

REPUBLIC OF SOUTH AFRICA

CRIMINAL PROCEDURE AMENDMENT BILL

*(As introduced in the National Assembly (proposed section 75); explanatory summary of
Bill published in Government Gazette No. 40487 of 9 December 2016)
(The English text is the official text of the Bill)*

(MINISTER OF JUSTICE AND CORRECTIONAL SERVICES)

[B 2—2017]

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GENERAL EXPLANATORY NOTE:

[] Words in bold type in square brackets indicate omissions from existing enactments.

 Words underlined with a solid line indicate insertions in existing enactments.

BILL

To amend the Criminal Procedure Act, 1977, so as to provide the courts with a wider range of options in respect of orders to be issued in cases of findings that accused persons are not capable of understanding criminal proceedings so as to make a proper defence; or that accused persons are by reason of mental illness or mental defect or for any other reason not criminally responsible for the offences they are charged with; to clarify the composition of the panels provided for in section 79 to conduct enquiries into the mental condition of accused persons; and to provide for matters connected therewith.

PARLIAMENT of the Republic of South Africa enacts, as follows:—

Amendment of section 77 of Act 51 of 1977, as substituted by section 10 of Act 33 of 1986, amended by section 9 of Act 51 of 1991, section 42 of Act 129 of 1993, section 3 of Act 68 of 1998, section 12 of Act 55 of 2002 and substituted by section 68 of Act 32 of 2007 5

1. Section 77 of the Criminal Procedure Act, 1977 (hereinafter referred to as the principal Act), is hereby amended—

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

“(1) If it appears to the court at any stage of criminal proceedings that the accused is by reason of mental illness or **[mental defect]** intellectual disability not capable of understanding the proceedings so as to make a proper defence, the court shall direct that the matter be enquired into and be reported on in accordance with the provisions of section 79.”; 10

(b) by the substitution for subsection (6) of the following subsection: 15

“(6) (a) If the court which has jurisdiction in terms of section 75 to try the case, finds that the accused is not capable of understanding the proceedings so as to make a proper defence, the court may, if it is of the opinion that it is in the interests of the accused, taking into account the nature of the accused’s incapacity contemplated in subsection (1), and unless it can be proved on a balance of probabilities that, on the limited evidence available the accused committed the act in question, order that such information or evidence be placed before the court as it deems fit so as to determine whether the accused has committed the act in question and the court **[shall]** may direct that the accused— 20 25

- (i) in the case of a charge of murder or culpable homicide or rape or compelled rape as contemplated in [sections] section 3 or 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively, or a charge involving serious violence or if the court considers it to be necessary in the public interest, where the court finds that the accused has committed the act in question, or any other offence involving serious violence, be—
- (aa) detained in a psychiatric hospital **[or a prison]**; or
- (bb) temporarily detained in a correctional health facility of a prison where a bed is not immediately available in a psychiatric hospital and be transferred where a bed becomes available, if the court is of the opinion that it is necessary to do so on the grounds that the accused poses a serious danger or threat to him or herself or to members of the public or to any property belonging to him or her or any other person, pending the decision of a judge in chambers in terms of section 47 of the Mental Health Care Act, 2002;
- (cc) admitted to and detained in a designated health establishment stated in the order as if he or she were an involuntary mental health care user contemplated in section 37 of the Mental Health Care Act, 2002; or
- (dd) released subject to such conditions as the court considers appropriate; or
- (ii) in the case where the court finds that the accused has committed an offence other than one contemplated in subparagraph (i) or that he or she has not committed any offence be—
- (aa) **[be]** admitted to and detained in **[an institution]** a designated health establishment stated in the order as if he or she were an involuntary mental health care user contemplated in section 37 of the Mental Health Care Act, 2002[.];
- (bb) released subject to such conditions as the court considers appropriate; or
- (cc) released unconditionally, where the court has found that the accused has not committed any offence,
- and if the court so directs after the accused has pleaded to the charge, the accused shall not be entitled under section 106(4) to be acquitted or to be convicted in respect of the charge in question.
- (b) If the court makes a finding in terms of paragraph (a) after the accused has been convicted of the offence charged but before sentence is passed, the court shall set the conviction aside, and if the accused has pleaded guilty it shall be deemed that he or she has pleaded not guilty.”; and
- (c) by the substitution for subsection (9) of the following subsection:
- “(9) Where an appeal against a finding in terms of subsection (5) is allowed, the court of appeal shall set aside the conviction and sentence and **[direct that the person concerned be detained]** remit the case to the court which made the finding, whereupon that court must deal with the person concerned in accordance with the provisions of subsection (6).”.

Amendment of section 78 of Act 51 of 1977, as substituted by section 11 of Act 33 of 1986, amended by section 9 of Act 51 of 1991, section 43 of Act 129 of 1993, substituted by section 5 of Act 68 of 1998, section 13 of Act 55 of 2002 and section 68 of Act 32 of 2007

2. Section 78 of the principal Act is hereby amended—

- (a) by the substitution for the heading of the following heading:
- “Mental illness or [mental defect] intellectual disability and criminal responsibility”;**
- (b) by the substitution for the words preceding paragraph (a) in subsection (1) of the following words:
- “(1) A person who commits an act or makes an omission which constitutes an offence and who at the time of such commission or omission suffers from a mental illness or **[mental defect]** intellectual disability which makes him or her incapable—”;

- (c) by the substitution for subsection (1A) of the following subsection:
 “(1A) Every person is presumed not to suffer from a mental illness or **[mental defect]** intellectual disability so as not to be criminally responsible in terms of section 78(1), until the contrary is proved on a balance of probabilities.”; 5
- (d) by the substitution for subsection (2) of the following subsection:
 “(2) If it is alleged at criminal proceedings that the accused is by reason of mental illness or **[mental defect]** intellectual disability or for any other reason not criminally responsible for the offence charged, or if it appears to the court at criminal proceedings that the accused might for such a reason not be so responsible, the court shall in the case of an allegation or appearance of mental illness or **[mental defect]** intellectual disability, and may, in any other case, direct that the matter be enquired into and be reported on in accordance with the provisions of section 79.”; 10
- (e) by the substitution for subsection (6) of the following subsection: 15
 “(6) If the court finds that the accused committed the act in question and that he or she at the time of such commission was by reason of mental illness or intellectual disability not criminally responsible for such act—
 (a) the court shall find the accused not guilty; or 20
 (b) if the court so finds after the accused has been convicted of the offence charged but before sentence is passed, the court shall set the conviction aside and find the accused not guilty, by reason of mental illness or intellectual disability, as the case may be, and direct— 25
 (i) in a case where the accused is charged with murder or culpable homicide or rape or compelled rape as contemplated in **[sections]** section 3 or 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively, or another charge involving serious violence, or if the court considers it to be necessary in the public interest that the accused be— 30
 (aa) detained in a psychiatric hospital **[or a prison]**;
 (bb) temporarily detained in a correctional health facility of a prison where a bed is not immediately available in a psychiatric hospital and be transferred where a bed becomes available, if the court is of the opinion that it is necessary to do so on the grounds that the accused poses a serious danger or threat to himself or herself or to members of the public or to any property belonging to him or her or any other person, pending the decision of a judge in chambers in terms of section 47 of the Mental Health Care Act, 2002; 35
[(bb)](cc) admitted to and detained in **[an institution]** a designated health establishment stated in the order and treated as if he or she were an involuntary mental **[care health]** health care user contemplated in section 37 of the Mental Health Care Act, 2002; 45
 (cc) . . .
 (dd) released subject to such conditions as the court considers appropriate; or
 (ee) released unconditionally; 50
 (ii) in any other case than a case contemplated in subparagraph (i), that the accused be—
 (aa) **[be]** admitted to and detained in **[an institution]** a designated health establishment stated in the order and treated as if he or she were an involuntary mental health care user contemplated in section 37 of the Mental Health Care Act, 2002; 55
 (bb) . . .
 (cc) **[be]** released subject to such conditions as the court considers appropriate; or
 (dd) **[be]** released unconditionally.”; and 60
- (f) by the substitution for subsection (7) of the following subsection:
 “(7) If the court finds that the accused at the time of the commission of the act in question was criminally responsible for the act but that his

capacity to appreciate the wrongfulness of the act or to act in accordance with an appreciation of the wrongfulness of the act was diminished by reason of mental illness or **[mental defect]** intellectual disability, the court may take the fact of such diminished responsibility into account when sentencing the accused.”.

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Amendment of section 79 of Act 51 of 1977, as amended by section 4 of Act 4 of 1992, substituted by section 17 of Act 116 of 1993, amended by section 44 of Act 129 of 1993, section 28 of Act 105 of 1997, substituted by section 6 of Act 68 of 1998, section 8 of Act 42 of 2001, section 68 of Act 32 of 2007 and section 10 of Act 66 of 2008

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3. Section 79 of the principal Act is hereby amended—

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

“(1) Where a court issues a direction under section 77(1) or 78(2), the relevant enquiry shall be conducted and be reported on—

(a) where the accused is charged with an offence other than one referred to in paragraph (b), by the **[medical superintendent of a psychiatric hospital designated by the court, or by a psychiatrist appointed by the medical superintendent at the request of the court]** head of the designated health establishment designated by the court, or by another psychiatrist delegated by the head concerned; or

(b) where the accused is charged with murder or culpable homicide or rape or compelled rape as provided for in **[sections]** section 3 or 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively, or another charge involving serious violence, or if the court considers it to be necessary in the public interest, or where the court in any particular case so directs—

(i) by the **[medical superintendent of a psychiatric hospital designated by the court or by a psychiatrist appointed by the medical superintendent at the request of the court]** head of the designated health establishment, or by another psychiatrist delegated by the head concerned;

(ii) by a psychiatrist appointed by the court **[and who is not in the full-time service of the State unless the court directs otherwise, upon application of the prosecutor, in accordance with directives issued under subsection (13) by the National Director of Public Prosecutions];**

(iii) by a psychiatrist appointed **[for]** by the court, upon application and on good cause shown by the accused [by the court] for such appointment; and

(iv) by a clinical psychologist where the court so directs.”;

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

“(1A) The prosecutor undertaking the prosecution of the accused or any other prosecutor attached to the same court shall provide the persons who, in terms of subsection (1), have to conduct the enquiry and report on the accused’s mental condition or mental capacity with a report in which the following are stated, namely—”;

(c) by the substitution for paragraph (d) of subsection (4) of the following paragraph:

“(d) if the enquiry is in terms of section 78(2), include a finding as to the extent to which the capacity of the accused to appreciate the wrongfulness of the act in question or to act in accordance with an appreciation of the wrongfulness of that act was, at the time of the commission thereof, affected by mental illness or **[mental defect]** intellectual disability or by any other cause.”; and

(d) by the deletion of subsection 13.

Short title

4. This Act is called the Criminal Procedure Amendment Act, 2017.

MEMORANDUM ON THE OBJECTS OF THE CRIMINAL PROCEDURE AMENDMENT BILL, 2017

1. PURPOSE OF BILL

- 1.1 The Criminal Procedure Amendment Bill, 2017 (“the Amendment Bill”), among others, emanates from the judgment of the Constitutional Court in the case of *De Vos N.O. and Others v Minister of Justice and Constitutional Development and Others* [2015] ZACC 21 (“the De Vos case”). On 26 June 2015, the Constitutional Court declared section 77(6)(a)(i) and (ii) of the Criminal Procedure Act, 1977 (Act No. 51 of 1977) (“the principal Act”), to be inconsistent with the Constitution and invalid to the extent that it provides for the compulsory imprisonment of an adult accused person and the compulsory hospitalisation or imprisonment of children.
- 1.2 The Amendment Bill aims to amend the principal Act so as to provide the courts with a wider range of options in respect of orders to be issued in cases of findings that accused persons are not capable of understanding criminal proceedings so as to make a proper defence by reason of mental illness or intellectual disability. The composition of the panels provided for in section 79 of the principal Act came under scrutiny in the Western Cape High Court case of *S v Pedro* [2014] JOL 32061 (WCC) (“the Pedro case”). The Amendment Bill further aims to clarify the composition of the panels concerned in line with the Pedro case.

2. OBJECTS OF BILL

- 2.1 **Clauses 1 and 2** of the Amendment Bill aim to give effect to the judgment of the Constitutional Court in the De Vos case. **Clause 1** of the Bill aims to amend section 77 of the principal Act as follows:
 - 2.1.1 Clause 1(a) is intended to replace the outdated term of “mental defect” in section 77(1) with the more acceptable term of “intellectual disability”.
 - 2.1.2 Section 77(6)(a)(i) provides that if a court finds that an accused person is not capable of understanding the proceedings the court must, in the case of a charge of murder or culpable homicide or other offence involving serious violence, direct that the accused concerned be detained in a psychiatric hospital or a prison pending the decision of a judge in chambers in terms of section 47 of the Mental Health Care Act, 2002. Clause 1(b) aims to amend section 77(6)(a)(i) so as to provide the court with a discretion to order that accused person concerned be detained in a psychiatric hospital or correctional health facility of a prison where a bed is not immediately available in a psychiatric hospital if the court is of the opinion that it is necessary to do so on the grounds that the accused poses a serious danger or threat to himself or herself or to members of the public, pending the decision of a judge in chambers in terms of section 47 of the Mental Health Care Act, 2002. The court will also be able to order that accused person be admitted to and detained in an institution as an involuntary mental health care user contemplated in section 37 of the Mental Health Care Act, 2002 or be released subject to such conditions as the court considers appropriate.
 - 2.1.3 The proposed amendment of section 77(9) that is reflected in clause 1(c) is of a consequential nature dealing with cases of successful appeals against findings that accused persons are capable of understanding the proceedings. The proposed amendment requires that upon a successful appeal the matter must be referred back to the court that made the finding, whereupon that court must deal with the person concerned in accordance with the provisions of section 77(6) of the Act.

- 2.2 **Clause 2** of the Amendment Bill aims to amend section 78 of the principal Act as follows:
- 2.2.1 Subclauses (a) to (d) and (f) are intended to replace the outdated term of “mental defect” wherever it appears in section 78 with the more acceptable term of “intellectual disability”.
 - 2.2.2 Section 78(6) provides that if a court finds that an accused person is by reason of mental illness or intellectual disability not criminally responsible for an act the court may order that the person concerned be detained in a psychiatric hospital or a prison pending the decision of a judge in chambers in terms of section 47 of the Mental Health Care Act, 2002. The court may also order that the person concerned be admitted to and detained in an institution stated in the order and treated as if he or she were an involuntary mental health care user contemplated in section 37 of the Mental Health Care Act, 2002, released subject to such conditions as the court considers appropriate or be released unconditionally.
 - 2.2.3 Subclause (e) aims to deal with the detention of a person in prison. The proposed amendment requires that the person concerned be detained in a correctional health facility of a prison where a bed is not immediately available in a psychiatric hospital if the court is of the opinion that it is necessary to do so on the grounds that the accused poses a serious danger or threat to him or herself or to members of the public.
- 2.3 The Pedro case dealt with the composition of the panels provided for in section 79 of the principal Act. **Clause 3** of the Amendment Bill therefore aims to amend section 79 of the principal Act, in line with the Pedro case, as follows:
- 2.3.1 Subclause (a) aims to amend section 79(1) to clarify that in the case of less serious offences the relevant enquiry must be conducted and reported on by the head of a health establishment if the head is a psychiatrist or by a psychiatrist delegated by the head. Provision is also made that if the head is not a psychiatrist then he or she must appoint a psychiatrist to conduct the enquiry and report thereon.
 - 2.3.2 In the case of serious offences, such as murder and rape or compelled rape as provided for in section 3 or 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (Act No. 32 of 2007), a panel must be constituted to conduct the enquiry and report thereon. The panel will consist of at least two psychiatrists. A third member of the panel, namely a psychiatrist, may be appointed by the court upon application by the accused person. A third or fourth (depending whether a third psychiatrist member is appointed by the court upon application by the accused) member, namely a clinical psychologist will form part of the panel if the court so directs.
 - 2.3.3 Subclause (b) aims to insert the term “mental condition” before the term “mental capacity” for purposes of consistency with the other provisions of section 79. Subclause (c) is intended to replace the outdated term of “mental defect” in section 79(4)(d) with the more acceptable term of “intellectual disability”.
 - 2.3.4 The proposed repeal of section 79(13), that is reflected in subclause (d), is of a consequential nature due to the proposed amendment of section 79(1) of the principal Act.

3. DEPARTMENTS/BODIES/PERSONS CONSULTED

- 3.1 A Task Team, consisting of representatives of the Department of Justice, the National Prosecuting Authority, the Department of Health and the Department of Correctional Services, prepared an Amendment Bill with the view to wider consultation with interested parties.
- 3.2 The Department of Justice and Constitutional Development circulated the Amendment Bill in order to solicit the comments of interested parties. Cape Mental Health and the Commission on Gender Equality, in addition to the above interested parties, have submitted comments.

4. IMPLICATIONS FOR PROVINCES

None.

5. FINANCIAL IMPLICATIONS FOR STATE

None.

6. PARLIAMENTARY PROCEDURE

- 6.1 The State Law Advisers and the Department of Justice and Constitutional Development are of the opinion that the Bill must be dealt with in accordance with the procedure established by section 75 of the Constitution, since it contains no provision to which the procedure set out in section 74 or 76 of the Constitution applies.
- 6.2 The principles in the case of *Tongoane and Others v National Minister for Agriculture and Land Affairs and Others 2010 (8) BCLR 741 (CC)* (the “*Tongoane case*”) is important when determining if a Bill ought to be tagged as either a section 75 or 76 Bill. The test for determining the procedure to be followed in enacting a Bill is whether the provisions of the Bill, in substantial measure, fall within a functional area listed in Schedule 4.
- 6.3 The tagging of the Bill requires firstly, considering all the provisions of the Bill as opposed to a single provision in the Bill and, thereafter, employing the term “substantially” when considering the impact of these provisions on the Provinces. When considering if the Bill substantially affects the Provinces this must be done in accordance with an assessment of all the relevant provisions of the Bill and thereafter a consideration of whether or not the impact of these provisions is not so small as to be regarded as trivial.
- 6.4 Other key points to consider as stated in the *Tongoane* case are as follows:
- The tagging of Bills before Parliament must be informed by the need to ensure that provinces fully and effectively exercise their appropriate role in the process of considering national legislation that substantially affects them. Paying less attention to the provisions of a Bill once its substance, or purpose and effect, has been identified undermines the role that provinces should play in the enactment of national legislation affecting them.
 - To apply the “pith and substance” test to the tagging question, therefore undermines the constitutional role of the provinces in legislation in which they should have a meaningful say, and disregards the breadth of the legislative provisions that section 76(3) of the Constitution requires to be enacted in accordance with the section 76 procedure.
- 6.5 If we have to take into consideration the legal principles expounded by the *Tongoane* case, the following may be deduced from a reading of this Bill:
- De Vos case: The Constitutional Court declared section 77(6)(a)(i) of the principal Act to be inconsistent with the Constitution and invalid. Sections 77 and 78 of the principal Act, among others, require the detention and eventual institutionalisation of certain persons in psychiatric hospitals. Health services are reflected as a functional area of concurrent national and

provincial legislative competence in Schedule 4 to the Constitution. The Amendment Bill does not affect the existing references to psychiatric hospitals in sections 77 and 78 of principal Act. The provisions of the principal Act insofar as they relate to health services therefore remain as they are.

- The purpose of this Bill is to ensure that the constitutional court judgement is complied with and thereby amend the applicable sections of the principal Act to remedy the current position of constitutional invalidity.
- Pedro case: The interpretation of the provisions of section 79 of the principal Act, insofar as they relate to the composition of the panels, was clarified by the Western Cape High Court in the Pedro case. The Amendment Bill further aims to clarify the composition of the panels concerned in line with the Pedro case so as to ensure that the provisions of section 79 of the principal Act are consistently applied by all courts throughout the country.
- It would seem that the Bill, in its current form, would not, in substantial measure, substantially affect the provinces. These provisions do not appear to affect the interests of the provinces. The judiciary will be affected when implementing the proposed amendments however, this will not impact on the Provinces. The Bill therefore should be dealt with in terms of section 75 of the Constitution.

- 6.6 The State Law Advisers are of the opinion that it is not necessary to refer this 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.