

REPUBLIC OF SOUTH AFRICA

REPEAL OF THE TRANSKEIAN PENAL CODE BILL

(As introduced in the National Assembly (proposed section 75); explanatory summary of Bill and prior notice of its introduction published in Government Gazette No. 47637 of 2 December 2022)
(The English text is the official text of the Bill)

(MINISTER OF JUSTICE AND CORRECTIONAL SERVICES)

[B 34—2022]

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BILL

To repeal the Transkeian Penal Code, 1983; to extend the application of certain laws to the area formerly known as the Republic of Transkei; to provide for transitional arrangements; and to provide for matters connected therewith.

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

Definitions

1. In this Act, unless the context indicates otherwise, “**Code**” means the Transkeian Penal Code, 1983 (Act No. 9 of 1983), of the Republic of Transkei. 5

Repeal of Code

2. The Code is hereby repealed.

Reinstatement of common law

3. The common law and rules which by virtue of the Code did not apply in the area formerly known as the Republic of Transkei, must, from the date of commencement of this Act, also apply in the area formerly known as the Republic of Transkei. 10

Transitional provisions

4. (1) Any proceedings which prior to the commencement of this Act were instituted in terms of the provisions of the Code and which proceedings have not been concluded before the commencement of this Act, must continue and be concluded in every respect as if this Act had not been passed. 15

(2) An investigation, prosecution or other legal proceedings, in respect of conduct which would have constituted an offence in terms of the Code, and which occurred after the commencement of the Code but before the commencement of this Act, may be concluded, instituted and continued as if this Act had not been passed. 20

(3) Notwithstanding the repeal or amendment of any provision of any law by this Act, such provision must, for the purpose of the disposal of any investigation, prosecution or any proceedings contemplated in subsection (1) or (2), remain in force as if such provision had not been repealed or amended.

Savings 25

5. (1) Nothing in this Act affects—
 (a) the exercise of any power in terms of the Code or any right, privilege, obligation or liability acquired, accrued or incurred in terms of the Code;
 (b) any penalty, forfeiture or punishment incurred in respect of any offence committed in terms of the provisions of the Code; and
 (c) any appointment to any office made in terms of the Code, if a corresponding law in operation in the rest of the Republic of South Africa also provides for 30

such appointment, and anything done in connection with or by virtue of any such appointment, is deemed to have been done in terms of such corresponding law.

(2) As from the commencement of this Act, any provision of the Code which confers a power, jurisdiction or right, imposes a duty or entrusts a function to the holder of an office, a body, an institution or any other authority appointed or established in terms of the Code, such power, jurisdiction or right must be exercised and such duty or function must be performed by the holder of a corresponding office, or a corresponding body, institution or authority appointed or established for the purpose of exercising a corresponding power, jurisdiction or right, or performing a corresponding duty or function, in terms of a corresponding law in operation in the Republic of South Africa.

(3) Any reference in a law in operation in the area formerly known as the Republic of Transkei to a duty, function, power, procedure, process, provision or any other act in terms of the Code which, when the operation of the Code is repealed by this Act, must be construed as a reference to a duty, function, power, procedure, process, provision or act in terms of a corresponding law in operation in the Republic of South Africa.

Short title

6. This Act is called the Repeal of the Transkeian Penal Code Act, 2022, and takes effect on a date fixed by the President by proclamation in the *Gazette*.

MEMORANDUM ON THE OBJECTS OF THE REPEAL OF THE TRANSKEIAN PENAL CODE BILL, 2022

1. BACKGROUND AND OBJECTS OF BILL

- 1.1 The primary aim of the Repeal of the Transkeian Penal Code Bill, 2022 (“the Bill”) is to provide for the repeal the Transkeian Penal Code, 1983, to extend the application of certain laws to the area formerly known as the Republic of Transkei, to provide for transitional arrangements and to provide for matters connected therewith.
- 1.2 When the area formerly known as the Republic of Transkei became ‘independent’, the Code was enacted. Almost 20 years after the reincorporation of the area formerly known as the Republic of Transkei into South Africa, the Code remains of full force and effect.
- 1.3 The continued application of the Code has created an untenable situation and resulted in legal uncertainty as to whether the Code superseded the common law. In the rest of the Republic of South Africa, a large part of substantive criminal law has not been codified and specific crimes, for example, murder, assault and theft, are not statutorily defined and their requirements are still found in the common law. However, in the area formerly known as the Republic of Transkei, as a result of the application of the Code, the National Prosecuting Authority is obliged to frame criminal charges in terms of the Code.
- 1.4 The South African Law Reform Commission reviewed the Code and prepared a draft paper which sets out its preliminary findings and recommendations. Its preliminary recommendations include—
 - (i) that the Code be repealed wholly; and
 - (ii) that the common-law rules, crimes and defences it abolished in the area formerly known as the Republic of Transkei be reinstated.

2. SUMMARY OF BILL

- 2.1 The provisions of the Bill can be summarised as follows:

- 2.1.1 *Ad* Clause 1:

Clause 1 defines an expression that is necessary to be defined for the purposes of the Bill.

- 2.1.2 *Ad* Clause 2:

Clause 2 deals with the repeal of the Code.

- 2.1.3 *Ad* Clause 3:

Clause 3 deals with the reinstatement of common law and rules in the area formerly known as the Republic of Transkei.

- 2.1.4 *Ad* Clause 4:

- 2.1.4.1 Clause 4 is a transitional provision and provides that any proceedings which were instituted but not concluded before the commencement of the Act, must continue and be concluded in every respect as if the Act had not been passed (subsection (1)).

- 2.1.4.2 It also provides that an investigation, prosecution or other legal proceedings which occurred after the commencement of the Code but before the commencement of the Act, may be concluded, instituted and continued as if the Act had not been passed (subsection (2)).

2.1.4.3 It further provides that notwithstanding the repeal or amendment of any provision of any law by this Act, such provision must, for the purpose of the disposal of any investigation, prosecution or any proceedings contemplated in subsection (1) or (2), remain in force as if such provision had not been repealed or amended (subsection (3)).

2.1.5 **Ad** Clause 5:

2.1.5.1 Clause 5 is a general savings clause and provides that nothing in the Act affects—

- (a) the exercise of any power in terms of the Code or any right, privilege, obligation or liability acquired, accrued or incurred in terms of the Code;
- (b) any penalty, forfeiture or punishment incurred in respect of any offence committed in terms of the provisions of the Code; and
- (c) any appointment to any office made in terms of the Code, if a corresponding law in operation in the rest of the Republic of South Africa also provides for such appointment and anything done in connection with or by virtue of any such appointment is deemed to have been done in terms of such corresponding law (subsection (1)).

2.1.5.2 It further provides that as from the commencement of the Act, any provision of the Code which confers a power, jurisdiction or right, imposes a duty or entrusts a function to the holder of an office, a body, an institution or any other authority appointed or established in terms of the Code, such power, jurisdiction or right must be exercised and such duty or function must be performed by the holder of a corresponding office, or a corresponding body, institution or authority appointed or established for the purpose of exercising a corresponding power, jurisdiction or right, or performing a corresponding duty or function in terms of a corresponding law in operation in the Republic of South Africa (subsection (2)).

2.1.5.3 It also provides that any reference in a law in operation in the area formerly known as the Republic of Transkei to a duty, function, power, procedure, process, provision or any other act in terms of the Code which, when the operation of the Code is repealed by the Act, must be construed as a reference to a duty, function, power, procedure, process, provision or act in terms of a corresponding law applicable in the Republic of South Africa (subsection (3)).

2.1.6 **Ad** Clause 6:

Clause 6 contains the short title and provides that the Act will take effect on a date fixed by the President by proclamation in the *Gazette*.

3. DEPARTMENTS/BODIES/PERSONS CONSULTED

The Premier of the Eastern Cape Province, the Minister of Police, the Minister of Cooperative Governance and Traditional Affairs and the National Director of Public Prosecutions, were consulted.

4. IMPLICATIONS FOR PROVINCES

None, except for the repeal of the Code in the area formerly known as the Republic of Transkei, falling within the geographical area of the Province of the Eastern Cape.

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 as the Bill deals primarily with the application of criminal law. As 'criminal law' is not listed as a functional area in Schedule 4 to the Constitution, the Bill must be tagged as a section 75 Bill.
- 6.2 The State Law Advisers are of the opinion that it is not necessary to refer the Bill to the National House of Traditional and Khoi-San Leaders in terms of section 39(1)(a) of the Traditional and Khoi-San Leadership Act, 2019 (Act No. 3 of 2019), since the Bill does not contain any provision which directly affects customary law or the customs of traditional or Khoi-San communities and does not pertain to any matter referred to in section 154(2) of the Constitution.

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