MEMORANDUM ON THE OBJECTS OF THE CRIMINAL AND RELATED MATTERS AMENDMENT BILL

1. PURPOSE OF BILL

The primary aim of the Criminal and Related Matters Amendment Bill, 2020 (the ''Bill''), is to amend numerous Acts, which are administered by the Department of Justice and Constitutional Development (the ''Department'') and are intended to—

- address gender-based violence and offences committed against vulnerable persons; and
- provide for additional procedures to reduce secondary victimisation of vulnerable persons in court proceedings.

2. OBJECTS OF BILL

2.1 ***Clauses 1 and 18***

Clause 1 inserts new sections 51A, 51B and 51C in the Magistrates' Courts Act, 1944 (Act No. 32 of 1944) and **clause 18** inserts new sections 37A, 37B and 37C in the Superior Courts Act, 2013 (Act No. 10 of 2013).

2.1.1 It is widely recognised that a child witness must be protected from undue mental stress or suffering while giving evidence. Evidence through intermediaries is widely recognised as an effective procedure in criminal proceedings to protect a child witness or complainant. Currently, the intermediary service is available to a child witness or complainant in criminal proceedings. The intermediary service is not available to any other witness or complainant who may be exposed to similar undue mental stress, trauma or suffering. The intermediary service is also not available in respect of any proceedings, other than criminal proceedings. The proposed new sections ***51A and 37A*** aim to extend the intermediary service—

(a) firstly, to a witness who suffers from a physical, psychological, mental or emotional condition, and to older persons, as defined in the Older Persons Act, 2006 (Act No. 13 of 2006); and

(b) secondly, to proceedings other than criminal proceedings.

2.1.2 The proposed new ***sections 51A and 37A*** provide for the following:

(a) A presiding judicial officer may, on application by any party to civil proceedings or of its own accord, appoint an intermediary in order to enable a witness under the biological or mental age of 18 years, or a witness who suffers from a physical, psychological, mental or emotional condition, or a witness who is an older person as defined in the Older Persons Act, 2006, to give his or her evidence through that intermediary, if it appears to the court that the proceedings would expose such a witness to undue psychological, mental or emotional stress, trauma or suffering if he or she testifies at such proceedings.

(b) Where a judicial officer appoints an intermediary, no examination, cross-examination or re-examination of any witness may take place in any manner other than through the intermediary and the intermediary may, unless the court directs otherwise, convey the general purport of any question to the relevant witness.

(c) Where a judicial officer appoints an intermediary, the court may direct that the relevant witness gives his or her evidence at any place—

- which is informally arranged to set that witness at ease;
- which is so situated that any person whose presence may upset that witness, is outside the sight and hearing of that witness; and
- which enables the court and any person whose presence is necessary at the relevant proceedings to see and hear, either directly or through the medium of any electronic or other

devices, that intermediary, as well as that witness, during his or her testimony.

(d) The Cabinet member responsible for the administration of justice may, by notice in the *Gazette,* determine the persons or the category or class of persons who are competent to be appointed as intermediaries.

(e) An intermediary appearing at proceedings, who is not in the full-time employment of the State, will be paid such travelling and subsistence and other allowances in respect of the services rendered by him or her as prescribed by the Rules Board.

(f) A court must provide reasons for refusing any application or request for the appointment of an intermediary, immediately upon refusal, which reasons must be entered into the record of the proceedings.

(g) To ensure that an intermediary attends proceedings, the intermediary must be summoned to appear in court on a specified date and at a specified place and time to act as an intermediary.

(h) If an intermediary appointed by the court is, for any reason, absent, becomes unable to act as an intermediary or dies, the court in question may, in the interests of justice and after due consideration of the arguments put forward by the parties, postpone the proceedings in order to obtain the intermediary's presence, summons the intermediary to appear before the court to advance reasons for being absent, direct that the appointment of the intermediary be revoked and that another intermediary be appointed, or direct that the appointment of the intermediary be revoked and that the proceedings continue in the absence of an intermediary.

2.1.3 The proposed new ***sections 51B and 37B*** provide for the oath and competency of intermediaries appointed under sections 51A and 37A. These sections provide for the following:

(a) An intermediary must, before commencing with his or her functions, take an oath or make an affirmation in the prescribed form.

(b) Before a person is appointed to perform the functions of an intermediary, the judicial officer presiding over the proceedings must enquire into the competence of the person to be appointed as an intermediary.

(c) The head of a court may, however, at his or her discretion and after holding an enquiry into the competence of a person to be appointed as an intermediary, issue a certificate in the form prescribed by the Minister, by notice in the *Gazette*, to a person whom he or she has found to be competent, to appear as an intermediary in a court after the person has taken the oath or made the affirmation referred to in paragraph *(a)*. In terms of this section, such a certificate may be accepted as proof of the competency of a person to be appointed as an intermediary and of the fact that the person has taken the oath or made the affirmation contemplated in paragraph *(a)* for purposes of any subsequent proceedings.

2.1.4 The proposed new ***sections 51C and 37C*** provide for evidence through audiovisual link in proceedings other than criminal proceedings. This procedure is recognised in criminal proceedings by virtue of section 158 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977). Neither the Magistrates' Courts Act, 1944, nor the Superior Courts Act, 2013, expressly recognises this procedure. In terms of the two proposed new sections a court may, on application by any party to proceedings or of its own accord, order that a witness, irrespective of whether the witness is in or outside the Republic, if the witness consents thereto, may give evidence by means of a remote audiovisual link—

- if it appears to the court that to do so would prevent unreasonable delay, save costs, be convenient or prevent prejudice or harm that may result to a person if he or she testifies or is present at such proceedings and it is otherwise in the interests of justice; and
- if the required facilities are readily available or obtainable at the court.

The court may make the giving of evidence through audiovisual link subject to such conditions as it may deem necessary in the interests of justice. The section further provides that a witness who gives evidence by means of audiovisual link, is regarded as a witness who has been subpoenaed to give evidence in the court in question.

2.2 ***Clause 2***

2.2.1 Section 59(1) of the Criminal Procedure Act, 1977, provides that an accused who is in custody in respect of any offence, other than an offence referred to in Part II or Part III of Schedule 2 to that Act, may, before his or her first appearance in a lower court, be released on bail in respect of such offence by any police official of or above the rank of non-commissioned officer, in consultation with the police official charged with the investigation. The offences listed in Parts II and III of Schedule 2 include those of treason, sedition, murder, rape or compelled rape, sexual offence against a child or a person who is mentally disabled, offences pertaining to the trafficking in persons, robbery, assault, housebreaking, theft, fraud and forgery or uttering involving amounts more than R2 500, public violence, arson, kidnapping and childstealing.

2.2.2 Clause 2 seeks to amend section 59(1), to provide that, in addition to an offence referred to in Part II or Part III of Schedule 2 to the Criminal Procedure Act, 1977, an accused may not be released on bail before his or her first appearance in a lower court in respect of the following:

(a) An offence against a person in a domestic relationship, as defined in section 1 of the Domestic Violence Act, 1998 (Act No. 116 of 1998). A ''domestic relationship'' is defined in the Domestic Violence Act, 1998, as a relationship between a complainant and a respondent in any of the following ways:

(i) They are or were married to each other, including marriage according to any law, custom or religion;

(ii) they (whether they are of the same or of the opposite sex) live or lived together in a relationship in the nature of marriage, although they are not, or were not, married to each other, or are not able to be married to each other;

(iii) they are the parents of a child or are persons who have or had parental responsibility for that child (whether or not at the same time);

(iv) they are family members related by consanguinity, affinity or adoption;

(v) they are or were in an engagement, dating or customary relationship, including an actual or perceived romantic, intimate or sexual relationship of any duration; or

(vi) they share or recently shared the same residence.

(b) An offence referred to in section 17(1)*(a)* of the Domestic Violence Act, 1998. Section 17(1)*(a)* of the Domestic Violence Act, 1998, provides that a person who contravenes any prohibition, condition or obligation of an interim or final protection order, is guilty of an offence and liable on conviction to a fine or imprisonment for a period not exceeding five years or to both such fine and such imprisonment.

(c) An offence referred to in section 18(1)*(a)* of the Protection from Harassment Act, 2011 (Act No. 17 of 2011). Section 18(1)*(a)* of the Protection from Harassment Act, 2011, provides that a person who contravenes any prohibition, condition or obligation of an

interim or final protection order, is guilty of an offence and liable on conviction to a fine or imprisonment for a period not exceeding five years.

2.3 ***Clause 3***

2.3.1 Section 59A of the Criminal Procedure Act, 1977, provides that a Director of Public Prosecutions or an authorised prosecutor may, in respect of the offences referred to in Schedule 7 to that Act and in consultation with the police official charged with the investigation, authorise the release of an accused on bail. The offences mentioned in Schedule 7, which qualify for release on bail by a prosecutor, include public violence, culpable homicide, assault involving the infliction of grievous bodily harm, arson, robbery, housebreaking, theft involving amounts that do not exceed R20 000, malicious injury to property and the possession of drugs.

2.3.2 Clause 3 of the Bill amends section 59A of the Criminal Procedure Act, 1977, to exclude an offence—

(a) against a person in a domestic relationship, as defined in section 1 of the Domestic Violence Act, 1998; or

(b) referred to in—

(i) section 17(1)*(a)* of the Domestic Violence Act, 1998;

(ii) section 18(1)*(a)* of the Protection from Harassment Act, 2011; or

(iii) any law, that criminalises a contravention of any prohibition, condition, obligation or an order, that was issued by a court to protect the person against whom the offence in question was allegedly committed, from the accused,

from the ambit of the application of section 59A.

2.3.3 The effect of these amendments is that the accused must be kept in custody in respect of the offences referred to in paragraph 2.3.2, until he or she appears in court, whereafter he or she may, in terms of section 60 of the Criminal Procedure Act, 1977, make an application to the court to be released on bail.

2.4 ***Clause 4***

2.4.1 Section 60 of the Criminal Procedure Act, 1977, regulates bail applications of an accused who is in custody in respect of an offence.

2.4.2 In terms of section 60(2) of the Criminal Procedure Act, 1977, in bail proceedings, a court, among others—

(a) may postpone the proceedings if the court has insufficient information or evidence at its disposal to reach a decision on the bail application (subsection (2)*(a)*);

(b) may, in respect of matters that are not in dispute between the accused and the prosecutor, acquire in an informal manner the information that is needed for its decision regarding bail (subsection (2)*(b)*);

(c) may, in respect of matters that are in dispute between the accused and the prosecutor, require of the prosecutor or the accused, as the case may be, that evidence be adduced (subsection (2)*(c)*); or

(d) must, where the prosecutor does not oppose bail in respect of matters referred to in section 60(11)*(a)* and *(b)*, require of the prosecutor to place on record the reasons for not opposing the bail application (subsection (2)*(d)*).

Clause 4*(a)* of the Bill amends section 60(2)*(d)* of the Criminal Procedure Act, 1977, to include a reference to paragraph *(c)* of subsection (11). Clause 4*(f)* inserts paragraph *(c)* in section 60(11), to refer to any offence referred to in section 59(1)*(a)*(ii) or (iii) (discussed in paragraph 2.2.2), namely any offence against a person in a domestic

relationship as defined in section 1 of the Domestic Violence Act, 1998, an offence referred to in section 17(1)*(a)* of the Domestic Violence Act, 1998, an offence referred to in section 18(1)*(a)* of the Protection from Harassment Act, 2011, or an offence in any law that criminalises a contravention of any prohibition, condition, obligation or an order, that was issued by a court to protect the person against whom the offence in question was allegedly committed, from the accused.

2.4.3 In terms of section 60(2A) of the Criminal Procedure Act, 1977, the court must, before reaching a decision on a bail application, take into consideration any pre-trial services report regarding the desirability of releasing an accused on bail, if such a report is available. Clause 4*(b)* of the Bill expands the provision by obliging the court to also take into consideration the view of any person against whom the offence in question was allegedly committed, regarding his or her safety.

2.4.4 Section 60(4) of the Criminal Procedure Act, 1977, lists various grounds which do not permit the release of an accused from custody, among others, as provided for in paragraph *(a)* of section 60(4), where there is a likelihood that the accused, if he or she is to be released on bail, will endanger the safety of the public or any particular person or will commit a Schedule 1 offence. Clause 4*(c)* of the Bill amends paragraph *(a)* to include the likelihood that the accused, if released on bail, will endanger the safety of the person against whom the offence in question was allegedly committed.

2.4.5 Section 60(5) of the Criminal Procedure Act, 1977, provides guidance to the court when considering the ground referred to in section 60(4)*(a)* (discussed above). Clause 4*(d)* of the Bill proposes various amendments to the factors which a court may consider to establish whether there is the likelihood that the accused, if released on bail, will endanger the safety of the public, any person against whom the offence in question was allegedly committed or any other particular person or will commit a Schedule 1 offence, among others, any disposition of an accused to commit—

(a) an offence against any person in a domestic relationship, as defined in section 1 of the Domestic Violence Act, 1998; or

(b) an offence referred to in—

- section 17(1)*(a)* of the Domestic Violence Act, 1998;
- section 18(1)*(a)* of the Protection from Harassment Act, 2011; or
- any law that criminalises a contravention of any prohibition, condition, obligation or an order, that was issued by a court to protect the person against whom the offence in question was allegedly committed, from the accused.

2.4.6 Section 60(10) of the Criminal Procedure Act, 1977, provides that even if the prosecution does not oppose bail, the court has a duty to weigh up the personal interests of the accused against the interests of justice. Clause 4*(e)* amends section 60(10), to clarify that the ''interests of justice'' should be interpreted to include, but not be limited to, the safety of any person against whom the offence in question has allegedly been committed.

2.4.7 In terms of section 60(11) of the Criminal Procedure Act, 1977, where an accused is charged—

(a) with an offence contemplated in Schedule 6, the accused must adduce evidence which satisfies the court that exceptional circumstances exist which, in the interests of justice, permit his or her release on bail; or

(b) with an offence contemplated in Schedule 5,

the accused must adduce evidence which satisfies the court that the interests of justice permit his or her release.

Clause 4*(f)* of the Bill inserts paragraph *(c)* to the aforementioned provisions to provide that, where an accused is charged with an offence contemplated in section 59(1)*(a)*(ii) or (iii) (see paragraph 2.2.2), the court shall order that the accused be detained in custody until he or she is dealt with in accordance with the law, unless the accused, having been given a reasonable opportunity to do so, adduces evidence which satisfies the court that the interests of justice permit his or her release.

2.4.8 Section 60(11B)*(a)* of the Criminal Procedure Act, 1977, provides that during bail proceedings the accused is obliged to inform the court of his or her previous convictions and pending charges. Clause 4*(h)* of the Bill amends this provision to further oblige the accused to inform the court of whether—

- an order contemplated in section 5 or 6 of the Domestic Violence Act, 1998, section 3 or 9 of the Protection from Harassment Act, 2011, or any similar order in terms of any other law, was issued by a court to protect the person against whom the offence in question was allegedly committed, from the accused, and whether such an order is still of force; and
- the accused is, or was at the time of the alleged commission of the offence, a sentenced offender who has been placed under correctional supervision, day parole, parole or medical parole as contemplated in section 73 of the Correctional Services Act, 1998 (Act No. 111 of 1998).

2.4.9 Section 60(12) of the Criminal Procedure Act, 1977, provides that the court may make the release of an accused on bail subject to conditions which, in the court's opinion, are in the interests of justice. Clause 4(*i*) of the Bill amends this provision to clarify that the ''interests of justice'' should be interpreted to include, but not be limited to, the safety of any person against whom the offence in question has allegedly been committed. Clause 4(*i*) further inserts a new provision in section 60(12), to provide that if the court is satisfied that the interests of justice permit the release of an accused on bail as provided for in section 60(1), in respect of an offence that was allegedly committed by the accused against any person in a domestic relationship, as defined in section 1 of the Domestic Violence Act, 1998, with the accused, and a protection order as contemplated in that Act has not been issued against the accused, the court must after holding an enquiry, issue a protection order referred to in section 6 of that Act against the accused, whereafter the provisions of that Act shall apply.

2.5 ***Clause 5***

2.5.1 Section 68 of the Criminal Procedure Act, 1977, provides for the cancellation of bail. In terms of section 68(1), a 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) the accused has interfered or threatened or attempted to interfere with witnesses;

(c) the accused has defeated or attempted to defeat the ends of justice;

(d) the accused poses a threat to the safety of the public or of a particular person;

(e) the accused has not disclosed or has not correctly disclosed all his or her previous convictions in the bail proceedings or where his

or her true list of previous convictions has come to light after his or her release on bail;

(f) further evidence has since become available or factors have arisen, including the fact that the accused has furnished false information in the bail proceedings, which might have affected the decision to grant bail; or

(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 until the conclusion of the relevant criminal proceedings.

In terms of section 68(2), any magistrate may, in circumstances in which it is not practicable to obtain a warrant of arrest under section 68(1), upon the application of any peace officer and upon a written statement on oath by such officer that similar grounds as referred to in section 68(1), are present, 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, 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.

2.5.2 Clause 5 amends section 68(1) and (2), respectively, to provide for the following additional grounds on which bail may be cancelled:

(a) The accused contravened any prohibition, condition, obligation imposed in terms of—

(i) section 7 of the Domestic Violence Act, 1998;

(ii) section 10(1) and (2) of the Protection from Harassment Act, 2011; or

(iii) an order in terms of any other law, that was issued by a court to protect the person against whom the offence in question was allegedly committed, from the accused;

(b) the accused has not disclosed that—

(i) an order as contemplated in section 5 or 6 of the Domestic Violence Act, 1998;

(ii) an order as contemplated in section 3 or 9 of the Protection from Harassment Act, 2011; or

(iii) an order in terms of any other law,

was issued by a court to protect the person against whom the offence in question was allegedly committed, from the accused and whether such an order is still of force;

(c) the accused has not disclosed or correctly disclosed that he or she is or was, at the time of the alleged commission of the offence, a sentenced offender who has been placed under correctional supervision, day parole, parole or medical parole as contemplated in section 73 of the Correctional Services Act, 1998.

2.5.3 Clause 5 further amends section 68(1)*(d)* and (2)*(a)*(iv) (see paragraph 2.5.1*(d)* above) to extend the current ambit of those provisions to instances where the accused poses a threat to the safety of any person against whom the offence in question was allegedly committed, or of any other particular person.

2.6 ***Clause 6***

2.6.1 Section 158(1) of the Criminal Procedure Act, 1977, provides that all criminal proceedings in any court must take place in the presence of the accused person, unless otherwise provided by law. In terms of section 158(2) a court may, on its own initiative or an application by the prosecutor, order that a witness or an accused person gives his or her evidence by means of closed circuit television or similar electronic media, but only if the witness or the accused person agrees to this. A court may make a similar order on the application of an accused

person or a witness. The court may, however, only make such an order if the necessary facilities are readily available or obtainable. Furthermore, the court can only make such an order if to do so would—

(a) prevent unreasonable delay;
(b) save costs;
(c) be convenient;
(d) be in the interest of the security of the State or of public safety or in the interests of justice or the public; or
(e) prevent the likelihood that prejudice or harm might result to any person if he or she testifies or is present at such proceedings.

When making such an order the court may, in order to ensure a fair and just trial, make the giving of such evidence subject to the conditions the court deems necessary.

2.6.2 There are differing views and High Court judgments on whether section 158 can be invoked to obtain evidence from a witness who is based abroad. In order to address this uncertainty, clause 6 amends section 158 of the Criminal Procedure Act, 1977, in order to clarify that a court can order that a witness who consents thereto, irrespective of whether the witness is in or outside the Republic, may give evidence by means of closed circuit television or similar electronic media.

2.7 ***Clause 7***

2.7.1 Section 161 of the Criminal Procedure Act, 1977, requires a witness in criminal proceedings to give evidence *viva voce*. In respect of a witness who is deaf and dumb, the expression *viva voce* includes gesture-language, and in respect of a witness under the age of eighteen, includes demonstrations, gestures or any other non-verbal expressions.

2.7.2 In line with the amendments to section 170A (discussed below), clause 7 amends section 161 of the Criminal Procedure Act, 1977, to extend the expression '*viva voce*' in respect of a witness who suffers from a physical, psychological, mental or emotional condition which inhibits the ability of that witness to give his or her evidence *viva voce*, to include demonstrations, gestures or any other form of non-verbal expression. Clause 7 further substitutes the description of a ''deaf and dumb'' witness for the description of a witness lacking the sense of hearing or the ability to speak.

2.8 ***Clause 8***

2.8.1 Section 170A of the Criminal Procedure Act, 1977, provides that in any criminal proceedings, if it appears to the court that a witness under the biological or mental age of eighteen years may be exposed to undue mental stress or suffering, the court may appoint an intermediary in order to enable the witness to give evidence through an intermediary. As indicated in paragraph 2.1, the provision of intermediary service is intended to protect a witness from undue mental stress or suffering while giving evidence.

2.8.2 Clause 8 further amends section 170A in order to extend the intermediary service to witnesses who suffer from a physical, psychological, mental or emotional condition, and to older persons as defined in the Older Persons Act, 2006. The amendment provides further that the court may order the use of intermediary service, if it appears to the court that the proceedings would expose such a witness to undue psychological or emotional stress, trauma or suffering if he or she testifies at such proceedings. This is in addition to undue mental stress or suffering which is currently provided for in the section. Section 170A(7) requires the court to provide reasons for refusal immediately upon refusal in respect of a child under the age of 14

years. This section is amended to remove reference to a child under the age of 14 years. The amended subsection now provides that the court shall provide reasons immediately upon refusal of any application for the appointment of an intermediary, so that the protective measure covers every witness referred to in this section.

2.8.3 The Department has created the post of intermediaries on its establishment. The aim is to ensure that a permanent group of intermediaries is available at all courts. The appointment of permanent intermediaries necessitates certain amendments to section 170A, which currently regulates the giving of evidence through intermediaries. The purpose of the amendments is to promote functional efficiency. At present, section 170A does not regulate the taking of the oath or making an affirmation by intermediaries, nor does it deal with the competency of persons to be appointed as intermediaries. Representatives of the magistracy have indicated that an enquiry into the competency of a person who is to be appointed as an intermediary and the taking of the oath by intermediaries take up valuable court time. In some instances, the same person appears before a court as an intermediary on numerous occasions. The court is obliged to enquire into the competency of that person to act as an intermediary and the intermediary must, on every occasion, take the oath or make an affirmation. This unnecessary procedure takes up court time. In addition, the form of the oath or affirmation that an intermediary must take is not prescribed. It is suggested that section 170A should also provide for all of these aspects, in the same manner as in clause 1, which purports to regulate the position of intermediaries in civil proceedings. As a result, subsections (11), (12) and (13) are inserted in section 170A, in order to provide—

(a) for the form of the oath to be taken or affirmation to be made by an intermediary before commencing his or her functions in terms of section 170A;

(b) that the presiding officer must enquire into the competence of a person to be appointed as an intermediary and factors that should be taken into account in evaluating the competency of a person to be appointed as an intermediary;

(c) that the head of a court may hold an enquiry into the competence of a person to be appointed as an intermediary and may, if the person is found to be competent to be appointed as an intermediary and after the person has taken the oath referred to in paragraph *(a)* above, issue a certificate in the form prescribed by the Minister, by notice in the *Gazette*, to the intermediary that may be accepted as proof of the competency of the intermediary and the fact that the intermediary took the prescribed oath in any subsequent proceedings in terms of which the person acts as an intermediary; and

(d) that paragraph *(c)* above must not be construed as prohibiting a judicial officer presiding over proceedings from conducting an enquiry, at any stage of proceedings, regarding the competence of a person to act as an intermediary.

2.9 ***Clause 9***

2.9.1 Section 299A of the Criminal Procedure Act, 1977, regulates the right of a complainant to make representations in certain matters regarding the placement of a person on parole, day parole and under correctional supervision. In terms of section 299A, when a court sentences a person to imprisonment for offences listed in section 299A(1) (which, among others, include murder or any other offence which involves the intentional killing of a person, rape, robbery, sexual assault, kidnapping and trafficking in persons offences), it must inform the complainant or a relative of the deceased, in the case of murder, if he or she is present that the complainant or relative has a right to make

representations to the National Commissioner of Correctional Services when the placement of the accused on parole, day parole or under correctional supervision is considered or to even attend any relevant meeting of the parole board.

2.9.2 Clause 9 of the Bill amends section 299A(1) in order to—

(a) delete the requirement in paragraph *(a)* of intentional killing of a person, since those words may imply that culpable homicide, which is based on negligence, is excluded from the provision; and

(b) include any offence, which was committed against any person in a domestic relationship, as defined in section 1 of the Domestic Violence Act, 1998, with the sentenced person, and where an effective period of imprisonment exceeding seven years was imposed.

2.10 ***Clause 10***

2.10.1 Section 316B of the Criminal Procedure Act, 1977, regulates appeals by the State against a sentence imposed by a superior court. Section 316B was inserted in the Criminal Procedure Act, 1977, by section 11 of the Criminal Law Amendment Act, 1990 (Act No. 107 of 1990), and provides that the National Director may appeal to the Appellate Division (Supreme Court of Appeal) against a sentence imposed upon an accused in a superior court (High Court). There has been uncertainty whether this section empowers the State to appeal against a sentence imposed by a High Court sitting as an appeal court from a lower court (section 310A of the Criminal Procedure Act, 1977). This uncertainty has been a subject of judicial consideration. As early as 2005, in *Director of Public Prosecution v Olivier* 2006 (1) SACR 380 SCA, *Ms Olivier,* convicted of theft and sentenced to six years imprisonment by a regional court, appealed to the High Court against the sentence. The High Court set aside the sentence imposed by the regional court and substituted it with a sentence of six years imprisonment wholly suspended for five years on certain conditions. With the leave of the High Court, the Director of Public Prosecutions (the ''DPP'') appealed to the Supreme Court of Appeal (the ''SCA'') against the sentence imposed by the High Court. In considering the matter, one of the questions the SCA raised, was whether the DPP has a statutory right to appeal a sentence granted by a high court sitting as a court of appeal, on the backdrop of section 316B of the Act and sections 20 and 21 of the repealed Supreme Court Act, 1959 (Act No. 59 of 1959). The SCA (at paragraph 15) stated that subsection (1) of section 316 provides for appeals to the SCA against a sentence imposed by a superior court, and that this does not mean a superior court sitting as a court of appeal. It clearly means a superior court sitting as a court of first instance. The SCA noted that this was in line with established common law principles limiting the right of appeal of the State. The SCA concluded that, in the absence of an empowering provision in the Criminal Procedure Act, 1977, which specifically grants the SCA jurisdiction, and which is consistent with the Constitution of the Republic of South Africa, 1996 (the ''Constitution''), the SCA does not have jurisdiction to entertain the appeal. Later on, in *S v Nabolisa* 2013 (2) SACR 221 CC, a matter involving an application for leave to appeal by *Nabolisa* against a sentence that was increased on appeal by the SCA after his appeal from the High Court, the Constitutional Court, held that section 316B did not empower the SCA to adjudicate the increase of the sentence where the State did not apply for leave to cross appeal the sentence as the State's right of appeal is sourced from the Criminal Procedure Act, 1977 (section 316B), and no other legislation empowered the State to appeal in the manner that it did. The Constitutional Court thus concluded that the SCA did not have jurisdiction to increase the sentence and

re-instated the sentence imposed by the trial court. In *DPP Western Cape v Kock* 2016 (1) SACR 539 (SCA), similar to the *Olivier* matter, *Kock* was convicted by the regional court for fraud and sentenced to five years imprisonment, wholly suspended for five years. The DPP appealed to the High Court, which further reduced the sentence to four years' imprisonment suspended for five years. The DPP then sought special leave to appeal to the SCA in terms of sections 16(1)*(b)* and 17(1)*(a)*(i) and (ii) of the Superior Courts Act, 2013. Referring to *Olivier*, the SCA held that sections 16 and 17 of the Superior Courts Act, 2013, do not apply in criminal matters, and that there is no specific provision in the Criminal Procedure Act, 1977, that empowers the State to appeal against a sentence imposed by a High Court substituting a sentence of a lower court (paragraph 12). Recently, in *DPP, Gauteng vs Ramolefi* 2019 ZASPA 60 (delivered 3 June 2019), involving an appeal by the State against a sentence imposed on appeal by a High Court, the SCA reluctantly relied on its decision in *Olivier, Nabolisa* and *Kock* in respect of the State's right of appeal against a sentence imposed by the High Court on appeal. Although the SCA noted (at paragraph 5) that on the facts *Ramolefi*'s case may be distinguished from *Kock*'s matter, in that *Kock*'s matter involved a further (or second) appeal by the State, whilst in *Ramolefi*, the first appeal from the trial court was by the accused, the SCA concluded (at paragraph 15) that, on the reasoning in *Olivier* and *Kock*, the court does not have jurisdiction to determine the matter (''*as no provision is made for a situation where appeal court wildly errs in the opposite direction*''), noting that this is a situation that may expose a *lacuna* which may merit consideration by the legislature. It is on this basis that the judiciary has since indicated a need for legislative clarity on this issue.

2.10.2 Clause 10 seeks to address this matter by amending section 316B of the Criminal Procedure Act, 1977, to allow the State to appeal a sentence imposed by the High Court sitting as a court of appeal in terms of section 310A, in circumstances where a grave failure of justice would otherwise result or the administration of justice may be brought into disrepute. The provision is intended to maintain the common law principle of limiting the right of appeal by the State, in that the State is not given a free and endless right of appeal, but limiting the right to cases where injustice may result if the State is not afforded the right of appeal, as the court noted in *Ramolefi*'s matter.

2.11 ***Clauses 11, 12, 13 and 14***

2.11.1 Section 40(1)*(b)* of the Criminal Procedure Act, 1977, empowers a police official to arrest, without a warrant of arrest, a person whom he or she reasonably suspects of committing an offence referred to in Schedule 1 of the Act. Section 42(1)*(a)* contains a similar provision empowering a member of the public to arrest, without a warrant, a person who commits in his or her presence or whom he or she reasonably suspects of committing an offence referred to in Schedule 1 of the Act. The offences listed in Schedule 1 of the Act include the offence of assault where a dangerous wound is inflicted. It appears there has been uncertainty about the meaning or the interpretation of assault where a dangerous wound is inflicted as listed in Schedule 1. The question seems to be whether assault listed in Schedule 1 is similar to or includes the offence of assault with intent to inflict grievous bodily harm. Recently, the Supreme Court of Appeal in *De Klerk v Minister of Police* (329/17) ZASCA 45 (28 March 2018), noted that ''*it is common cause that Schedule 1 does not include assault with intent to do grievous bodily harm. It lists an offence of assault when a dangerous wound in inflicted*''. Later, in 2018 in an article, titled ''Assault with GBH is a misstatement of the Law'' (the Law, December 2018, p 17), Adv. Kilifele discusses the *De Klerk*

matter and an earlier High Court decision in *Mnewo v Minister of Police* (647/2013)[2016] ECBHC 13 (14 June 2016), where the court noted that ''*it is evident that the concepts of 'grievous bodily harm' and 'dangerous wound' are not necessarily synonymous as it was pointed out in Bobbert v Minister of Law and Order 1990 (1) SACR 404 (c) at 408–490*''. The article concludes that, in the light of these cases, assault with intent to inflict grievous bodily harm is a misstatement of law, misapprehension, and not an offence envisaged in Schedule 1 of the Criminal Procedure Act, 1977. The judiciary has thus called for clarity on this matter.

2.11.2 Clauses 11, 12, 13 and 14 amend Schedules 1, 2, 7 and 8 to the Criminal Procedure Act, 1977, respectively, to expand the offence of assault when a dangerous wound is inflicted. In terms of these amendments, the offence is described as assault when a dangerous wound is inflicted, involving the infliction of grievous bodily harm, or where a person is threatened with grievous bodily harm or with a fire-arm or dangerous weapon as defined in section 1 of the Dangerous Weapons Act, 2013 (Act No. 15 of 2013).

2.12 ***Clause 15***

2.12.1 Part I of Schedule 2 to the Criminal Law Amendment Act, 1997 (Act No. 105 of 1997) (the ''Minimum Sentences Act''), makes provision for minimum sentences for certain serious offences, including murder, rape and compelled rape. In terms of section 51(1) of this Act, a regional court or the High Court must sentence a person convicted of an offence in Part I of Schedule 2 to the Act, to life imprisonment.

2.12.2 Clause 15 substitutes the offence of murder, to include the following offences thereunder:

(a) The murder of a person under the age of 18 years; and

(b) the death of the victim which resulted from physical abuse or sexual abuse as contemplated in paragraphs *(a)* and *(b)* of the definition of ''domestic violence'' in section 1 of the Domestic Violence Act, 1998, by the accused who is or was in a domestic relationship, as defined in section 1 of that Act, with the victim.

2.12.3 Part I of Schedule 2 provides that the offence of rape—

(a) when committed—

(i) in circumstances where the victim was raped more than once, whether by the accused or by any co-perpetrator or accomplice;

(ii) by more than one person, where such persons acted in the execution or furtherance of a common purpose or conspiracy;

(iii) by a person who has been convicted of two or more offences of rape or compelled rape, but has not yet been sentenced in respect of such convictions; or

(iv) by a person, knowing that he has the acquired immune deficiency syndrome or the human immunodeficiency virus,

is punishable by life imprisonment.

2.12.4 The wording of items (i) and (iii) in paragraph 2.12.3 above has given rise to the following uncertainties in a number of court judgments:

(a) In respect of item (i), the issue seems to be that in circumstances where the victim is raped more than once by the accused or any co-perpetrator or accomplice, but the co-perpetrator or the accomplice is not before court or has not been convicted for rape, whether the court can sentence the accused in terms of item (i), to life imprisonment. It seems that the SCA created a precedent in 2013 in *Mahlase v S (255/13) ZASCA* 191), but the issue continues to be a cause of concern in subsequent judgments.

Mahlase appealed to the SCA against a sentence by the Limpopo High Court sitting as a trial court, where the High Court convicted *Mahlase* of various crimes, including rape, and in respect of rape sentenced him to life imprisonment in terms of item (i) of Part I Schedule 2 of the Minimum Sentences Act. The SCA, after considering the facts, concluded that the trial court misdirected itself in respect of the sentence imposed for the rape conviction. The SCA noted that while the victim was apparently raped more than once, the judge overlooked the fact that accused 2 and 6 who were implicated by the State witness, were not before the trial court and had not yet been convicted of rape, thus it cannot be held that the rape fell within the circumstance contemplated in item (i) of Part I Schedule 2 to the Minimum Sentences Act. The minimum sentence was therefore not applicable to the rape conviction and the sentence of life imprisonment was set aside. With that decision of the SCA binding on the High Court, the precedent has created uncertainty in subsequent High Court decisions. In 2015, the Eastern Cape High Court (the "ECG"), in *S v Cock, S v Manuel* 2015 (2) SACR 115, considering two separate appeals against a sentence of life imprisonment for rape, the court felt obliged to comment on the anomaly brought about by the SCA in the *Mahlase* matter. The anomaly being that the first accused (*Cock*) to be convicted and sentenced, is liable to be sentenced to the prescribed minimum sentence of ten years (in terms of Part III of Schedule 2), whereas any accused to be convicted thereafter (*Manuel*) would be sentenced to life imprisonment. The ECG held that it was nevertheless bound by the decision, and the life imprisonment imposed on *Cock* was set aside (paragraph 28). In 2017, the Gauteng High Court, in *Khanye v State* (A66/2015 [2017] ZAGP JHC 320), considering an appeal against a sentence of life imprisonment in terms of Part I, item (i) of the Minimum Sentences Act, was critical of the decision in the *Mahlase* matter. The court was of the view that the interpretation in the *Mahlase* matter was incorrect, noting that section 51(1), read with Schedule 2 Part 1 of the Minimum Sentences Act, does not mean that more than one person must be convicted to trigger its application (paragraph 30). The court dismissed the appeal and confirmed the sentence of life imprisonment in respect of rape. The most recent decision is that of *Ndlovu v* S [2019] JOL 45350 (KZP), where the court held that despite the criticism of the *Mahlase* matter, the decision is still binding. The court concluded that the effect of the *Mahlase* decision is that it cannot be said that the victim was raped by more than one person, unless both of them have been convicted.

(b) The question that arises in respect of item (iii) is whether the wording covers a person who has been convicted of more than one rape in the same trial. According to a judgment of the SCA in the matter of *S v Mahamotsa* 2002 (2) SACR 435 (SCA), item (iii) does not apply. In this case, which involved an accused convicted on two counts of rape, the second rape was committed whilst the accused was awaiting trial on the first rape, the court noted that it must be remembered that at the time of the second rape, the accused had not as yet been convicted on the first count of rape and that the Legislature has, in itself, distinguished him from persons who, having been convicted of two or more offences of rape but not yet sentenced, commits another rape. In a more recent decision, in *Ngcobo & Other v S* (AR759/14) 2016 ZAKZPHC, the court noted (at paragraph 11) that the meaning of the item raises questions, including a question why a third rape committed after two convictions, but before sentencing, would attract a life imprisonment, while a third rape committed in

circumstances contemplated in Part III would attract 20 years imprisonment.

2.12.5 In order facilitate legal certainty, clause 15 seeks to amend the wording of items (i), (ii) and (iii), in order to make it applicable in the case of the following scenarios:

(a) In the circumstances where the accused is convicted of the offence of rape and evidence adduced at the trial of the accused proves that the victim was also raped by—

(i) any co-perpetrator or accomplice; or

(ii) a person, who was compelled by any co-perpetrator or accomplice, to rape the victim, as contemplated in section 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007,

irrespective of whether or not the co-perpetrator or accomplice has been convicted of, or has been charged with, or is standing trial in respect of, the offence in question.

(b) In the circumstances where the accused is convicted of the offence of rape on the basis that the accused acted in the execution or furtherance of a common purpose or conspiracy and evidence adduced at the trial proves that the victim was raped by more than one person acted in the execution or furtherance of a common purpose or conspiracy to rape the victim, irrespective of whether or not any other person who so acted in the execution or furtherance of a common purpose or conspiracy has been convicted of, or has been charged with, or is standing trial in respect of, the offence in question.

(c) When committed by the accused who—

(i) has previously been convicted of the offence of rape or compelled rape; or

(ii) has been convicted by the trial court of two or more offences of rape or the offences of rape and compelled rape,

irrespective of—

- whether the rape of which the accused has so been convicted constitutes a common law or statutory offence;
- the date of the commission of any such offence of which the accused has so been convicted;
- whether the accused has been sentenced in respect of any such offence of which the accused has so been convicted;
- whether any such offence of which the accused has so been convicted was committed in respect of the same victim or any other victim; or
- whether any such offence of which the accused has so been convicted was committed as part of the same chain of events, on a single occasion or on different occasions.

2.12.6 Clause 15 also amends paragraph *(b)* of the offence of rape. Paragraph *(b)* provides for circumstances where the offence of rape is punishable by life imprisonment, where the victim of the offence is a vulnerable person. In terms of this amendment—

(a) the age of a vulnerable person is increased from 16 years to 18 years; and

(b) a new item is inserted to extend the application of Part I of Schedule 2 to a victim who is or was in a domestic relationship, as defined in section 1 of the Domestic Violence Act, 1998, with the accused.

2.12.7 Similar amendments are effected to the offence of compelled rape listed in Part I of Schedule 2 to the Minimum Sentences Act.

2.13 ***Clause 16***

2.13.1 Various persons recommended that the offences of—

- attempted murder;
- 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 Part I; and
- sexual exploitation of a child or sexual exploitation of a person who is mentally disabled as contemplated in section 17 or 23 or using a child for child pornography or using a person who is mentally disabled for pornographic purposes, as contemplated in section 20(1) or 26(1) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007,

which are currently listed in Part III of Schedule 2 must, due to their seriousness, be inserted in Part II of Schedule 2 of the Minimum Sentences Act.

2.13.2 Section 51(2)*(a)* of the Minimum Sentences Act provides that a regional court or the High Court must sentence a person convicted of an offence listed in Part II of Schedule 2 to the Act, to a minimum period of imprisonment of 15 years in the case of a first offender, 20 years in the case of a second offender and 25 years in the case of a third or subsequent offender. The offences discussed in paragraph 2.13.1 are currently subject to the sentencing dispensation discussed in paragraph 2.14, below. Clause 16 of the Bill inserts these offences in Part II of Schedule 2 to the Minimum Sentences Act.

2.14 ***Clause 17***

2.14.1 Section 51(2)*(b)* of the Minimum Sentences Act provides that a regional court or the High Court must sentence a person convicted of an offence listed in Part III of Schedule 2 to the Act, to a minimum period of imprisonment of 10 years, in the case of a first offender, 15 years in the case of a second offender and 20 years in the case of a third or subsequent offender.

2.14.2 Clause 17—

(a) deletes the offences referred to in paragraph 2.13.1 from Part III of Schedule 2; and

(b) inserts in Part III of Schedule 2, the offence of assault with intent to do grievous bodily harm—

(i) on a child—

- under the age of 16 years; or
- either 16 or 17 years of age and where the age difference between the child and the person who has been convicted of the offence is more than four years; or

(ii) where the victim is or was in a domestic relationship, as defined in section 1 of the Domestic Violence Act, 1998, with the accused.

2.15 ***Clause 19*** contains the short title and provides for the commencement of the Amendment Act.

3. DEPARTMENTS/BODIES CONSULTED

3.1 The individual provisions of the Bill were developed in conjunction with or at the request of, relevant stakeholders, including representatives of the lower courts judiciary, the National Prosecuting Authority, the Department of Correctional Services, the Inter-sectoral Committee for the Management of Sexual Offence Matters established under the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, and the South African Police Service.

3.2 The Bill was made available for public comment. The Department received inputs from the Women's Legal Centre, Rape Crisis Cape Town Trust in collaboration with Lawyers for Human Rights, Legal Resources Centre, Commission for Gender Equality, United Nations Office on Drugs and Crime, Scalabrini Centre, Western Cape Provincial Government, African Policing Civilian Oversight Forum, Dr Joan van Niekerk, Karrin Pillay, Adv R Meintjies, G van Rooyen, Z Mdlozini, H Saunders, M Prinsloo and G Hunt-Higgs. The majority of the commentators supported the Bill.

4. IMPLICATIONS FOR PROVINCES

There are no implications for the provinces.

5. FINANCIAL IMPLICATIONS FOR STATE

There are no financial implications for the State.

6. PARLIAMENTARY PROCEDURE

The Department of Justice and Constitutional Development and the State Law Advisers are of the opinion—

(a) that the Bill must be dealt with in accordance with the procedure established by section 75 of the Constitution since it contains no provision to which the procedure set out in section 74 or 76 of the Constitution applies; and

(b) that it is not necessary to refer the Bill to the National House of Traditional Leaders in terms of section 18(1)*(a)* of the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003), since it does not contain provisions pertaining to customary law or customs of traditional communities.