender **[himself]** on a date and at a time specified in the notice or (if prevented from doing so by circumstances beyond his or her control) as soon as possible thereafter, to the officer in charge of a place so specified, whether within or outside the area of jurisdiction of the court, for the purpose of undergoing such imprisonment.

(b) ...

(3) ...

(4) Any person who-

(a) without lawful excuse, the proof whereof shall be on such person, fails to comply with a notice issued under subsection (2); or

(b) when surrendering him or herself for the purpose of undergoing periodical imprisonment, is under the influence of intoxicating liquor or drugs or the like; or

(c) impersonates or falsely represents him or herself to be a person who has been directed to surrender him or herself for the purpose of undergoing periodical imprisonment,

shall be guilty of an offence and liable on conviction to imprisonment for a period not exceeding three months.

(5) ...

117. Sections 286, 286A, 286B, 287, and 288 are hereby amended by the substitution of the sections of the following sections:

286. Declaration of certain persons as habitual criminals

(1) Subject to the provisions of subsection (2), a superior court or a regional court which convicts a person of one or more offences, may, if it is satisfied that the said person habitually commits offences and that the community should be protected against him or her, declare him or her an habitual criminal, in lieu of the imposition of any other punishment for the offence or offences of which he or she is convicted.

(2) No person shall be declared an habitual criminal -

- (a) if he or she is under the age of eighteen years; or
- (b) ...
- (c) if in the opinion of the court the offence warrants the imposition of punishment which by itself or together with any punishment warranted or required in respect of any other offence of which the accused is simultaneously convicted, would entail imprisonment for a period exceeding 15 years.

(3) A person declared an habitual criminal shall be dealt with in accordance with the laws relating to **[prisons]** correctional centres.

286A. Declaration of certain persons as dangerous criminals

(1) Subject to the provisions of subsections (2), (3) and (4), a superior court or a regional court which convicts a person of one or more offences, may, if it is satisfied that the said person represents a danger to the physical or mental well-being of other persons and that the community should be protected against him or her, declare him or her a dangerous criminal.

(2) (a) ...

(b) Before the court commits an accused for an enquiry in terms of subsection (3), the court shall inform such accused of its intention and explain to him or her the provisions of this section and of section 286B as well as the gravity of those provisions.

(3) (a) Where a court issues a direction under subsection (2)(a), the relevant enquiry shall be conducted and be reported on -

(i) ...

(ii) by a psychiatrist appointed by the accused if he or she so wishes.

(b) (i) The court may for the purposes of such enquiry commit the accused to a psychiatric hospital or other place designated by the court, for such periods, not exceeding 30 days at a time, as the court may from time to time determine, and if an accused is in custody when he or she is so committed, he or she shall, while he or she is so committed, be deemed to be in the lawful custody of the person or the authority in whose custody he or she was at the time of such committal.

(ii) When the period of committal is extended for the first time under subparagraph (i), such extension may be granted in the absence of the accused unless the accused or his or her legal representative requests otherwise.

(c) The relevant report shall be in writing and shall be submitted in triplicate to the registrar or the clerk of the court, as the case may be, who shall make a copy thereof available to the prosecutor and the accused or his or her legal representative.

(d) ...

- (e) If the persons conducting the enquiry are not unanimous in their finding under paragraph (d)(ii), such fact shall be mentioned in the report and each of such persons shall give his or her finding on the matter in question.
 - (f) ...
 - (i) Where the list compiled and kept in terms of section 79(9) does not include a sufficient number of psychiatrists who may conveniently be appointed for any enquiry under this subsection, a psychiatrist may be appointed for the purposes of such enquiry notwithstanding that his or her name does not appear on such list.
 - (j) A psychiatrist designated or appointed under paragraph (a) and who is not in the full-time service of the State, shall be compensated for his or her services in connection with the enquiry, including giving evidence, from public funds in accordance with a tariff determined by the Minister in consultation with the Minister of **[State Expenditure] Finance**.
 - (k) For the purposes of this subsection a psychiatrist means a person registered as a psychiatrist under the **[Medical, Dental and Supplementary] Health [Service] Professions Act, 1974 (Act No. 56 of 1974)**.
- (4) (a) ...
 - (b) ...
 - (c) ...

286B. Imprisonment for indefinite period

- (1) ...
- (2) A person sentenced under subsection (1) to undergo imprisonment for an indefinite period shall, notwithstanding the provisions of subsection (1)(b) but subject to the provisions of subsection (3), within seven days after the expiration of the period contemplated in subsection (1)(b) be brought before the court which sentenced him or her in order to enable such court to reconsider the said sentence: Provided that in the absence of the judicial officer who sentenced the person any other judicial officer of that court may, after consideration of the evidence recorded and in the presence of the person, make such order as the judicial officer who is absent could lawfully have made in the proceedings in question if he or she had not been absent.
- (3) (a) The National Commissioner may, if he or she is of the opinion that owing to practical or other considerations it is desirable that a court other than the court which sentenced the person should reconsider such sentence after the expiration of the period contemplated in subsection (1) (b), with the concurrence of the **[attorney-general] Director of Public Prosecutions** in whose jurisdiction such other court is situated, apply to the registrar or to the clerk of the court, as the case may be, of the other court to have such person appear before the other court for that purpose:

Provided that such sentence shall only be reconsidered by a court with jurisdiction equal to that of the court which sentenced the person.

- (b) On receipt of any application referred to in paragraph (a), the registrar or the clerk of the court, as the case may be, shall, after consultation with the prosecutor, set the matter down for a date which shall not be later than seven days after the expiration of the period contemplated in subsection (1) (b).
- (c) The registrar or the clerk of the court, as the case may be, shall for the purpose of the reconsideration of the sentence -
 - (j) within a reasonable time before the date contemplated in paragraph (b) submit the case record to the judicial officer who is to reconsider the sentence; and
 - (ii) inform the National Commissioner in writing of the date for which the matter has been set down.
- (4) (a) Whenever a court reconsiders a sentence in terms of this section, it shall have the same powers as it would have had if it were considering sentence after conviction of a person and the procedure adopted at such proceedings shall apply *mutatis mutandis* during such reconsideration: Provided that the court shall make no finding before it has considered a report of a parole board as contemplated in section **[5C of the Correctional Services Act, 1959 (Act No. 8 of 1959)]** 75 of the Correctional Services Act, 1998 (Act No. 111 of 1998).
- (b) ...
- (5) A court which has converted the sentence of a person under subsection (4)(b)(ii) may, whether differently constituted or not -
 - (a) at any time, if it is found from a motivated recommendation by the National Commissioner that that person is not fit to be subject to correctional supervision; or
 - (b) after such person has been brought before the court in terms of section **[84B] 75(1)** of the Correctional Services Act, **[1959 (Act No. 8 of 1959)]**, 1998 (Act No. 111 of 1998), reconsider that sentence and -
 - (iii) confirm the sentence of imprisonment for an indefinite period, in which case the court shall direct that such person be brought before the court on the expiration of a further period determined by it, which shall not exceed the jurisdiction of the court; release the person unconditionally or on such conditions as it deems fit; or
 - (iv) where the person is brought before the court in terms of paragraph (b), again place the person under correctional supervision on the conditions it deems fit and for a period which shall not exceed the unexpired portion of the period of correctional supervision as converted in terms of subsection (4)(b)(ii).

....

287. Imprisonment in default of payment of fine

(1) ...

(2) Whenever a court has imposed upon any person a fine without an alternative sentence of imprisonment and the fine is not paid in full or is not recovered in full in terms of section 288, the court which passed sentence on such person (or if that court was a circuit local division of the **[Supreme] High Court**, then the **[provincial or local] division of the [Supreme] High Court** within whose area of jurisdiction such sentence was imposed) may issue a warrant directing that the person [he] be arrested and brought before the court, which may thereupon sentence that person to such term of imprisonment as could have been imposed as an alternative punishment in terms of subsection (1).

(3) Whenever by any law passed before the date of commencement of the General Law Amendment Act, 1935 (Act 46 of 1935), a court is empowered to impose upon a person convicted by such court of an offence, a sentence of imprisonment (whether direct or as an alternative to a fine) of a duration proportionate to the sum of a fine, that court may, notwithstanding such law, impose upon any person convicted of such offence in lieu of a sentence of imprisonment which is proportionate as aforesaid, any sentence of imprisonment within the limits of the jurisdiction of the court.

(4) Unless the court which has imposed a period of imprisonment as an alternative to a fine has directed otherwise, the National Commissioner or a parole board may in **[]** their discretion at the commencement of the alternative punishment or at any point thereafter, if it does not exceed five years -

- (a) act as if the person were sentenced to imprisonment as referred to in section 276(1)(i); or
- (b) apply in accordance with the provisions of section 276A(3) for the sentence to be reconsidered by the court a quo, and thereupon the provisions of section 276A(3) shall apply *mutatis mutandis* to such a case.

288. Recovery of fine

(1) (a) Whenever a person is sentenced to pay a fine, the court passing the sentence may, in its discretion, issue a warrant addressed to the sheriff or messenger of the court authorizing him or her to levy the amount of the fine by attachment and sale of any movable property belonging to such person although the sentence directs that, in default of payment of the fine, such person shall be imprisoned.

(b) ...

(3) When a person is sentenced only to a fine or, in default of payment of the fine, imprisonment and the court issues a warrant under this section, it may suspend the execution of the sentence of imprisonment and may release the person upon his or her executing a bond with or without sureties as the court thinks fit, on condition that he or she appears before such court or some other court on the day appointed for the return of such warrant, such day being not more than fifteen days from the time of executing the bond, and in the event of the amount of the fine not being recovered, the sentence of imprisonment may be carried into execution forthwith or may be suspended as before for a further period or periods of not more than fifteen days, as the court may deem fit.

(4) In any case in which an order for the payment of money is made on non-recovery whereof imprisonment may be ordered, and the money is not paid forthwith, the court may require the person ordered to make such payment to enter into a bond as prescribed in subsection (3), and in default of his or her doing so, may at once pass sentence of imprisonment as if the money had not been recovered.

118. Sections 296 and 297 are hereby amended by the substitution of the sections of the following sections:

296. Committal to treatment centre

(1) A court convicting any person of any offence may, in addition to or in lieu of any sentence in respect of such offence, order that the person be detained at a treatment centre established under the Prevention of and Treatment **[of Drug Dependency] for Substance Abuse Act, [1992] 2008 (Act 70 of 2008)** if the court is satisfied from the evidence or from any other information placed before it, which shall in either of the said cases include the report of a probation officer, that such person is a person as is described in **section [21] 33** (1) of the said Act, [and such order shall for the purposes of the said Act be deemed to have been made under section **[22] 35** thereof: Provided that such order shall not be made in addition to any sentence of imprisonment (whether direct or as an alternative to a fine) unless the operation of the whole of such sentence is suspended.

297 Conditional or unconditional postponement or suspension of sentence, and caution or reprimand

(1) Where a court convicts a person of any offence, other than an offence in respect of which any law prescribes a minimum punishment, the court may in its discretion -

(a) postpone for a period not exceeding five years the passing of sentence and release the person concerned -

(i) on one or more conditions, whether as to -

(aa) ...

(cc) the performance without remuneration and outside the **[prison] correctional centre** of some service for the benefit of the community under the supervision or control of an organization or institution which, or person who, in the opinion of the court, promotes the interests of the community (in this section referred to as community service);

...

(2) Where a court has under paragraph (a) (i) of subsection (1) postponed the passing of sentence and the court, whether differently constituted or not, is at the expiration of the relevant period satisfied that the person concerned has observed the conditions imposed under that paragraph, the court shall discharge him or her without passing sentence, and such discharge shall have the effect of an acquittal, except that the conviction shall be recorded as a previous conviction.

(3) ...

(8) A court which has-

- (a) postponed the passing of sentence under paragraph (a) (i) of subsection (1); or
- (b) suspended the operation of a sentence under subsection (1) (b) or under subsection (4),

on condition that the person concerned perform community service or that he or she submit himself or herself to instruction or treatment or to the supervision or control of a probation officer or that he or she attend or reside at a specified centre for a specified purpose, may, whether or not the court is constituted differently than it was at the time of such postponement or suspension, at any time during the period of postponement or suspension on good cause shown amend any such condition or substitute any other competent condition for such condition, or cancel the order of postponement or suspension and impose a competent sentence or put the suspended sentence into operation, as the case may be.

- (8A) (a) A court which under this section has imposed a condition according to which the person concerned is required to perform community service, to undergo instruction or treatment or to attend or reside at a specified centre for a specified purpose, shall cause to be served upon the person concerned a notice in writing directing him or her to report on a date and time specified in the notice or (if prevented from doing so by circumstances beyond his or her control) as soon as practicable thereafter, to the person specified in that notice, whether within or outside the area of jurisdiction of the court, in order to perform that community service, to undergo that instruction or treatment or to attend that centre or to reside thereat, as the case may be.

(b)

- (8B) Any person who-

- (a) when he or she reports to perform community service, to undergo instruction or treatment or to attend or reside at a specified centre for a specified purpose, is under the influence of intoxicating liquor or drugs or the like; or
- (b) impersonates or falsely represents himself or herself to be the person who has been directed to perform the community service in question, to undergo the instruction or treatment in question or to attend or reside at the specified centre for the specified purpose,

shall be guilty of an offence and liable on conviction to imprisonment for a period not exceeding three months.

- (9) ...

119. Sections 297A, 297B, 299, 299A, 300, 301, 302, 303, 304, 304A, 306 and 307 of the Principal Act are hereby amended by the substitution for the sections by the following sections:

297A. Liability for patrimonial loss arising from performance of community service

(1) If patrimonial loss may be recovered from an accused on the ground of a delict committed by him or her in the performance of community service in terms of section 297, that loss may, subject to subsection (3), be recovered from the State.

(2) ...

(5) If any person as a result of the performance of community service in terms of section 297 has suffered patrimonial loss which cannot be recovered from the State in terms of subsection (1), the Director-general: Justice and Constitutional Development may, with the concurrence of the Treasury, as an act of grace pay such amount as he or she may deem reasonable to that person.

297B. Agreement on operation of suspended sentences

(1) The **[State]** President may, on such conditions as he or she may deem necessary, enter into an international agreement with any state, so as to provide, on a reciprocal basis, for the putting into operation of suspended sentences in respect of persons convicted, within the jurisdiction of the Republic or of such state, of an offence mentioned in the agreement.

(2) The **[State]** President may, if the parties agree, amend such an agreement to the extent which he or she deems necessary.

(3) If an application is made for a suspended sentence, imposed by a court of a state referred to in subsection (1), to be put into operation, the court at which the application is made shall, subject to the terms of the agreement, proceed with that application as if the suspended sentence was imposed by a court in the Republic.

(4) (a) An agreement referred to in subsection (1), or any amendment thereof, shall only be in force after it has been published by the **[State]** President by proclamation in the *Gazette*.

(b) The **[State]** President may at any time and in like manner withdraw any such agreement.

299. Warrant for the execution of sentence

A warrant for the execution of any sentence may be issued by the judge or judicial officer who passed the sentence or by any other judge or judicial officer of the court in question, or, in the case of a regional court, by any magistrate, and such warrant shall commit the person concerned to the **[prison]** correctional centre for the magisterial district in which such person is sentenced.

299A. Right of complainant to make representations in certain matters with regard to placement on parole, on day parole, or under correctional supervision

(1) ...

(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 National Commissioner of Correctional Services thereof in writing;
- (ii) to provide the said National Commissioner with his or her postal and physical address in writing; and
- (iii) to inform the said National Commissioner in writing of any change of address.

(3) The National 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 National 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 National 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.

300. Court may award compensation where offence causes damage to or loss of property

(1) ...

(4) Where money of the person convicted is taken from him or her upon his or her arrest, the court may order that payment be made forthwith from such money in satisfaction or on account of the award.

(5) ...

301. Compensation to innocent purchaser of property unlawfully obtained

Where a person is convicted of theft or of any other offence whereby he or she has unlawfully obtained any property, and it appears to the court on the evidence that such person sold such property or part thereof to another person who had no knowledge that the property was stolen or unlawfully obtained, the court may, on the application of such purchaser and on restitution of such property to the owner thereof, order that, out of any money of such convicted person taken from him or her on his or her arrest, a sum not exceeding the amount paid by the purchaser be returned to him or her.

302. Sentences subject to review in the ordinary course

- (1) (a) Any sentence imposed by a magistrate's court -
 - (i) which, in the case of imprisonment (including detention in a child and youth care centre providing a programme contemplated in

section 191(2)(j) of the Children's Act, 2005 (Act No. [32] 38 of 2005)), exceeds a period of three months, if imposed by a judicial officer who has not held the substantive rank of magistrate or higher for a period of seven years, or which exceeds a period of six months, if imposed by a judicial officer who has held the substantive rank of magistrate or higher for a period of seven years or longer;

...

303. Transmission of record

The clerk of the court in question shall within one week after the determination of a case referred to in paragraph (a) of section 302(1) forward to the registrar of the [provincial] Division or local [d] Division of the High Court as referred to in section 6 of the Superior Courts Act 10 of 2013 having jurisdiction the record of the proceedings in the case or a copy thereof certified by such clerk, together with such remarks as the presiding judicial officer may wish to append thereto, and with any written statement or argument which the person convicted may within three days after imposition of the sentence furnish to the clerk of the court, and such registrar shall, as soon as possible, lay the same in chambers before a judge of that division for his or her consideration

304. Procedure on review

(1) If, upon considering the proceedings referred to in section 303 and any further information or evidence which may, by direction of the judge, be supplied or taken by the magistrate's court in question, it appears to the judge that the proceedings are in accordance with justice, he or she shall endorse his or her certificate to that effect upon the record thereof, and the registrar concerned shall then return the record to the magistrate's court in question.

(2) (a) If, upon considering the said proceedings, it appears to the judge that the proceedings are not in accordance with justice or that doubt exists whether the proceedings are in accordance with justice, [he] the judge shall obtain from the judicial officer who presided at the trial a statement setting forth [his] the reasons for convicting the accused and for the sentence imposed, and shall thereupon lay the record of the proceedings and the said statement before the court of the [provincial] Division or local [d] Division of the High Court as referred to in section 6 of the Superior Courts Act 10 of 2013 having jurisdiction for consideration by that court as a court of appeal: Provided that where the judge concerned is of the opinion that the conviction or sentence imposed is clearly not in accordance with justice and that the person convicted may be prejudiced if the record of the proceedings is not forthwith placed before the [provincial] Division or local [d] Division of the High Court as referred to in section 6 of the Superior Courts Act 10 of 2013 having jurisdiction, the judge may lay the record of the proceedings before that court without obtaining the statement of the judicial officer who presided at the trial.

(b) ...

(c) Such court, whether or not it has heard evidence, may, subject to the provisions of section 312 -

(i) ...

- (v) remit the case to the magistrate's court with instructions to deal with any matter in such manner as the **[provincial] Division** or local **[d]Division of the High Court as referred to in section 6 of the Superior Courts Act 10 of 2013** may think fit; and
- (vi) make any such order in regard to the suspension of the execution of any sentence against the person convicted or the admission of such person to bail, or, generally, in regard to any matter or thing connected with such person or the proceedings in regard to such person as to the court seems likely to promote the ends of justice.

(3) If the court desires to have a question of law or of fact arising in any case argued, it may direct such question to be argued by the **[attorney-general] Director of Public Prosecutions** and by such counsel as the court may appoint.

(4) If in any criminal case in which a magistrate's court has imposed a sentence which is not subject to review in the ordinary course in terms of section 302 or in which a regional court has imposed any sentence, it is brought to the notice of the **[provincial] Division** or local **[d]Division of the High Court as referred to in section 6 of the Superior Courts Act 10 of 2013** having jurisdiction or any judge thereof that the proceedings in which the sentence was imposed were not in accordance with justice, such court or judge shall have the same powers in respect of such proceedings as if the record thereof had been laid before such court or judge in terms of section 303 or this section.

304A. Review of proceedings before sentence

- (a) If a magistrate or regional magistrate after conviction but before sentence is of the opinion that the proceedings in respect of which he or she brought in a conviction are not in accordance with justice, or that doubt exists whether the proceedings are in accordance with justice, he or she shall, without sentencing the accused, record the reasons for his or her opinion and transmit them, together with the record of the proceedings, to the registrar of the **[provincial] [d]Division of the High Court as referred to in Section 6 of the Superior Courts Act 10 of 2013** having jurisdiction, and such registrar shall, as soon as practicable, lay the same for review in chambers before a judge, who shall have the same powers in respect of such proceedings as if the record thereof had been laid before him or her in terms of section 303.
- (b) When a magistrate or a regional magistrate acts in terms of paragraph (a), he or she shall inform the accused accordingly and postpone the case to some future date pending the outcome of the review proceedings and, if the accused is in custody, the magistrate or regional magistrate may make such order with regard to the detention or release of the accused as he or she may deem fit.

306. Accused may set down case for argument

(1) A magistrate's court imposing sentence which under section 302 is subject to review, shall forthwith inform the person convicted that the record of the proceedings will be transmitted within one week, and such person may then inspect and make a copy of such record before transmission or whilst in the possession of the **[provincial] Division** or local **[d]Division of the High Court as referred to in section 6 of the Superior Courts Act 10 of 2013**, and may set down the case for argument before the **[provincial] Division** or local **[d]Division of the High Court as referred to in section 6 of the Superior Courts Act 10 of 2013** having jurisdiction in like manner as if the record had

been returned or transmitted to such **[provincial or local] [d]**Division in compliance with any order made by it for the purpose of bringing in review the proceedings of a magistrate's court.

(2) Whenever a case is so set down, whether the offence in question was prosecuted at the instance of the State or at the instance of a private prosecutor, a written notice shall be served, by or on behalf of the person convicted, upon the **[attorney-general] Director of Public Prosecutions** at his or her office not less than seven days before the day appointed for the argument, setting forth the name and number of the case, the court before which it was tried, the date for which the case has been set down for argument and the grounds or reasons upon which the judgment is sought to be reversed or altered.

(3) Whether such judgment is confirmed or reversed or altered, no costs shall in respect of the proceedings on review be payable by the prosecution to the person convicted or by the person convicted to the prosecution.

307. Execution of sentence not suspended unless bail granted

(1) Subject to the provisions of section 308, the execution of any sentence shall not be suspended by the transmission of or the obligation to transmit the record for review unless the court which imposed the sentence releases the person convicted on bail.

(2) If the court releases such person on bail, the court may -

- (a) if the person concerned was released on bail under section 59 or 60, extend the bail, either in the same amount or any other amount; or
- (b) if such person was not so released on bail, release him or her on bail on condition that he or she deposits with the clerk of the court or with a member of the Department of Correctional Services at the **[prison] correctional centre** where such person is in custody or with any police official at the place where such convicted person is in custody, the sum of money determined by the court in question; or
- (c) on good cause shown, permit such person to furnish a guarantee, with or without sureties, that he or she will pay and forfeit to the State the sum of money determined under paragraph (b), in circumstances under which such sum, if it had been deposited, would be forfeited to the State.

(3) It shall be a condition of the release of the person convicted that he or she shall -

- (a) at a time and place specified by the court; and
- (b) upon service, in the manner prescribed by the rules of court, of a written order upon him or her at a place specified by the court,

surrender him or herself in order that effect may be given to any sentence in respect of the proceedings in question.

(3A) (a) If the order contemplated in subsection (3)(b) is not served on the convicted person within 14 days of the issuing thereof because **[he or she] that person** cannot be found at the address **[given by him or her] which he or she gave** at the time of the granting of bail **[to him or her]**,

the bail shall be provisionally cancelled and the bail money provisionally forfeited and a warrant for his or her arrest shall be issued.

- (b) The provisions of section 67(2) in respect of the confirmation or the lapsing of the provisional cancellation of bail or the forfeiture of bail money, and making final the provisional forfeiture of bail money, the provisions of section 67(3) in respect of the hearing of evidence, and the provisions of section 70 in respect of the remission of forfeited bail money, shall *mutatis mutandis* apply in respect of bail pending review.

(4) ...

120. Section 310 of the Principal Act is hereby amended by the substitution for the section of the following section:

310. Appeal from lower court by prosecutor

(1) When a lower court has in criminal proceedings given a decision in favour of the accused on any question of law, including an order made under section 85 (2), the **[attorney-general] Director of Public Prosecutions** or, if a body or a person other than the **[attorney-general] Director of Public Prosecutions** or his or her representative, was the prosecutor in the proceedings, then such other prosecutor may require the judicial officer concerned to state a case for the consideration of the provincial or local division having jurisdiction, setting forth the question of law and his or her decision thereon and, if evidence has been heard, his or her findings of fact, in so far as they are material to the question of law.

...

121. Section 310A of the Principal Act is hereby amended by the substitution for the section of the following section:

310A. Appeal by **[attorney-general] Director of Public Prosecutions against sentence of lower court**

(1) The **[attorney-general] Director of Public Prosecutions** may appeal against a sentence imposed upon an accused in a criminal case in a lower court, to the provincial or local division having jurisdiction, provided that an application for leave to appeal has been granted by a judge in chambers.

(2) (a) A written notice of such an application shall be lodged with the registrar of the provincial or local division concerned by the **[attorney-general] Director of Public Prosecutions**, within a period of 30 days of the passing of sentence or within such extended period as may on application on good cause be allowed.

(b) The notice shall state briefly the grounds for the application.

(3) The **[attorney-general] Director of Public Prosecutions** shall, at least 14 days before the day appointed for the hearing of the application, cause to be served by the deputy sheriff upon the accused in person a copy of the notice, together with a written statement of the rights of the accused in terms of subsection (4): Provided that if the deputy sheriff is not able so to serve a copy of the notice, it may be served in any other manner that may on application be allowed.

(4) An accused may, within a period of 10 days of the serving of such a notice upon him or her, lodge a written submission with the registrar concerned, and the registrar shall submit it to the judge who is to hear the application, and shall send a copy thereof to the **[attorney-general]** Director of Public Prosecutions.

(5) ...

122. Section 311 of the Principal Act is hereby amended by the substitution for the section of the following section:

311 Appeal to [Appellate Division] Supreme Court of Appeal

(1) Where the **[provincial]** Division or local **[d]**Division of the High Court as referred to in section 6 of the Superior Courts Act 10 of 2013 on appeal, whether brought by the **[attorney-general]** Director of Public Prosecutions or other prosecutor or the person convicted, gives a decision in favour of the person convicted on a question of law, the **[attorney-general]** Director of Public Prosecutions or other prosecutor against whom the decision is given may appeal to the **[Appellate Division of the]** Supreme Court of Appeal, which shall, if it decides the matter in issue in favour of the appellant, set aside or vary the decision appealed from and, if the matter was brought before the **[provincial]** Division or local **[d]**Division of the High Court as referred to in section 6 of the Superior Courts Act 10 of 2013 in terms of-

(a) section 309 (1), re-instate the conviction, sentence or order of the lower court appealed from, either in its original form or in such a modified form as the said **[Appellate Division]** Supreme Court of Appeal may consider desirable; or

(b) ...

(2) If an appeal brought by the **[attorney-general]** Director of Public Prosecutions or other prosecutor under this section or section 310 is dismissed, the court dismissing the appeal may order that the appellant pay the respondent the costs to which the respondent may have been put in opposing the appeal, taxed according to the scale in civil cases of that court: Provided that where the **[attorney-general]** Director of Public Prosecutions is the appellant, the costs which he or she is so ordered to pay shall be paid by the State.

123. Section 312 of the Principal Act is hereby amended by the substitution for the section of the following section:

312. Review or appeal and failure to comply with subsection (1) (b) or (2) of section 112

(1) ...

(2) When the provision referred to in subsection (1) is complied with and the judicial officer is after such compliance not satisfied as is required by section 112 (1) (b) or 112 (2), he or she shall enter a plea of not guilty whereupon the provisions of section 113 shall apply with reference to the matter.

124. Section 314 of the Principal Act is hereby amended by the substitution for the section of the following section:

314. Obtaining presence of convicted person in lower court after setting aside of sentence or order

(1) Where a sentence or order imposed or made by a lower court is set aside on appeal or review and the person convicted is not in custody and the court setting aside the sentence or order remits the matter to the lower court in order that a fresh sentence or order may be imposed or made, the presence before that court of the person convicted may be obtained by means of a written notice addressed to that person calling upon him or her to appear at a stated place and time on a stated date in order that such sentence or order may be imposed or made.

(2) ...

125. Section 315 of the Principal Act is hereby amended by the substitution for the section of the following section:

315. Court of appeal in respect of superior court judgments

(1) (a) ...

(3) An appeal which is to be heard by a full court in terms of a direction under paragraph (a) of subsection (2) which has not been set aside under paragraph (b) of that subsection, shall be heard -

(a) in the case of an appeal in a criminal case heard by a single judge of a **[provincial d]Division**, by the full court of the **[provincial d]Division** concerned;

[(b) in the case of an appeal in a criminal case heard by a single judge of a local division **[other than the Witwatersrand Local Division]**, by the full court of the **[provincial d]Division** which exercises concurrent jurisdiction in the area of jurisdiction of the local division concerned;

(c) in the case of an appeal in a criminal case heard by a single judge of **[the Witwatersrand] a [L]local [D]division**, by the full court of the local division concerned or a full court of a local division designated by the relevant judge president.

[(i) **by the full court of the Transvaal Provincial Division, unless a direction by the judge president of that provincial division under subparagraph (ii) applies to it; or**

(ii) **by the full court of the said local division if the said judge president has so directed in the particular instance.]**

(4) ...

(5) In this Chapter -

(a) "court of appeal" means, in relation to an appeal which in terms of subsection (3) is heard or is to be heard by a full court, the full court

concerned and, in relation to any other appeal, the Supreme Court of Appeal;

- (b) “full court” means the court of a **[provincial d]Division[, or the Witwatersrand Local Division,]** sitting as a court of appeal and constituted before three judges as referred to in the Superior Courts Act 10 of 2013.

126. Sections 316B, 317, 318, 319,325, 327, 329, 331, 332, 333, 334, 335, 338, 339, and 340 of the Principal Act are hereby amended by the substitution for the sections of the following sections:

316B. Appeal by attorney-general against sentence of superior court

(1) Subject to subsection (2), the **[attorney-general] Director of Public Prosecutions** may appeal to the **[Appellate Division] Supreme Court of Appeal** against a sentence imposed upon an accused in a criminal case in a superior court.

(2) The provisions of section 316 in respect of an application or appeal referred to in that section by an accused, shall apply *mutatis mutandis* with reference to a case in which the **[attorney-general] Director of Public Prosecutions** appeals in terms of subsection (1) of this section.

(3) Upon an appeal in terms of subsection (1) or an application referred to in subsection (2), brought by the **[attorney-general] Director of Public Prosecutions**, the court may order that the State pay the accused concerned the whole or any part of the costs to which the accused may have been put in opposing the appeal or application, taxed according to the scale in civil cases of that court.

317. Special entry of irregularity or illegality

(1) If an accused is of the view that any of the proceedings in connection with or during his or her trial before a High Court are irregular or not according to law, he or she may, either during his or her trial or within a period of 14 days after his or her conviction or within such extended period as may upon application (in this section referred to as an application for condonation) on good cause be allowed, apply for a special entry to be made on the record (in this section referred to as an application for a special entry) stating in what respect the proceedings are alleged to be irregular or not according to law, and such a special entry shall, upon such application for a special entry, be made unless the court to which or the judge to whom the application for a special entry is made is of the opinion that the application is not made *bona fide* or that it is frivolous or absurd or that the granting of the application would be an abuse of the process of the court.

(2) Save as hereinafter provided, an application for condonation or for a special entry shall be made to the judge who presided at the trial or, if he or she is not available, or, if in the case of a conviction before a circuit court the said court is not sitting, to any other judge of the **[provincial] Division** or local **[d]Division** of which that judge was a member when he or she so presided.

(3)

(4) The terms of a special entry shall be settled by the court which or the judge who grants the application for a special entry.

(5) If an application for condonation or for a special entry is refused, the accused may within a period of twenty-one days of such refusal or within such extended period as may on good cause be allowed, by petition addressed to the Chief Justice, apply to the **[Appellate Division] Supreme Court of Appeal** for condonation or for a special entry to be made on the record stating in what respect the proceedings are alleged to be irregular or not according to law, as the case may be, and thereupon the provisions of subsections (7), (8), (9) and (10) of section 316 shall *mutatis mutandis* apply.

318. Appeal on special entry under section 317

(1) If a special entry is made on the record, the person convicted may appeal to the **[Appellate Division] Supreme Court of Appeal** against his or her conviction on the ground of the irregularity stated in the special entry if, within a period of twenty-one days after entry is so made or within such extended period as may on good cause be allowed, notice of appeal has been given to the registrar of the **[Appellate Division] Supreme Court of Appeal** and to the registrar of the **[provincial] Division** or local **[d]Division**, other than a circuit court, within whose area of jurisdiction the trial took place, and of which the judge who presided at the trial was a member when he or she so presided.

(2) The registrar of such **[provincial] Division** or local **[d] Division** shall forthwith after receiving such notice give notice thereof to the **[attorney-general] Director of Public Prosecutions** and shall transmit to the registrar of the **[Appellate Division] Supreme Court of Appeal** a certified copy of the record, including copies of the evidence, whether oral or documentary, taken or admitted at the trial and of the special entry: Provided that with the consent of the accused and the attorney-general, the registrar concerned may, instead of transmitting the whole record, transmit copies, one of which shall be certified, of such parts of the record as may be agreed upon by the attorney-general and the accused to be sufficient, in which event the Appellate Division may nevertheless call for the production of the whole record.

319. Reservation of question of law

(1) If any question of law arises on the trial in a superior court of any person for any offence, that court may of its own motion or at the request either of the prosecutor or the accused reserve that question for the consideration of the **[Appellate Division] Supreme Court of Appeal**, and thereupon the first-mentioned court shall state the question reserved and shall direct that it be specially entered in the record and that a copy thereof be transmitted to the registrar of the **[Appellate Division] Supreme Court of Appeal**.

(2) ...

325. Saving of power of [State] President to extend mercy

Nothing in this Act shall affect the power of the **[State] President** to extend mercy to any person.

327. Further evidence and free pardon or substitution of verdict by [State] President

- (1) ...
- (6) (a) The **[State]** President may, upon consideration of the finding or advice of the court under subsection (4) -
- (i) direct that the conviction in question be expunged from all official records by way of endorsement on such records, and the effect of such a direction and endorsement shall be that the person concerned be given a free pardon as if the conviction in question had never occurred; or
 - (ii) substitute for the conviction in question a conviction of lesser gravity and substitute for the punishment imposed for such conviction any other punishment provided by law; or
 - (iii)
- (b) The **[State]** President shall direct the Minister to advise the person concerned in writing of any decision taken under paragraph (a), other than a decision taken under subparagraph (iii) of that paragraph, and to publish a notice in the *Gazette* in which such decision, other than a decision taken under the said subparagraph (iii), is set out.
- (7) No appeal, review or other proceedings of whatever nature shall lie in respect of -
- (a) a refusal by the Minister to issue a direction under subsection (1) or by the **[State]** President to act upon the finding or advice of the court under subsection (4) (a); or
 - (b) any aspect of the proceedings, finding or advice of the court under this section.

329. Court process may be served or executed by police official

Any police official shall, subject to the rules of court, be as qualified to serve or execute any subpoena or summons or other document under this Act as if he or she had been appointed deputy sheriff **[or deputy messenger]** or other like officer of the court.

331. Irregular warrant or process

Any person who acts under a warrant or process which is bad in law on account of a defect in the substance or form thereof shall, if he or she has no knowledge that such warrant or process is bad in law and whether or not such defect is apparent on the face of the warrant or process, be exempt from liability in respect of such act as if the warrant or process were good in law.

332. Prosecution of corporations and members of associations

- (1) For the purpose of imposing upon a corporate body criminal liability for any offence, whether under any law or at common law -

- (a) ...
- (b) the omission, with or without a particular intent, of any act which ought to have been but was not performed by or on instructions given by a director or servant of that corporate body,

in the exercise of his or her powers or in the performance of his or her duties as such director or servant or in furthering or endeavouring to further the interests of that corporate body, shall be deemed to have been performed (and with the same intent, if any) by that corporate body or, as the case may be, to have been an omission (and with the same intent, if any) on the part of that corporate body.

(2) In any prosecution against a corporate body, a director or servant of that corporate body shall be cited, as representative of that corporate body, as the offender, and thereupon the person so cited may, as such representative, be dealt with as if he or she were the person accused of having committed the offence in question: Provided that -

- (a) if the said person pleads guilty, other than by way of admitting guilt under section 57, the plea shall not be valid unless the corporate body authorized him or her to plead guilty;
- (b) ...
- (c) if the said person, as representing the corporate body, is convicted, the court convicting him or her shall not impose upon him or her in his or her representative capacity any punishment, whether direct or as an alternative, other than a fine, even if the relevant law makes no provision for the imposition of a fine in respect of the offence in question, and such fine shall be payable by the corporate body and may be recovered by attachment and sale of property of the corporate body in terms of section 288;
- (d) ...

(3) In criminal proceedings against a corporate body, any record which was made or kept by a director, servant or agent of the corporate body within the scope of his or her activities as such director, servant or agent, or any document which was at any time in the custody or under the control of any such director, servant or agent within the scope of his or her activities as such director, servant or agent, shall be admissible in evidence against the accused.

(4) For the purposes of subsection (3) any record made or kept by a director, servant or agent of a corporate body or any document which was at any time in his or her custody or under his or her control, shall be presumed to have been made or kept by him or her or to have been in his or her custody or under his control within the scope of his or her activities as such director, servant or agent, unless the contrary is proved.

(5) When an offence has been committed, whether by the performance of any act or by the failure to perform any act, for which any corporate body is or was liable to prosecution, any person who was, at the time of the commission of the offence, a director or servant of the corporate body shall be deemed to be guilty of the said offence, unless it is proved that he or she did not take part in the commission of the offence and that he or she could not have prevented it, and shall be liable to

prosecution therefor, either jointly with the corporate body or apart therefrom, and shall on conviction be personally liable to punishment therefor.

(6) In criminal proceedings against a director or servant of a corporate body in respect of an offence -

- (a) any evidence which would be or was admissible against that corporate body in a prosecution for that offence, shall be admissible against the accused;
- (b) whether or not such corporate body is or was liable to prosecution for the said offence, any document, memorandum, book or record which was drawn up, entered up or kept in the ordinary course of business of that corporate body or which was at any time in the custody or under the control of any director, servant or agent, of such corporate body, in his or her capacity as director, servant or agent, shall be prima facie proof of its contents and admissible in evidence against the accused, unless he or she is able to prove that at all material times he or she had no knowledge of the said document, memorandum, book or record, in so far as its contents are relevant to the offence charged, and was in no way party to the drawing up of such document or memorandum or the making of any relevant entries in such book or record.

(7) When a member of an association of persons, other than a corporate body, has, in carrying on the business or affairs of that association or in furthering or in endeavouring to further its interests, committed an offence, whether by the performance of any act or by the failure to perform any act, any person who was, at the time of the commission of the offence, a member of that association, shall be deemed to be guilty of the said offence, unless it is proved that he or she did not take part in the commission of the offence and that he or she could not have prevented it: Provided that if the business or affairs of the association are governed or controlled by a committee or other similar governing body, the provisions of this subsection shall not apply to any person who was not at the time of the commission of the offence a member of that committee or other body.

(8) In any proceedings against a member of an association of persons in respect of an offence mentioned in subsection (7) any record which was made or kept by any member or servant or agent of the association within the scope of his or her activities as such member, servant or agent, or any document which was at any time in the custody or under the control of any such member, servant or agent within the scope of his or her activities as such member, servant or agent, shall be admissible in evidence against the accused.

(9) For the purposes of subsection (8) any record made or kept by a member or servant or agent of an association, or any document which was at any time in his or her custody or under his or her control, shall be presumed to have been made or kept by him or her or to have been in his or her custody or under his or her control within the scope of his or her activities as such member or servant or agent, unless the contrary is proved.

(10) In this section the word "director" in relation to a corporate body means any person who controls or governs that corporate body or who is a member of a body or group of persons which controls or governs that corporate body or, where there is no such body or group, who is a member of that corporate body.

(11) The provisions of this section shall be additional to and not in substitution for any other law which provides for a prosecution against corporate bodies or their directors or servants or against associations of persons or their members.

(12) Where a summons under this Act is to be served on a corporate body, it shall be served on the director or servant referred to in subsection (2) and in the manner referred to in section 54(2).

333. Minister may invoke decision of [Appellate Division] Supreme Court of Appeal on question of law

Whenever the Minister has any doubt as to the correctness of any decision given by any superior court in any criminal case on a question of law, or whenever a decision in any criminal case on a question of law is given by any division of the [Supreme] High Court which is in conflict with a decision in any criminal case on a question of law given by any other division of the [Supreme] High Court, the Minister may submit such decision or, as the case may be, such conflicting decisions to the [Appellate Division of the] Supreme Court of Appeal and cause the matter to be argued before that Court in order that it may determine such question of law for the future guidance of all courts.

334. Minister may declare certain persons peace officers for specific purposes

- (1) (a) The Minister may by notice in the *Gazette* declare that any person who, by virtue of his or her office, falls within any category defined in the notice, shall, within an area specified in the notice, be a peace officer for the purpose of exercising, with reference to any provision of this Act or any offence or any class of offences likewise specified, the powers defined in the notice.
- (b) The powers referred to in paragraph (a) may include any power which is not conferred upon a peace officer by this Act.
- (2) (a) No person who is a peace officer by virtue of a notice issued under subsection (1) shall exercise any power conferred upon him or her under that subsection unless he or she is at the time of exercising such power in possession of a certificate of appointment issued by his or her employer, which certificate shall be produced on demand.
- (b) A power exercised contrary to the provisions of paragraph (a) shall have no legal force or effect.

...

335. Person who makes statement entitled to copy thereof

Whenever a person has in relation to any matter made to a peace officer a statement in writing or a statement which was reduced to writing, and criminal proceedings are thereafter instituted against such person in connection with that matter, the person in possession of such statement shall furnish the person who made the statement, at his or her request, with a copy of such statement.

338. Production of document by accused in criminal proceedings

Where any law requires any person to produce any document at any criminal proceedings at which such person is an accused, and such person fails to produce such document at such proceedings, such person shall be guilty of an offence, and the court

may in a summary manner enquire into his or her failure to produce the document and, unless such person satisfies the court that his or her failure was not due to any fault on his or her part, sentence him or her to any punishment provided for in such law, or, if no punishment is so provided, to a fine not exceeding R300 or to imprisonment for a period not exceeding three months.

339 Removal of accused from one prison to another for purpose of attending at criminal proceedings

Whenever an accused is in custody and it becomes necessary that he or she be removed from one prison to another prison for the purpose of attending his or her trial, the magistrate of the district in which the accused is in custody shall issue a warrant for the removal of the accused to such other prison.

340 Prison list of unsentenced prisoners and witnesses detained

Every head of a **[prison] correctional centre** within the area for which any session or circuit of any superior court is held for the trial of criminal cases shall deliver to that court at the commencement of each such session or circuit a list –

- (a) of the unsentenced prisoners who, at such commencement, have been detained within his or her prison for a period of ninety days or longer; and
- (b) of witnesses detained under section 184 or 185 and who, at such commencement, are being detained within his or her **[prison] correctional centre**,

and such list shall, in the case of each such prisoner and each such witness, specify the date of his or her admission to the **[prison] correctional centre** and the authority for his or her detention which shall, in the case of a witness, state whether the detention is under section 184 or 185, and shall further specify, in the case of each such prisoner, the cause of his or her detention.

127. Sections 341 and 342A of the Principal Act are hereby amended by the substitution for the sections of the following sections:

341. Compounding of certain minor offences

(1) If a person receives from any peace officer a notification in writing alleging that such person has committed, at a place and upon a date and at a time or during a period specified in the notification, any offence likewise specified, of any class mentioned in Schedule 3, and setting forth the amount of the fine which a court trying such person for such offence would probably impose upon him or her, such person may within thirty days after the receipt of the notification deliver or transmit the notification, together with a sum of money equal to the said amount, to the magistrate of the district or area wherein the offence is alleged to have been committed, and thereupon such person shall not be prosecuted for having committed such offence.

(2) ...

(d) If the magistrate finds that the amount specified in the notification exceeds the amount determined in terms of subsection (5) in respect of the offence in question, he or she shall notify the local authority of the amount whereby the amount specified in the notification exceeds the amount so

determined and the local authority concerned shall immediately refund the amount of such excess to the person concerned.

(e) For the purpose of this subsection '**local authority**' means any institution or body contemplated in section **[84 (1) (f) of the Provincial Government Act, 1961 (Act 32 of 1961)**, and includes-

(i) a regional services council established under section 3 of the Regional Services Councils Act, 1985 (Act 109 of 1985);

(ii) any institution or body established under the Rural Areas Act, (House of Representatives), 1987 (Act 9 of 1987);

(iii) a local authority as defined in section 1 of the Black Local Authorities Act, 1982 (Act 102 of 1982);

(iv) a local government body contemplated in section 30 (2) (a) of the Black Administration Act, 1927 (Act 38 of 1927); and

(v) any committee referred to in section 17 (1) of the Promotion of Local Government Affairs Act, 1983 (Act 91 of 1983).] 155 of the Constitution, Act 108 of 1996 and under Chapter 2 of the Local Government: Municipal Structures Act, 1998 (Act 117 of 1998);

(3) ...

342A. Unreasonable delays in trials

(1) ...

(3) ...

(a) ...

(b) ...

(c) where the accused has not yet pleaded to the charge, that the case be struck off the roll and the prosecution not be resumed or instituted *de novo* without the written instruction of the **[attorney-general] Director of Public Prosecutions**;

(4) (a) ...

(b) The **[attorney-general] Director of Public Prosecutions** and the accused may appeal against an order contemplated in subsection (3) (d) and the provisions of sections 310A and 316 in respect of an application or appeal referred to in that section by an accused, shall apply *mutatis mutandis* with reference to a case in which the **[attorney-general] Director of Public Prosecutions** appeals and, in the case of an appeal by the accused, the provisions of section 309 and 316 shall apply *mutatis mutandis*.

128. Schedule 5 of the Principal Act is hereby amended by the substitution of the Schedule for the following:

Schedule 5

(Sections 58 and 60 (11) and (11A) and Schedule 6)

Treason.

Murder.

Attempted murder involving the infliction of grievous bodily harm.

Rape or compelled rape as contemplated in section 3 or 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively, in circumstances other than those referred to in Schedule 6.

Any trafficking related offence by a commercial carrier as contemplated in section 71(6) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007.

Any offence referred to in section 13(f) of the Drugs and Drug Trafficking Act, 1992 (Act No. 140 of 1992), if it is alleged that –

- (a) the value of the dependence-producing substance in question is more than R50 000,00; or
- (b) the value of the dependence-producing substance in question is more than R10 000,00 and that the offence was committed by a person, group of persons, syndicate or any enterprise acting in the execution or furtherance of a common purpose or conspiracy; or
- (c) the offence was committed by any law enforcement officer.

Any offence relating to the dealing in or smuggling of ammunition, firearms, explosives or armament, or the possession of an automatic or semi-automatic firearm, explosives or armament.

Any offence in contravention of section **[36 of the Arms and Ammunition Act, 1969 (Act No. 75 of 1969),]** 91 of the Firearms Control, 2000 (Act NO 60 of 2000) on account of being in possession of more than **[1 000]** 200 rounds of ammunition intended for firing in an arm contemplated in section **[39(2)(a)(i)]** Chapter 6 of that Act.

Any offence relating to exchange control, extortion, fraud, forgery, uttering, theft, or any offence referred to in Part 1 to 4, or section 17, 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004 -

- (a) involving amounts of more than R500 000,00; or
- (b) involving amounts of more than R100 000,00, if it is alleged that the offence was committed by a person, group of persons, syndicate or any enterprise acting in the execution or furtherance of a common purpose or conspiracy; or
- (c) if it is alleged that the offence was committed by any law enforcement officer -
 - (i) involving amounts of more than R10 000,00; or
 - (ii) as a member of a group of persons, syndicate or any enterprise acting in the execution or furtherance of a common purpose or conspiracy.

...

129. **Short title and commencement**

This Act shall be called the Criminal Procedure Amendment Act, 20.., and shall come into operation on a date determined by the President in the *Gazette*.