

REPUBLIC OF SOUTH AFRICA

CRIMINAL PROCEDURE AMENDMENT BILL

*(As introduced by the Portfolio Committee on Justice and Constitutional Development.
Permission for introduction granted by the National Assembly on 20 June 2001 in terms of
Rule 238(3) of the National Assembly) (The English text is the official text of the Bill)*

(PORTFOLIO COMMITTEE ON JUSTICE AND CONSTITUTIONAL DEVELOPMENT)

[B 37—2001]

REPUBLIEK VAN SUID-AFRIKA

STRAFPROSESWYSIGINGS- WETSONTWERP

*(Soos ingedien deur die Portefeuljekomitee oor Justisie en Staatkundige Ontwikkeling.
Toestemming vir indiening verleen deur die Nasionale Vergadering op 20 Junie 2001
ingevolge Reël 238(3) van die Nasionale Vergadering) (Die Afrikaanse teks is die amptelike
vertaling van die Wetsontwerp)*

(PORTEFEULJEKOMITEE OOR JUSTISIE EN STAATKUNDIGE ONTWIKKELING)

[W 37—2001]

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GENERAL EXPLANATORY NOTE:

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

BILL

To amend the Criminal Procedure Act, 1977, so as to further regulate the presentation of evidence through an intermediary; and to provide for matters connected therewith.

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:—

Substitution of section 170A of Act 51 of 1977, as inserted by section 3 of Act 135 of 1991

1. The following section is hereby substituted for section 170 of the Criminal Procedure Act, 1977: 5

“Evidence through intermediaries

170A. (1) Whenever criminal proceedings are pending before any court and it appears to such court that it would expose any witness under the age of eighteen years to undue mental stress or suffering if he or she testifies at such proceedings, the court may, subject to subsection (4), appoint a competent person as an intermediary in order to enable such witness to give his or her evidence through that intermediary. 10

(2) (a) No examination, cross-examination or re-examination of any witness in respect of whom a court has appointed an intermediary under subsection (1), except examination by the court, shall take place in any manner other than through that intermediary. 15

(b) The said intermediary may, unless the court directs otherwise, convey the general purport of any question to the relevant witness.

(3) If a court appoints an intermediary under subsection (1), the court may direct that the relevant witness shall give his or her evidence at any place— 20

(a) which is informally arranged to set that witness at ease;

(b) which is so situated that any person whose presence may upset that witness, is outside the sight and hearing of that witness; and 25

(c) 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.

(4) (a) The Minister may by notice in the *Gazette* determine the persons or the category or class of persons who are competent to be appointed as intermediaries. 5

(b) An intermediary who is not in the full-time employment of the State shall be paid such travelling and subsistence and other allowances in respect of the services rendered by him or her as the Minister, with the concurrence of the Minister of Finance, may determine. 10

(5) (a) No oath, affirmation or admonition which has been administered through an intermediary in terms of section 165 shall be invalid and no evidence which has been presented through an intermediary shall be inadmissible solely on account of the fact that such intermediary was not competent to be appointed as an intermediary in terms of a regulation referred to in subsection (4)(a), at the time when such oath, affirmation or admonition was administered or such evidence was presented. 15

(b) If in any proceedings it appears to a court that an oath, affirmation or admonition was administered or that evidence has been presented through an intermediary who was appointed in good faith but, at the time of such appointment, was not qualified to be appointed as an intermediary in terms of a regulation referred to in subsection (4)(a), the court must make a finding as to the validity of that oath, affirmation or admonition or the admissibility of that evidence, as the case may be, with due regard to— 20

- (i) the reason why the intermediary concerned was not qualified to be appointed as an intermediary, and the likelihood that the reason concerned will affect the reliability of the evidence so presented adversely;
- (ii) the mental stress or suffering which the witness, in respect of whom that intermediary was appointed, will be exposed to if that evidence is to be presented anew, whether by the witness in person or through another intermediary; and
- (iii) the likelihood that real and substantial justice will be impaired if that evidence is admitted. 25

(6) (a) Subsection (5) does not prevent the prosecution from presenting anew any evidence which was presented through an intermediary referred to in that subsection. 30

(b) The provisions of subsection (5) shall also be applicable in respect of all cases where an intermediary referred to in that subsection has been appointed, and in respect of which, at the time of the commencement of that subsection— 35

- (i) the trial court; or
- (ii) the court considering an appeal or review, has not delivered judgment. 40

Short title

2. This Act is called the Criminal Procedure Amendment Act, 2001. 45

MEMORANDUM ON THE OBJECTS OF THE CRIMINAL PROCEDURE AMENDMENT BILL, 2001

1. OBJECTS OF BILL

1.1 In terms of section 170A of the Criminal Procedure Act, 1977 (Act No. 51 of 1977) (the Act), a court may, if it is of the opinion that a witness under the age of eighteen years will be exposed to undue mental stress or suffering if he or she testifies at criminal proceedings, appoint a “competent person” as an intermediary in order to enable the witness to give his or her evidence through that intermediary. Section 170A was inserted into the Act in 1991, to protect specifically the interests of young persons and children who have to testify in sensitive cases such as rape, indecent assault and child abuse.

1.2 The Minister for Justice and Constitutional Development may by notice in the *Gazette* determine the persons or the category or class of persons who are competent to be appointed as intermediaries.

- * A list of categories of persons who are competent to be appointed as intermediaries was subsequently published in Government Notice No. R1374 of 30 July 1993. This Notice was amended by Government Notice No. R360 of 28 February 1997.
- * One of the categories fixed in terms of this Notice is that of “...(e)ducators in terms of the Educators’ Employment Act, 1994 (Proclamation No. 138 of 1994) who have four years experience in teaching and who have not at any stage, for whatever reason, been suspended or dismissed from service in teaching”.
- * The Educators’ Employment Act, 1994, was, however, repealed by the Employment of Educators Act, 1998 (Act No. 76 of 1998). In terms of the definition of “educator” contained in this 1998-Act, an educator must, amongst others, be “...appointed in a post on any educator establishment under this Act”.

1.3 In a review judgment delivered on 13 March 2001, the Cape Town High Court held that former (and retired) teachers do not fall within the new definition of “educators” and they are therefore not competent to be appointed as intermediaries. (*S v Bongani*; Case No 20006077). This ruling will have a profound and adverse effect on the significant number of cases which are part-heard and in which former or retired educators were appointed as intermediaries. It is particularly distressing to note that vulnerable witnesses, in respect of whom intermediaries were appointed to protect them from exposure to undue mental stress or suffering when they testified at criminal proceedings, will through no fault of their own be required to repeat their testimony, whether in person or through another intermediary. It is believed that there are approximately 46 such part-heard cases in the Western Cape alone, and several hundred such cases across the country.

1.4 The Bill aims therefore to amend section 170A of the Criminal Procedure Act, 1977, in order to determine a procedure to be followed by a court when it appears that evidence has been presented through an intermediary who, although appointed as an intermediary in good faith, was not competent to be appointed as such an intermediary.

1.5 Provision is made that evidence presented through such an “incompetent intermediary” shall not be inadmissible solely on account of the fact that the intermediary did not qualify for appointment as an intermediary. However, if it appears to the court that the intermediary was appointed in good faith, the court must make a finding regarding the admissibility of the evidence concerned, with due regard to—

- * the reason why the intermediary concerned was not qualified to be appointed as an intermediary, and the likelihood that the reason concerned will affect the reliability of the evidence so presented adversely;

- * the mental stress or suffering which the witness, in respect of whom that intermediary was appointed, will be exposed to if that evidence is to be presented anew, whether by the witness in person or through another intermediary; and
- * the likelihood that real and substantial justice will be impaired if that evidence is admitted.

2. DEPARTMENTS/BODIES/PERSONS CONSULTED

The National Director of Public Prosecutions, the Director of Public Prosecutions: Cape Town, the Women's Legal Centre and the research component of the South African Law Commission were consulted regarding the Bill.

3. IMPLICATIONS FOR PROVINCES

None.

4. FINANCIAL IMPLICATIONS FOR STATE

None.

5. PARLIAMENTARY PROCEDURE

The Portfolio Committee on Justice and Constitutional Development is 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.