For attention: Mr M Mokulubete

Per email: MMokulubete@justice.gov.za

The Department of Justice and Constitutional Development

15 June 2022

Dear Mr Mokulubete

Submission in response to the Magistrates Bill, 2022 [B XX – 2022]

Please find attached the submission by the Helen Suzman Foundation for your consideration.

We would like to confirm our interest in making oral representations to the Department at a later convenient date.

Should you have any queries, it would be appreciated if you could contact Chelsea Ramsden (email: chelsea@hsf.org.za)

Yours sincerely

Nicole Fritz

Director

Helen Suzman Foundation Trust
Trust No: 1455/93
NPO Reg. No. 036-281-NPO
www.hsf.org.za

Postnet Suite 130, Private Bag
x2600, Houghton 2041
Tel: +27 11 482 2872
Fax: +27 11 482 8468

Dysart House
6 Sherborne Road
Parktown, 2193
Email:info@hsf.org.za

SUBMISSION TO THE DEPARTMENT OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT

in respect of

MAGISTRATES BILL, 2022

made by

THE HELEN SUZMAN FOUNDATION

15 JUNE 2022

Helen Suzman Foundation Trust
Trust No: 1455/93
NPO Reg. No. 036-281-NPO
www.hsf.org.za

Postnet Suite 130, Private Bag
x2600, Houghton 2041
Tel: +27 11 482 2872
Fax: +27 11 482 8468

Dysart House
6 Sherborne Road
Parktown, 2193
Email:info@hsf.org.za

Table of Contents

Introduction

1. The Helen Suzman Foundation ("HSF") welcomes the opportunity to make submissions to the Department of Justice and Constitutional Development ("Department") on the Magistrates Bill ("the Bill"). The HSF sees this engagement as a way of fostering critical yet constructive dialogue between civil society and government.

2. The HSF is a non-governmental organisation whose main objective is to promote and defend the values of our constitutional democracy in South Africa, with a focus on the rule of law, transparency and accountability. The HSF's interest in participating in these proceedings centres on our commitment to our constitutional obligations of the achievement of equality and the advancement of human rights and freedoms. Central to our work is the defence of the rule of law.

3. The independence, credibility and integrity of the Judiciary are central to our constitutional democracy. Section 165 of the Constitution vests judicial authority in the courts and provides for the independence of the courts.[1] Section 166(d) makes clear that the Magistrates' Courts form part of the court structure vested with judicial authority. The Judiciary, and the courts, are the guardians of the Constitution and must uphold the rule of law.

4. The HSF would like to draw the Department's attention to the fact that we have also made submissions on the Lower Courts Bill, 2022.

5. In Part A, the HSF will provide comments of a general nature on the overall purpose and scheme of the Bill. The HSF is aware of the proposed unification of the Superior and Lower Courts into a single judicial system. With this in mind, the HSF submits that a comprehensive study into the merger of the two court systems be conducted,

[1] Section 165(2) provides that "[t]he courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice".

after which the Department should indicate how the proposed legislation fits within this unified scheme.

6. In Part B, the HSF will provide comments on certain specific sections contained therein.

Part A: Comments Regarding the Overall Purpose and Scheme of the Bill

7. The Bill purports, in the main, to create and ensure the autonomy of the magistracy from the Executive and bring the discipline of magistrates in line with the dispensation applicable in the Superior Courts. Finally, the Bill intends to ensure that all provisions relating to the appointment of magistrates are contained within one legislative document.[2]

8. The HSF commends the Department on taking the initiative to draft new legislation in order to provide reform to the Lower Courts. Magistrates are often seen as lacking independence. Pre-democratic magistrates 'were public servants', and it was the magistrates' courts in which 'the systematic aspects of racial oppression . . . were implemented on a daily basis'.[3] Even after years of democracy, magistrates were still seen as lacking independence despite there being little to no evidence of interference in their adjudicative functions.[4] This is concerning, as it is often the first court that the average person has an interaction with.

[2] See Memorandum on the Objects of the Magistrates Bill, 2022, para 1.2.
[3] 'Twenty Year Review: South Africa 1994-2014' (2014) *Department of Planning, Monitoring and Evaluation* <https://www.dpme.gov.za/news/Documents/20%20Year%20Review.pdf> ("Twenty Year Review"), para 2.1. See also 'Discussion Document on the Transformation of the Judicial System and the Role of the Judiciary in the Developmental South African State' (February 2012) *Department of Justice and Constitutional Development* <https://www.justice.gov.za/docs/other-docs/20120228-transf-jud.pdf> ("Transformation of Judicial System"), para 2.5.1.
[4] Special Rapporteur on the Independence of Judges and Lawyers Dato' Param Cumaraswamy, 'Mission to South Africa' (25 January 2001) *Commission on Human Rights – Economic and Social Council* Doc No. E/CN.4/2001/65/Add.2 ("Mission to South Africa") para 39.

9. Initially, post-democracy, the magistracy fell within the complete control and realm of the Department. Significantly, this tie has been somewhat severed as magistrates are now public office-bearers rather than civil servants.[5] This move brought the appointment, discipline and removal of magistrates more in line with Superior Courts in that magistrates are no longer regarded as public servants, subject to the Public Service Act, under the full responsibility of the Minister.[6] Instead, the appointment, discipline and removal of magistrates were now tasked to the Minister in consultation with the Magistrates Commission ("Commission"). This was an essential move to improving the perceived, and actual, independence of the Magistrates' Courts.

10. In terms of the current administrative structure, the Magistrates Courts, or Lower Courts as they have been termed in the Lower Courts Bill, fall within the administration of the Department and not the Office of the Chief Justice ("OCJ).[7] The OCJ was established as a new National Department in 2010, by Presidential proclamation.[8] The OCJ, under the leadership of the Chief Justice, is responsible for the support and administration of the Superior Courts.[9]

11. The HSF commends the aim of ensuring the autonomy of the magistracy from the Executive. There have been calls, and proposals, for a unified Judiciary with both the Superior and Lower Courts being subsumed into one single judicial system, under the control of the OCJ.[10]

---

[5] *S and Others v Van Rooyen and Others (General Council of the Bar of South Africa Intervening)* [2002] ZACC 8; 2002 (5) SA 246 (CC); 2002 (8) BCLR 810 (CC) (*Van Rooyen*). Twenty Year Review (n 3) para 2.3.
[6] *Van Rooyen* ibid para 79.
[7] Unrevised Hansard, 'Vote No 27' Mini Plenary – National Assembly (12 May 2022) <https://www.parliament.gov.za/storage/app/media/Docs/hansard/dd2e1f78-8a30-4a4f-a078-cc022bf27c5c.pdf> ("Vote 27"), 39-40.
[8] Judicial Matters Amendment Act (66/2008): Commencement of Sections 10, 13, 14, 15 and 16 of the Act – *GG 335500*, No. R 45, 2010, (23 August 2010).
[9] The Establishment of the Office of the Chief Justice 2010 – 2013, *Office of the Chief Justice of the Republic of South Africa*, <https://www.judiciary.org.za/images/establishment/Establishment-of-the-OCJ-2010-2013.pdf>, para 5.
[10] Mission to South Africa (n 4) para 50.

12. This issue has been receiving more attention, as evidenced by the Judicial Service Commission ("JSC") interviews held in February 2022 for the position of Chief Justice, where some candidates envisaged a single Judiciary where the Lower Courts will fall within the realm of the OCJ entirely.[11]

13. The Department has published this Bill and the Lower Courts Bill for comment. The clear intention behind the two Bills is to create a single, unified judiciary that will fall under the administration of the OCJ.[12]

14. However, how this merger would take place and what implications this would have on the profession *as a whole* have not been set out in any detail. For example, when the Department suggested a single Judiciary, some judges opposed the proposal,[13] uncertain as to whether this would entail professional career judges or how training would work.[14] The Bill does not provide any detail in this regard.

15. One of the main issues in relation to the independence of the magistracy, and even the Judiciary as a whole, relates to its budget and expenditure. The Lower Courts Bill makes provision for the Chief Justice to determine the necessary budget for the Lower Courts, after consultation with the other heads of court, and then to request the Minister to request these funds from Parliament.[15]

16. A similar provision is provided for the budget of the Superior Courts in the Superior Courts Act.[16] However, as appears from the JSC Chief Justice interviews, this section

---

[11] For example, see Chief Justice Interviews: JSC Interview of Justice Mandisa Maya – Judges Matter (Feb 2022) (9 February 2022) <https://www.youtube.com/watch?v=medfs6HuxMY> ("Maya Interview") at 1:00:00, 1:10:14, 4:35:51, and 5:14:15. See also Chief Justice Interviews: JSC Interview of Justice Dunstan Mlambo – Judges Matter (Feb 2022) (10 February 2022) <https://www.youtube.com/watch?v=uUAvbN2MbMw> ("Mlambo Interview") at 37:00:00 and 4:47:05.
[12] Vote 27 (n 7) for example see Deputy Minister of Justice, John Jeffrey, comments at 39-45 wherein the overall purpose of the two Bills is to ensure that the Chief Justice, as head of the judiciary, exercises responsibility for the judicial functions of all courts.
[13] B M Ngoeope, 'White Paper on the Judicial System: Memorandum by Pretoria Judges' *Advocate* First Term 2000 27-32.
[14] Maya Interview (n 11) at 5:14:15 and Mlambo Interview (n 11) at 4:47:05.
[15] Lower Courts Bill, 2022, section 148(1).
[16] 10 of 2013, section 54(1).

has not yet been relied upon or utilised.[17] During these interviews it became apparent that the candidates for the Chief Justice position were of the opinion that the Judiciary, and the OCJ, had no control over its budget and expenditure.[18]

17. In addition, the OCJ currently has a separate budget from that of the Lower Courts. The Department administers the Lower Courts' budget.[19] Section 148(2) of the Lower Courts Bill places the responsibility of accounting for the 'money received and paid out' for the Lower Courts on the Secretary-General, who is the accounting officer of the OCJ. This creates confusion, as the OCJ (which has a separate budget) is to account for the Lower Courts' budget (which is part of the Department's budget).

18. Presently, neither the Bill nor the Lower Courts Bill provides an explanation as to how this arrangement will work or how one department will administer and account for the budget of a separate government department.

19. Therefore, although the Lower and Superior Courts are provided with much needed budgetary independence on paper, this is still not the case in practice. If the Judiciary is to be a genuinely independent third arm of the state, both the Lower and Superior Courts' budget and resources need to be actively administered by the Chief Justice and other members of the Judiciary with the support of the OCJ.

20. The establishment of the OCJ was a significant development in ensuring the independence of the Judiciary as required by the Constitution. The rationalisation of the two judicial court systems will guarantee greater certainty, uniformity and efficiency. As the magistracy is a part of the Judiciary, bringing it under the control of

[17] Mlambo Interview (n 11) at 1:38:54 and 4:49:31; Maya Interview (n 11) at 1:38:40; Chief Justice Interviews: JSC Interview of Justice Mbyuseli Madlanga – Judges Matter (9 February 2022) <https://www.youtube.com/watch?v=9Towqd7Omgc> at 3:02:30 and 3:05:35; Chief Justice Interviews: JSC Interview of Justice Raymond Zondo – Judges Matter (11 February 2022) <https://www.youtube.com/watch?v=VcEt0X8teZQ> at 1:54:35.

[18] Maya ibid at 1:10:00 where President Maya tells the JSC commissioners that the purpose of the OCJ was to create institutional independence but which 'now has its hands tied behind its back because it has no control over its own budget and expenditure'. See also Vote 27 (n 7) 31 and 38.

[19] Vote 27 ibid 6 and 40.

the OCJ will provide a level of independence that cannot be obtained if the magistracy is to remain under the Department.

21. However, how this should look or take place is still open to debate, and it may therefore be necessary for a more in-depth study to be conducted into the unification of the Judiciary. It would therefore be reasonable to recommend or call for a comprehensive study into the merging or unification of a single Judiciary under the OCJ before the Bill is implemented.

Part B: Comments Regarding Specific Aspects of the Bill

Section 3: Constitution of Commission and Period of Office of Members

22. Section 3(1)(a) provides for the composition of the Commission. Essentially, the Bill proposes 26 permanent commissioners, which will increase to 27 when a matter relates to 'a specific Regional Court or District Court'.[20] Of those 26 members, nine represent the political sphere.[21] This, in and of itself, seems a small percentage of political representation.

23. However, the Bill provides that of the seven judicial officers (judges and magistrates), three are designated by the Minister 'after consultation' with the relevant body/profession.[22] Similarly, the four commissioners (advocates and attorneys) representing the profession and the academic representative are appointed in the same manner.[23] It is uncertain, and there is no explanation provided, as to why a commissioner would need to be appointed in the above 'consultative' manner or even as to why the Bill provides for the appointment of three judicial officers in a different manner as compared to the other four judicial officers.

[20] Magistrates Bill 2022, section 3(1)(a)(xiv).
[21] Ibid, sections 3(1)(a)(ii), (xi) and (xii).
[22] Ibid, sections 3(1)(a)(iv)-(vi).
[23] Ibid, sections 3(1)(a)(vii)-(ix)

24. In comparison, the JSC – as prescribed by the Constitution – allows each of the relevant bodies to nominate their representatives.[24] The Cambridge dictionary definition of "consult" is 'to get information or advice from a person, esp. an expert, or to look at written material in order to get information'[25]. In contrast, the definition of "nominate" is 'to officially choose someone for a job or to do something'.[26]

25. A further distinction must be drawn to the Bill's choice of 'after consultation' instead of 'in consultation'. It is settled law that 'after consultation' merely requires the decision-maker (in this case, the Minister) to consider the views of the consulting bodies, but he or she is not bound by those views and is responsible for making the ultimate decision, with the *proviso* that it is made in good faith.[27] Whereas, 'in consultation' requires a concurrence between the consulting bodies and the decision-maker.[28]

26. It is therefore arguable that the inclusion of 'after consultation' rather than allowing representative bodies to nominate a candidate (as is required by the Constitution in relation to JSC commissioners), or even 'in consultation', even at this basic level provides the Minister with far broader powers of appointing commissioners than is required and will lead to real, or perceived, perceptions of bias or political stacking.

27. In addition, section 3(1)(a)(xiii) provides the President with the power to appoint four persons. However, two may not 'be involved in the administration of justice or the practice of law'. The reasonableness of this requirement can be questioned as the

[24] See Constitution, section 178(1)(e)-(g).
[25] Cambridge Dictionary, 'consult' <https://dictionary.cambridge.org/dictionary/english/consult>.
[26] Cambridge Dictionary, 'nominate' <https://dictionary.cambridge.org/dictionary/english/nominate>.
[27] *Premier, Western Cape v President of the Republic of South Africa* [1999] ZACC 2; 1999 (3) SA 657 (CC) at para 85. See also *President of the Republic of South Africa and Others v Reinecke* 2014 (3) SA 205 (SCA) (*Reinecke*), para 9.
[28] *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* [1999] ZACC 9; 1999 (4) SA 147 (CC), para 63; *Reinecke* ibid.

commissioners are to sit on and be a part of making important decisions that impact the very sector to which they may not belong.

28. Furthermore, the HSF recommends that of the four commissioners to be appointed from the National Council of Provinces ("NCOP"), at least two must be members of opposition parties.[29] This would ensure that there is a fair representation of the parties elected by the people of South Africa and respect and value accorded to the broader vote. The HSF has made a similar call regarding the JSC commissioners to be appointed from the NCOP. We have recommended that only three members be appointed from the NCOP, each representing one of the three largest political parties.[30]

29. Finally, in recent months the JSC has faced calls for the publication of a code of conduct due to the improper conduct of some of its commissioners.[31] Therefore, to avoid any similar situation arising in the future with regards to the Commission, the HSF proposes that a subsection be included within section 3 that requires the Commission to publish a professional code of conduct to which its members must adhere. A code of conduct will guide commissioners on how to act, what is expected of them, the limits of their actions and the sanction/s that may be taken for exceeding such limits.

Section 6: Committees of Commission

30. Section 6(1)(a)(i) establishes an executive committee which consists of the 'Chairperson and two or more members of the Commission'. Effectively, this means that the executive committee may consist of only three members at any given time.

[29] Magistrates Bill, section 3(1)(a)(xii).
[30] Helen Suzman Foundation, 'Submission in Response to the Call for Comments on the Annual Review of the Constitution' <https://hsf.org.za/publications/submissions/hsf-submission-annual-review-of-the-constitution.pdf>.
[31] Helen Suzman Foundation, 'Press Release: Civil Society Calls for JSC Code of Conduct Before any New Judicial Appointments' (3 March 2022) <https://hsf.org.za/news/press-releases/press-release-civil-society-calls-for-jsc-code-of-conduct-before-any-new-judicial-appointments>.

Section 6(4)(b) provides that '*any function* so performed by the executive committee . . . is *deemed* to have *been performed by the Commission*' (own emphasis added).

31. The HSF submits that a situation in which a three person committee may act, and in doing so bind, a 26 member Commission opens up the possibility for the abuse of power. This very limited executive committee needs to have a more significant minimum number of members if its actions are to be deemed to have the approval stamp of the entire Commission.

32. In addition, neither the Bill nor the Memorandum on the Objects of the Magistrates Bill explain the necessity for the committee and, more importantly, what the executive committee's purpose, functions or powers are.[32] In contrast, both instruments referred to above at least explain the purpose of the standing committee, created in section 6(1)(a)(ii), which is to deal with allegations of misconduct committed by magistrates.[33]

33. Therefore, the HSF asserts that not only is the small number of members of the executive committee problematic, but the apparent limitless power may lead to a myriad of opportunities for abuse of power or lack of proper process, transparency and accountability.

Section 7: Powers and Functions of Commission

34. Section 7(1)(f) requires the Commission to 'report to the Minister for the information of Parliament on any matter the Commission deems fit', and section 7(2) requires the Commission to file a report to be submitted by the Minister to Parliament on all

[32] See Memorandum and the Objects (n 2) at para 2.5.5. In addition, there is no corresponding or similar committee of the JSC – see Judicial Service Commission, 'Annual Report 2020/21' *Office of the Chief Justice* ("JSC Annual Report 2020/21"), para 3.1 which provides that the JSC has established a sifting committee, litigation committee, and rules committee. In terms of the Judicial Service Commission Act 9 of 1994 ("JSC Act"), the only other formally mentioned committee is the Judicial Conducted Committee created in terms of section 8.

[33] Ibid. See also Magistrates Bill section 6(1)(a)(ii).

matters considered by the Commission on suspension of a magistrate,[34] removal of a magistrate,[35] and reduction of a magistrate's remuneration pending the finalisation of disciplinary proceedings.[36]

35. These new reporting requirements are admirable. However, it is phrased – specifically, section 7(1)(f) - in very broad terms, which may lead to ambiguity, a lack of transparency and ultimately, a lack of accountability. As required by the JSC,[37] the Bill should provide for specific items that need to be reported on annually and should also include a final subsection establishing that the Commission can report on any other matter that it deems fit.

Section 9: Secretary and Staff of Commission

36. Section 9(1) gives the Minister the power to appoint the Secretary of the Commission. If the magistracy is to be unified into a single judiciary, as envisaged by the Department, the Secretary of the Commission should be a staff member under the employment of the OCJ.

[34] Ibid, section 15(2).
[35] Ibid, section 15(3).
[36] Ibid, section 15(4).
[37] JSC Act (n 32) section 6 provides that:
(1) The Commission shall within six months after the end of every year submit a written report to Parliament for tabling.
(2) The report referred to in subsection (1) must include information regarding-
a. The activities of the Commission during the year in question;
b. All matters dealt with by the Judicial Conduct Committee referred to in section 8;
c. All matters relating to, including the degree of compliance with, the Register of Judges' Registrable Interests referred to in section 13, as reported by the Registrar of Judges' Registrable Interests; and
d. All matters considered by the Commission in the course of the application of Chapters 2 and 3 of this Act, including the number of matters outstanding and the progress in respect thereof.

37. This would also bring the Commission more in line with the JSC, as the JSC Act requires the Secretary of the Commission to be a member of 'staff in the Office of the Chief Justice'.[38] The independence of the magistracy as a whole will be enhanced.

Section 10: Appointment of Magistrates

38. Section 10(1) requires any magistrate to be a South African citizen. On its own, this is not inherently wrong. However, section 174(1) of the Constitution only requires that Constitutional Court justices be South African citizens. It would create an unusual situation where magistrates are required to be South African citizens, but Superior Court judges (barring the Constitutional Court) are not. In addition, it is not unusual for highly qualified practitioners or judges of other countries to act in courts of other countries from time to time.

39. The only criteria provided for the appointment of magistrates is that a person must be 'appropriately qualified', 'fit and proper', and, as mentioned – a 'South African citizen'.[39] The HSF submits that a subsection should be included indicating that the Commission must publish and make publicly available, at the time of the call for applications, additional criteria that will be considered when appointing a magistrate. The purpose of not requiring the inclusion of other concrete criteria within this section would be to leave open the possibility that the relevant criteria may change from time to time.

40. The HSF contends that it is essential that the Commission, the candidates, and the public be aware of what criteria will be applied in the appointment process. This should be done at the time vacancies are published. This would align with

[38] Ibid section 37(1).
[39] Magistrates Bill, section 10(1).

international best practices of other judicial commissions[40] and ensure higher levels of transparency and accountability.[41]

41. In addition, it will lend a greater degree of credibility to the appointment procedure, as each candidate will know what is expected of them, whether they meet such criteria and how they will be judged. Finally, it will allow the commissioners to accurately assess the candidates and weigh them against each other based on how they meet the necessary prescribed criteria.

Section 11: Acting Magistrates

42. Similar to the above, section 11 does not provide for further criteria other than that an applicant must be fit and proper and appropriately qualified.[42] The HSF acknowledges that the Bill provides for the promulgation of regulations, including regulating the appointment requirements.[43] However, it does not provide, or require, the publication of an established policy setting out the criteria or detailed procedure for the appointment of acting magistrates.

43. In addition, contrary to section 10(1), acting appointments do not require the appointee to be a South African citizen. This may lead to an anomalous situation

[40] Dr Karen Brewer, James Dingemans QC & Dr Peter Slinn eds, 'Judicial Appointments Commissions: A Model Clause for Constitutions' (May 2013) *Commonwealth Lawyers Association, Commonwealth Legal Education Association & Commonwealth Magistrates' and Judges' Association*; Commonwealth (Latimer House) Principles on the Three Branches of Government (2003); Human Rights Committee, 'General Comment No.32', CCPR/C/GC/32, (23 August 2007) <https://digitallibrary.un.org/record/606075?ln=en>; and 'Lilongwe Principles and Guidelines on the Selection and Appointment of Judicial Officers' (30 October 2018) *Southern African Chief Justices' Forum*.
[41] Aldo Zammit Borda, 'The Appointment, Tenure and Removal of Judges Under Commonwealth Principles: a Compendium and Analysis of Best Practice' (2015) 41(3) *Commonwealth Law Bulletin* 347; Susannah Cowen, 'Judicial Selection in South Africa' (2010) *Democratic Governance Rights* Unit; and 'Cape Town Principles on the Role of Independent Commissions in the Selection and Appointment of Judges' (February 2016) *British Institute of International and Comparative Law.*
[42] Magistrates Bill, section 11(1).
[43] Ibid, section 19(1)(a).

where a person may qualify to act as a magistrate. Yet, the same person is not eligible for an appointment as a permanent magistrate based on their citizenship.

44. Sections 11(1) and (2)(a) merely require the Minister to consult the 'Head of the Court' before making an acting appointment. This situation is similar to the position in the Superior Courts. The lack of transparency, clarity and uniformity in the appointment of acting magistrates (and judges) may lead to real or perceived bias and favouritism. A clear policy setting out a uniform process will minimise this risk and help reduce the number of complaints, issues, and conjectures.

45. Section 11(4)(a)(ii) allows for the reappointment of persons to acting positions but fails to provide a limitation on the number of times this may happen. A recent Supreme Court of Appeal decision clearly demonstrates that the continuous renewal of acting appointments is a genuine concern in our court system.[44] In *Lawrence*, the respondent, an acting magistrate in Bloemfontein, had been reappointed to an acting position 48 times in a period of four years.[45]

46. The possibility of continuous renewal of an acting appointment poses a dangerous and severe threat to the security of tenure and independence of acting magistrates. The temporary appointment of a magistrate may expose him or her to the potential of undue influence or pressure, especially where there is an expectation of further extension to an acting appointment (or even of a permanent appointment).[46] In this

[44] *Magistrates Commission and Others v Lawrence* [2021] ZASCA 165; (2022) 43 ILJ 567 (SCA); [2022] All SA 321 (SCA) ("*Lawrence*").
[45] Ibid paras 19-20.
[46] Special Rapporteur on the Independence of Judges and Lawyers Diego García-Sayán, 'Report of the Special Rapporteur on the Independence of Judges and Lawyers' (17 July 2020) *General Assembly* Doc No. A/75/172, para 66. See also Johan Trengrove, 'The Prevalence of Acting Judges in the High Courts – is this Consistent with an Independent Bench?' (*Parliamentary Monitoring Group* 2007) <https://static.pmg.org.za/docs/2007/070817trengove.htm>, para 21; Venice Commission, 'Judicial Appointments' (16-17 March 2007) Opinion No. 403/2006 *Council of Europe* Doc No. CDL-AD(2007)028, para 40; and Mission to South Africa (n 4) para 68.

regard, the HSF submits that the Bill must limit the number of possible re-appointments or extensions.

47. Section 11(4)(b) provides that the Minister may suspend an acting magistrate on the recommendation of the Head of Court, where the Head of Court is 'satisfied that reliable evidence exists indicating that an allegation against that person is of such a serious nature as to make it inappropriate for the person to perform the functions of judicial office while the allegation is being investigated'. The acting magistrate must have had a 'reasonable opportunity to be heard regarding the desirability of such suspension before a recommendation is made'. The HSF does not take issue with this subsection except to recommend that the Bill should at least include a review of the suspension by the Commission or even the standing committee (referred to in section 6(1)(a)(ii)) to ensure that due process was followed.

Section 12: Conditions of Service of Magistrates, Except Salary and Vacation of Office & Section 19: Regulations

48. The HSF contends that section 12 and section 19 are antithetical to the independence of the magistracy as the Minister is given extensive power, after consultation with only the Commission, to regulate and determine the conditions of service of a magistrate. This places a significant amount of control over the functions and administration of the magistrates within the realm of the Executive.

49. The position is somewhat different in the Superior Courts. In the first instance, the Judges' Remuneration and Conditions of Employment Act [47] provides that the President may make regulations after a consultation has taken place between the Minister, 'the Chief Justice, the President of the Supreme Court of Appeal and the judges president of the respective high courts'.[48]

[47] 57 of 2001.
[48] Ibid section 13.

50. Secondly, regarding the more specific regulation and administration of the Superior Courts, the Minister may make regulations 'on the advice of the Chief Justice'.[49] Although seemingly similar to that proposed in the Bill, the Superior Courts Act goes further by requiring that any regulation be 'submitted to Parliament before publication thereof in the *Gazette*'.[50] The submission to Parliament and publication in the *Gazette* would allow for further participation and input in the functioning and administration of the Lower Courts and the conditions of service to which magistrates will be subjected.

51. Finally, in terms of the Lower Courts Bill, the budget of the Lower Courts is to fall within the control of the Chief Justice.[51] It would therefore be at odds to allow the Minister to make regulations on matters that may have an impact on the budget of Lower Courts without any consultation from the Chief Justice, the OCJ, or any other Superior Court judge for that matter.

Section 15: Removal from Office of Magistrate

52. Section 15 regulates the suspension and removal of a magistrate from office on account of suffering from an incapacity, gross incompetence, or is guilty of gross misconduct.[52] The text shows that section 15(2) regulates provisional suspension and 15(3) governs removal.

53. Section 15(3)(a) provides that the Commission may recommend the removal of a magistrate based on one of the above three grounds. In addition, the subsection provides that if not already suspended, the Minister must suspend the magistrate at this point. Section 15(3)(b) provides that a 'report in which the suspension in terms

[49] Superior Courts Act (n 16) section 49.
[50] Ibid section 49(2).
[51] Lower Courts Bill, section 148(1).
[52] Ibid, section 15(3)(a).

of paragraph (a) of a magistrate and the reason, therefore, are made known, must be tabled in the National Assembly'.

54. Section 15(3)(c) then provides that the National Assembly 'must pass a resolution as to whether or not the restoration to his or her office of a magistrate so suspended is recommended'. The wording of section 15(3)(c) makes it unclear whether the National Assembly's resolution refers to the suspension or the removal from office. Therefore, the HSF suggests that the Department make subsection 15(3)(c) clearer to avoid any uncertainty about its interpretation. This may be achieved by phrasing the subsection as follows: '[t]he National Assembly must, as soon as reasonably possible, pass a resolution either confirming or setting aside the recommendation of the Commission to remove him or her from the office of magistrate'.

Conclusion

55. The HSF welcomes the opportunity to engage with the Department in this regard. The HSF's comments are made to enhance the credibility, integrity and independence of the Judiciary and the magistracy in particular.

56. The HSF suggests that this submission be read in unison with the HSF's submission with the Lower Courts Bill, 2022, with particular regard to the submission regarding the administration of the budget of the Lower Courts.

57. Therefore, the HSF would like to draw attention to the submissions made on the specific sections of the Bill. In addition, the HSF strongly suggests that the Department, as well-intentioned as the current Bill is, conduct a comprehensive study of the feasibility of unification of the Lower and Superior Court system under the OCJ before the Bill is implemented. For the reasons set out in these submissions, the HSF is of the view that this development would best secure the independence of the Judiciary.