

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. 41658 of 25 May 2018)
(The English text is the official text of the Bill)*

(MINISTER OF JUSTICE AND CORRECTIONAL SERVICES)

[B 15—2018]

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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 extend the list of offences in respect of which a prosecution may be instituted after a period of 20 years has lapsed since the date of the alleged commission of an offence; and to provide for matters connected therewith.

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

Substitution of section 18 of Act 51 of 1977, as substituted by section 68 of Act 32 of 2007 and amended by section 48 of Act 7 of 2013 and section 8 of Act 8 of 2017

1. The following section is hereby substituted for section 18 of the Criminal Procedure Act, 1977: 5

“Prescription of right to institute prosecution

18. The right to institute a prosecution for any offence, other than **[the offences of]**—

- (a) murder; 10
- (b) treason committed when the Republic is in a state of war;
- (c) robbery, if aggravating circumstances were present;
- (d) kidnapping;
- (e) child-stealing;
- (f) **[rape or compelled rape as contemplated in section 3 or 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively;]** the offences— 15
 - (i) of rape, indecent assault, incest, or violation of a corpse, insofar as it relates to the commission of a sexual act with a corpse, which was committed before 16 December 2007; 20
 - (ii) as provided for in sections 9, 12, 13, 14 or 15, read with section 22, of the Sexual Offences Act, 1957 (Act No. 23 of 1957);
 - (iii) of possession of child pornography as contemplated in section 2(1) of the Indecent or Obscene Photographic Matter Act, 1967 (Act No. 37 of 1967); 25

- (iv) of commercial sexual exploitation of children as contemplated in section 50A of the Child Care Act, 1983 (Act No. 74 of 1983);
- (v) of possession or distribution of child pornography as contemplated in section 24B of the Films and Publications Act, 1996 (Act No. 65 of 1996);
- (vi) of commercial sexual exploitation of children as contemplated in section 141(1)(b), read with section 305(1)(c), of the Children's Act, 2005 (Act No. 38 of 2005); or
- (vii) as provided for in sections 3 to 10, 12, 14 to 26, 55 and 71 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (Act No. 32 of 2007);
- (g) genocide, crimes against humanity and war crimes, as contemplated in section 4 of the Implementation of the Rome Statute of the International Criminal Court Act, 2002;
- (h) any contravention of section 4, 5 or 7 and involvement in these offences as provided for in section 10 of the Prevention and Combating of Trafficking in Persons Act, 2013 (Act No. 7 of 2013);
- [(hA) trafficking in persons for sexual purposes by a person as contemplated in section 71(1) or (2) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007;**
- (i) using a child or person who is mentally disabled for pornographic purposes as contemplated in sections 20(1) and 26(1) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007;]** or
- (j) torture as contemplated in section 4(1) and (2) of the Prevention and Combating of Torture of Persons Act, 2013 (Act No. 13 of 2013), shall, unless some other period is expressly provided for by law, lapse after the expiration of a period of 20 years from the time when the offence was committed.”.

Short title

2. This Act is called the Criminal Procedure Amendment Act, 2018.

MEMORANDUM ON THE OBJECTS OF THE CRIMINAL PROCEDURE AMENDMENT BILL, 2018

1. BACKGROUND OF BILL

- 1.1 On 15 June 2017 the South Gauteng High Court declared section 18 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977) (“the Act”), inconsistent with the Constitution and invalid to the extent that it bars, in all circumstances, the right to institute a prosecution for all sexual offences, other than those listed in section 18(f), (h) and (i), after the lapse of a period of 20 years from the time when the offence was committed.
- 1.2 The High Court’s declaration of invalidity was referred to the Constitutional Court for confirmation and was heard by the Court on 14 November 2017 but to date the Constitutional Court has not delivered its judgment. The Criminal Procedure Amendment Bill, 2018 (“the Bill”), aims to amend the Act so as to extend the list of offences in respect of which a prosecution may be instituted after a period of 20 years has lapsed since the date of the alleged commission of an offence.

2. OBJECTS OF BILL

- 2.1 Section 18 of the Act regulates the prescription of the right to institute prosecutions after a period of 20 years has lapsed after the alleged commission of certain offences. A prosecution may, in terms of section 18, only be instituted after a period of 20 years has lapsed after the alleged commission of—
 - (a) murder;
 - (b) treason committed when the Republic is in a state of war;
 - (c) robbery, if aggravating circumstances were present;
 - (d) kidnapping;
 - (e) child-stealing;
 - (f) rape or compelled rape as contemplated in section 3 or 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (Act No. 32 of 2007), respectively;
 - (g) the crime of genocide, crimes against humanity and war crimes, as contemplated in section 4 of the Implementation of the Rome Statute of the International Criminal Court Act, 2002 (Act No. 27 of 2002);
 - (h) offences as provided for in sections 4, 5 and 7, and involvement in these offences as provided for in section 10, of the Prevention and Combating of Trafficking in Persons Act, 2013 (Act No. 7 of 2013); or
 - (i) using a child or person who is mentally disabled for pornographic purposes as contemplated in sections 20(1) and 26(1) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007.
- 2.2 Clause 1 of the Bill aims to give effect to the judgment of the High Court. Clause 1 aims to amend section 18 of the Act in order to ensure that certain sexual offences, whether they have been committed under the common or statutory law, are included in section 18 of the Act.

3. ORGANISATIONS AND INSTITUTIONS CONSULTED

The Department of Justice and Constitutional Development circulated the Bill in order to solicit the comments of interested parties. The Women’s Legal Centre, the South African Police Service, a Clinical Psychologist, the organisation Shukumisa, Women and Men Against Child Abuse, the Legal Resources Centre, the Parliamentary Committee of the General Council of the Bar, the Centre for Applied Legal Studies, Lawyers Against Abuse, a feminist writer and researcher, Norton Rose and Fulbright and the Commission for Gender Equality have submitted comments.

4. IMPLICATIONS FOR PROVINCES

None.

5. FINANCIAL IMPLICATIONS FOR STATE

None.

6. PARLIAMENTARY PROCEDURE

- 6.1 The Constitution prescribes the classification of Bills, therefore a Bill must be correctly classified otherwise it will be constitutionally out of order.
- 6.2 The State Law Advisers and the Department have considered the Bill against the provisions of the Constitution relating to the tagging of Bills, and against the functional areas listed in Schedule 4 (functional areas of concurrent national and provincial legislative competence) and Schedule 5 (functional areas of exclusive provincial legislative competence) to the Constitution.
- 6.3 For the purposes of tagging, the constitutional court case of *Tongoane and Others v Minister for Agriculture and Land Affairs and Others*¹ confirmed the “substantial measure” test indicated in *Ex Parte President of the Republic of South Africa: In re Constitutionality of the Liquor Bill*. The test entailed that “any Bill whose provisions in substantial measure” fall within a specific Schedule must be classified in terms of that Schedule.
- 6.4 In terms of section 76(3) of the Constitution a Bill must be dealt with in accordance with the procedure established by either subsection (1) or (2) if it falls within a functional area listed in Schedule 4 to the Constitution.
- 6.5 The issue to be determined is whether the proposed amendments as contained in the Bill, in substantial measure, fall within a functional area listed in Schedule 4 to the Constitution.
- 6.6 As was pointed out above the Bill seeks to comply with the judgment of the High Court in which the Court declared section 18 of the Act inconsistent with the Constitution and inconsistent to the extent that the section bars, in all circumstances, the right to institute a prosecution for all sexual offences other than those listed in section 18(f), (h) and (i) of the Act after the lapse of a period of 20 years from the time when the offence was committed.
- 6.7 The provisions of the Bill have been carefully examined to establish whether, in substantial measure, they fall within any of the functional areas listed in Schedule 4 to the Constitution.
- 6.8 The provisions of the Bill do not, in substantial measure, fall within a functional areas listed in Schedule 4. The State Law Advisers are therefore of the opinion that this Bill must be dealt with in accordance with the procedure set out in section 75 of the Constitution.
- 6.9 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.

¹ CCT 100/09 [2010] ZACC 10.

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