REPUBLIC OF SOUTH AFRICA

CRIMINAL MATTERS AMENDMENT BILL

(As introduced)

(MINISTER OF JUSTICE)

[B 93-97]

REPUBLIEK VAN SUID-AFRIKA

WYSIGINGSWETSONTWERP OP STRAFREGTELIKE AANGELEENTHEDE

(Soos ingedien)

(MINISTER VAN JUSTISIE)

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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 Mental Health Act, 1973, so as to further regulate periodical reporting on the mental condition of State patients and the detention and discharge of such patients; to amend the Criminal Procedure Act, 1977, so as to further regulate the referral of an accused for enquiry into his or her capacity to understand proceedings or regarding the criminal responsibility of an accused concerning the offence with which he or she is charged; and to provide for matters connected therewith.

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

Amendment of section 25 of Act 18 of 1973

1. Section 25 of the Mental Health Act, 1973, is hereby amended—

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

"*(a)* When a patient is detained in an institution or other place, the superintendent or person in charge thereof shall, except in the case of a patient detained in an institution under the control of the State and who is not in the medical care of the superintendent of such institution, transmit in the prescribed form **[annually for the first three years and thereafter in the fifth year and then every three years,]** every six months a report to the Director-General as to the mental condition of the patient."; and

(b) by the deletion of subsection (2).

Amendment of section 29 of Act 18 of 1973, as amended by section 1 of Act 48 of 1976, section 3 of Act 10 of 1978, section 9 of Act 51 of 1991, section 33 of Act 129 of 1993 and section 7 of Act 204 of 1993

2. Section 29 of the Mental Health Act, 1973, is hereby amended by the substitution for subsection (1) of the following subsection:

"(1)*(a)* Where any person is, with reference to a charge of murder or culpable homicide or a charge involving serious violence, detained as a State patient in terms of this Act or section 77(6)*(a)*(i) or 78(1) of the Criminal Procedure Act, 1977

(Act No. 51 of 1977), a **judge in** chambers may **at** any time after the order o detention, on written application made to him or her—

(i) order that the Slate patient—

(aa) be discharged either absolutely or conditionally;

(bb) cease 10 be treated as such:

(cc) be further detained as a Slate patient; or

(dd) be detained as a patient under Chapter 3; or

(ii) make such other order under section 19 as he or she thinks fit.

(b) Such application may be made by

(i) the official *curator ad litem*;

(ii) the superintendent of the institution where the State patient is detained;

(iii) the State patient;

(iv) a relative of the State patient; or

(v) any other person or body on behalf of the State patient,

that such State patient be discharged either absolutely or conditionally or (hat he o she ceases to be treated as a State patient.

(c) Such application shall be furnished to the official *curator ad litem* if it is made by someone other than the official *curator ad litem*.

(d) The official *curator ad litem* shall Upon receipt of such application as soon a! practicable—

(i) obtain the reports contemplated in paragraph *(e)*; and

(ii) furnish such reports together with the application and his or her own repor and recommendation to the registrar for submission to a judge in chambers.

(e) Such application—

i) may be accompanied by a report by a registered clinical psychologist; and

(ii) shall be accompanied by a report or reports by—

(aa) the superintendent of the institution or the person in charge of the place where the State patient is being detained; and

(bb) two medical practitioners,

and either the said superintendent or at least onc of the said two medical practitioners shall be a psychiatrist.

(f) Such reports sha ll contain a detailed history of the State patient and information as to, and a prognosis of. his or her mental conditi on.

(g) When considering an application under this section, a judge may—

(i) call for such further information as he or shc may consider necessary and may summon any psychiatrist to his or hcr assistance;

(ii) if the application is made by someone other than the official *curator ad litem* and it appears (o the judge that the interests of the official *curator ad litem* may be in conflict with those of the State patient, appoint, of his or her own accord or at the request 01 any interested person, a *curator ad litem* for the State patient.

h) The *curator ad litem* so appointed shall—

(i obtain the reports contemplated in paragraph *(e)* and furnish the judge with such reports;

(ii adduce any available evidence relevant to the application; and

(iii perform such other duties as the judge instructs.

(i) (i) If it appears to an official *curator ad litem* upon the receipt of such application that a similar application in respect of the State patient concerned had been rejected by a judge in chambers less than 12 months before the date of the aforementioned application, he or shc may, instead of acting as contemplated in paragraph *(d)*. transmit the application to the registrar with a recommendation that it be rejected and the registrar shall forthwith submit such application and recommendation to a judge in chambers.

(j) The judge in chambers may reject such application without giving effect to the provisions of paragraph *(a)* or he or she may make any order he or she thinks Iii.

(k) A *, urator ad litem* appointed under paragraph *(g)*(ii) shall be entitled to the remuneration that the Minister of Justice determines by notice in the *Gazette*.''.

Amendment of section 77 of Act 51 of 1977, as amended by section 10 of Act 33 of 1986, section 9 of Act 51 of 1991 and section 42 of Act 129 of 1993

3. Section 77 of the Criminal Procedure Act, 1977, is hereby amended—

(a) by the insertion of the following subsection after subsection (I):

"(1 A) At proceedings in terms of sections 77(I) and 78(2) the court may, it' it is of the opinion that substantial injustice would otherwise result, order that the accused be provided with the services of a legal practitioner in terms of the Legal Aid Amendment Act, 1996 (Act No. 20 of 1996).";

(b) by the substitution for paragraph *(a)* of subsection (6) of' the following paragraph:

"*(a)* If the court which has jurisdiction 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), 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 direct [hat the accused—

(i) in the case of a charge of murder or culpable homicide or a charge involving serious violence or it the court considers it to be necessary in the public interest, be detained in a psychiatric hospital or a prison pending the signification of' the decision of a judge in chambers; or

(ii) in any case-other than a case contemplated in subparagraph (i)—

(aa) be admitted to, detained and treated in an institution stated in the order in terms of Chapter 3 of the Mental Health Act, 1973 (Act No.18 Of 1973); or

(bb) be treated as an outpatient in terms of section 7 of that Act, pending discharge by a hospital board in terms of section 29(4A)(*a*) of that Act,

and if the court so directs after the accused has pleaded to the charge, the accused shall not be entitled under section 1 06(4) to be acquitted or to be convicted in respect of the charge in question.";

(c) by the substitution for subsection (7) of the following subsection:

"(7) Where a direction is issued [under] in terms of subsection (6) or (9) [that the accused be detained in a psychiatric hospital or a prison pending the signification of the decision of a judge in chambers], the accused may at any time thereafter, when he or she is capable of understanding the proceedings so as to make a proper defence, be prosecuted and tried for the offence in question."; and

(d) by the substitution for subsection (9) of the following subsection:

"(9) Where an appeal against a finding [under] 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 [in a psychiatric hospital or a prison pending the signification of the decision of a judge in chambers] in accordance with the provisions of subsection (6).".

Amendment of section 78 of Act 51 of 1977, as amended by section 11 of Act 3301 1986, section 9 of Act 51 of 1991 and section 43 of Act 129 of 1993

4. Section 78 of the Criminal Procedure Act, 1977, is hereby amended—

(a) by the insertion after subsection (1) of the following subsection:

"(1A) Whenever the criminal responsibility of an accused with reference to the commission of an act which constitutes an offence is in issue, the burden of proof with reference to the criminal responsibility of the accusal shall be on the party who raises the issue.";

(b) 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 or for any other reason **110(** 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 direct that the matter be enquired into and be reported on in accordance with the provisions of section 70.'"; and

(c) by the substitution for subsection (6) of the following subsection:

"(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 mental **defect** not criminally responsible for **such** act—

(a) the court **shall** find the accused not guilty; **or**

(b) **if** the court **so** finds after the **accusal 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 mental defect, as the case may be, and direct—

(i) in a case where the **accused is** charged with murder or culpable homicide or another charge involving serious violence or if the court considers it to be necessary in the public interest that the accusal be detained in a psychiatric hospital or a prison pending the signification of the decision of a judge in chambers; or

(ii) in any other case than a case contemplated in subparagraph (i), that the accused be—

(aa) **admitted to, detained** and treated **in** an institution slated in the order in terms of Chapter 3 of the Mental Health Act, 1973 (Act No. 18 of 1973), **pending** discharge by a hospital board in terms of section 29(4A)*(a)* of that Act; or

(bb) treated as an outpatient in terms of section 7 of that Act pending the certification by the superintendent of that institution stating that he or she **is** fit to be discharged.".

Amendment of section 79 of Act 5 I 01"1977, **as amended by section 4 of Act 4 of 1992, section 17 of Act 116 of 1993 and section 44 of Act 129 of 1993**

5. Section 79 of the Criminal Procedure Ac(, 1977, is hereby amended—

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

"(1) Where a court issues a direction **[under]** in terms of section 77(1) or 7S(2). the relevant enquiry shall be conducted and be reported on—

(a) where the accused is charged with an offence other than one **[for which the sentence of' death may not be imposed]** referred to in Part II or Part III of Schedule 2, by the medical superintendent of a psychiatric hospital designated by the court, or by a psychiatrist appointed by such medical superintendent at the request of the court; or

(b) where the accused **is charged with an** offence **[for which the sentence of death may be imposed]** referred to in Part 11 and Part III of Schedule 2 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 such medical superintendent at the request of the court;

(ii) by a psychiatrist appointed by the court and who is not in full-lime service of the State; **[and]**

(iii) by a psychiatrist appointed **[by]** for the accused by the court **[if he so wishes]**; and

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

(b) by the insertion after subsection (1) of the following subsection:

"(1 A) 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 capacity with a report in which the following are stated. namely—

(a) whether-the referral is taking place in terms of **section 77 or 78;**

(b) at whose request or on whose initiative the referral is taking place;

(') the nature of the charge against the accused;

(d) the stage of the proceedings at which the referral took place;

(e) the purport of any statement made by the accused before or during the court proceedings that is relevant with regard to his or her mental condition or mental capacity;

(f) the purport of evidence that has been given that is relevant to the accused's mental condition or mental capacity;

(g) in so far as it is within the knowledge of the prosecutor, the accused's social background and family composition and the names and addresses of his or her near relatives; and

(h) any other fact that may in the opinion of the prosecutor be relevant in the evaluation of the accused's mental condition or mental capacity."; and

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

"*(d)* if the enquiry is [under] 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 or by any other cause.".

Short title and commencement

6. This Act shall be called the Criminal Matters Amendment Act, 1997, and shall come into operation on a date fixed by the President by proclamation in the *Gazette*.

MEMORANDUM ON THE OBJECTS OF THE CRIMINAL MATTERS AMENDMENT 1111.1., 1997

1. The Bill emanates from the South African Law Commission's report (Project 89) on the declaration and detention of persons as State patients in terms of the Criminal Procedure Act, 1977 (Act No. 5 I of 1977), and the discharge of such persons in terms of the Mental Health Act, 1973 (Act No. 18 of 1973), including the burden of proof with regard to the mental state of accused or convicted persons. The main object of the Bill is to further regulate the referral of accused for enquiry into their mental capacity to understand proceedings or regarding their criminal responsibility concerning the offence with which they are charged. The Bill further envisages to further regulate the periodical reporting on the mental condition of State patients and the detention and discharge of such patients.

2. The South African law of criminal procedure requires that only those accused who can be tried should be brought to trial. The basis of this principle is another criminal law procedure principle to the effect that trials of accused should be conducted in [heir presence. This entails physical and mental presence. In terms of section 77 of the Criminal Procedure Act, 1977, the court may conduct an enquiry into the capacity of the accused to understand the proceedings so as to be able to conduct a proper de fence. If it appears to the court that the accused does not, by reason of mental illness or mental defect have this capacity, the court shall direct that the matter be enquired into in accordance with section 79 of the said Act. Section 79 gives a detailed description of how accused should be examined. The eventual decision on whether an accused suffers from a mental illness or defect is taken by the court, based on psychiatric evidence.

3. Section 78 of the Criminal Procedure Act, 1977, on the other hand, provides that a person who commits an offence and who at the time of commission suffers from a mental illness or defect which renders him or her incapable of understanding the wrongfulness of his *or* her act or of acting in accordance with such appreciation, is not criminally responsible for that act. As in the case of section 77 cases, the court may refer an accused for observation *mero motu*. However, when an allegation of criminal incapacity is made on the grounds of mental illness or mental defect, the accused must be referred for observation if there is a reasonable possibility that the accused suffers from a mental illness or mental defect. There exists in our law a presumption that everyone is sane, and if an accused pleads insanity, the burden of proof lies on him or her to prow it.

4. The provisions of section 79 of the Criminal Procedure Act, 1977, which are applicable to both sections 77 and 78 matters entail that the accused, who has been referred for observation by the court, should be detained in a psychiatric hospital or other place designated by the court for 30 days' observation. Normally the superintendent of the hospital reports back to the court, but the superintendent may also, when so requested by the court, appoint a psychiatrist to report hack to the court. Where capital punishment used to be at issue (before the Constitutional Court decided in S *v Makwanyane* 19955 BCLR 665 (CC) that the death sentence was unconstitutional) or if the court specifically so directs, the accused is examined by a panel of experts that usually consists of the superintendent of the hospital, a psychiatrist appointed by the court and a psychiatrist appointed by the de fence. If the finding of the panel report is unanimous and not disputed by the defence or the prosecution, the court may determine the matter without hearing any evidence. If there is no unanimity and there are disputed facts the matter is tried fully.

5. Where the court is of the opinion that the accused is not capable of understanding his or her trial properly, the court is obliged to have the accused detained in a psychiatric hospital or prison pending the decision of a judge in chambers. If the court finds that the accused was not criminally responsible at the time of (be offence, he or she will be found not guilty by reason of mental illness and the compulsory order made to the effect that he or she be detained pending the decision of a judge in chambers.

6. Currently, the detention and discharge of State patients is regulated by the provisions of the Mental Health Act, 1973, mainly by section 29. The section makes a distinction between the procedure in respect of people detained on charges of murder,

culpable homicide or some other charge involving serious violence and other charges [hat do not involve serious violence, In cases where serious violence is involved the official *curator ad litem* (the attorney-general) of the area in question has to apply in writing to the judge in chambers for the discharge 01 the State patient. Where serious violence is not involved the hospital board in question, may after proper investigation and after obtaining a report from the official *curator ad lit em* (attorney-general) discharge the State patient conditionally or unconditionally, or order that he or she no longer be treated as a State patient.

7. The main objections against the current law are that, firstly, an accused who was mentally ill at the time of the commission of an offence (and was therefore criminally incapable), but who is sane at the time of trial, should be detained as a State patient. Secondly, that an accused who was criminally incapable at the time of his or her trial is nevertheless detained as a State patient notwithstanding that the offence with which he or she was charged was not proved against him or her. Thirdly, the indefinite period of detention of State patients and the discharge procedure evoke a great deal of criticism. Fourthly, the burden of proof rule in the procedure preceding the finding of mental illness is also not generally acceptable.

8. Clause I of the Bill envisages to make it compulsory for the superintendent or person in charge of an institution or other place where a patient is detained to report every six months to the Director-General: Health on the mental condition of a patient.

9. The provisions of clause 2 seek to circumvent the possibility of the attorney-general frustrating the release of a State patient who, in the opinion of the superintendent, is sufficiently recovered for release, by failing to lodge an application for the release of the State patient with a judge in chambers. The clause, therefore, provides that such an. application may be made by the official *curator ad /item,* the **superintendent, the State patient himself or herself or any other person or** body on behalf of the State patient. If **the application is made by** someone other than tbe official *curator ad litem* (attorney - general), the application must be sent to the official *curator ad litem* for his or her own recommendation and report. It is further provided that if an application which is currently lodged was rejected less than a year ago, the official *curator ad litem* may submit it to [he registrar of the court with the recommendation that it be rejected and, the judge may reject such an application without obtaining further reports from the superi ntendent. The object of the aforementioned provision is to avoid unnecessary, repeated and unmeritorious applications. Clause 2 further provides that, if the judge in considering an application for the release of a State patient is of the opinion that there may be a conflict of interests between the official *curator ad litem* and any other person making the application for [he release of a State patient, he or she may appoint another *curator ad litem* for the patient, who shall have the same duties of the official *curator ad litem* and such other duties as the judge may impose. Tbe clause further provides that the aforementioned *curator ad litem* shall be entitled to the remuneration determined by the Minister of Justice.

10. Clause 3 provides that the court may order, in terms of the Legal Aid Amendment Act, 1996, that the accused be provided with the services of a legal practitioner by the State at proceedings in terms of sections 77(1) and 78(2) of the Criminal Procedure Act, 1997. Tbe clause also seeks to provide for the detention in a psychiatric hospital or a prison, pending the decision of a judge in chambers, of those accused who have been charged with murder, culpable homicide or a charge involving serious violence or if the court considers it to be necessary in the public interest. In any other case, except for the aforementioned, they will be detained and treated in the institution(s) stated in the order.

11. Clause 4 of the Bill envisages to place the burden of proof on the party who raises the issue whenever the criminal responsibility of an accused regarding the commission of an offence is at issue.

12. Clause 5 of the Bill is aimed at removing references to offences in respect of which the death penalty may be imposed. This is substituted by a reference to offences mentioned in Part II or Part III of Schedule 2 to the Act. The clause also seeks to include clinical psychologists in the panel who carry out enquiries into the mental capacity of persons referred for observation in terms of sections 77 and 7X of the Criminal Procedure Act, 1977. The clause further sets out the matters which the prosecutor' must

state in his or her report to the panel who carries out the enquiry into the mental capacity of a person referred for observation.

13. The South African Law Commission consulted with the following parties in the course of its investigation:

1. Supreme Court
2. Attorneys-General
3. Bar Societies
4. Law Societies
5. Magistrates
6. Universities
7. Psychiatrists, Psychologist and Welfare Workers
8. State Organs
9. Individuals.

14. In the opinion of the Department and the State Law Advisers this Bill should be dealt with in terms of section 75 of the Constitution of the Republic of South Africa, 1996.