

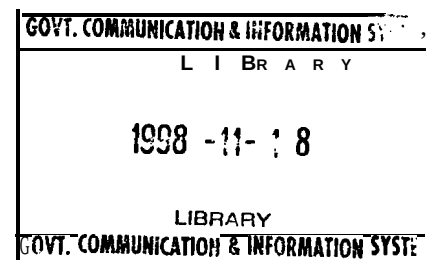
REPUBLIC OF SOUTH AFRICA

CRIMINAL PROCEDURE AMENDMENT BILL

(As amended by the Portfolio Committee on Justice (National Assembly))

(MINISTER OF JUSTICE)

[B 132B—98]



REPUBLIEK VAN SUID-AFRIKA

STRAFPROSESWYSIGINGS- WETSONTWERP

(Soos gewysig deur die Portefeuljekomitee oor Justisie (Nasionale Vergadering))

(MINISTER VAN JUSTISIE)

[W 132B—98]

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GENERAL EXPLANATORY NOTE:

- [1 Words in bold type in square brackets indicate omissions from existing enactments.
- Words underlined with a solid line indicate insertions in existing enactments.
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BILL

To amend the Criminal Procedure Act, 1977, so as to further regulate the custody and detention of unconvicted persons under the age of 18 years accused of having committed offences; and to provide for matters connected therewith.

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

Insertion of section 71A in Act 51 of 1977

1. The following section is hereby inserted in the Criminal Procedure Act, 1977 (hereafter referred to as the principal Act), after section 71:

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“Custody and detention of unconvicted persons under the age of 18 years

71A. (1) Without derogating from the provisions relating to bail in Chapter 9 and sections 50(4), (5) and (6), 71 and 72, but subject to subsections (2), (3) and (6), an unconvicted person under the age of 18 years, shall not be detained in a prison or a police cell or lock-up.

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(2) Subject to Chapter 9, dealing with the provisions relating to bail, an unconvicted person under the age of 18 years who is accused of having committed an offence, other than an offence referred to in Schedule 8 may, before his or her first appearance in court, only be detained in a police cell or lock-up for a period not exceeding 48 hours, as contemplated in section 50(1), pending such person’s first appearance in court after arrest, if the member of the South African Police Service or the peace officer concerned is satisfied—

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(a) that exceptional circumstances so demand; and

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(b) that such detention is necessary in the interests of the administration of justice or the safety or protection of the public or such person; and

(c) where applicable, that a police official as contemplated in section 59, or a Director of Public Prosecutions or a prosecutor authorised thereto by him or her in writing as contemplated in section 59A, as the case

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may be, has not released that person on bail in terms of the said sections; and

(d) that the person concerned cannot be placed in the care of—

(i) his or her parent or guardian;

(ii) any adult person who is prepared to assist the child in relation to his or her attendance at court and who has a prior relationship of responsibility towards the child or who is prepared to enter into a relationship of responsibility towards the child; or

(iii) any other suitable person; or

(e) that the person concerned cannot be placed for the period in question in any institution or place of safety as defined in section 1 of the Child Care Act, 1983 (Act No. 74 of 1983), within a reasonable distance from the court in which the appearance will take place.

(3) Subject to Chapter 9, dealing with the provisions relating to bail, an unconvicted person under the age of 18 years who is accused of having committed an offence referred to in Schedule 8 or who is awaiting trial in respect of an offence referred to in the said Schedule or who has a previous conviction in respect of an offence referred to in Item 1 or 2 of the said Schedule, may, before his or her first appearance in court, only be detained in a police cell or lock-up for a period not exceeding 48 hours, contemplated in section 50(1), pending such person's first appearance in court after arrest, if the member of the South African Police Service or the peace officer concerned is satisfied that—

(a) such detention is necessary in the interests of the administration of justice, or the safety or protection of the public, or such person; and

(b) the person concerned cannot be placed, within a reasonable distance from the court in which the appearance will take place, in a place of safety, referred to in section 28 of the Child Care Act, 1983, (Act No. 74 of 1983), which is intended to be used and is being used as a secure care facility for the appropriate physical, emotional and behavioural containment of persons under the age of 18 years who have been accused of having committed serious offences and who are awaiting trial or who are waiting to be sentenced; or

(c) the person concerned cannot be placed in a prison within a reasonable distance from the court in which the appearance will take place where it is practicable to do so.

(4) Where a person is detained in a police cell or lock-up as contemplated in subsection (2) or (3) the member of the South African Police Service or the peace officer responsible for ordering such detention shall—

(a) provide the court before which the person first appears with a written report setting out the reasons for the detention and an explanation as to why it was necessary to detain the person concerned in a police cell or lock-up and to keep him or her there until his or her first appearance before the court, and of the steps taken to notify the parents or guardian and a probation officer as contemplated in section 50(5) of the arrest of the person; or

(b) if the person is released before he or she appears in a court, provide the magistrate of the magisterial district in which the detention took place with a written report setting out the reasons for the detention and an explanation as to why it was necessary to detain the person concerned in a police cell or lock-up.

(5) The report referred to in subsection (4)(b) shall be submitted to the magistrate referred to in the said subsection not later than one court day after the person concerned has been released from detention,

(6) (a) Subject to Chapter 9, dealing with the provisions relating to bail, an unconvicted person under the age of 18 years may, after his or her first appearance in court, only be detained in a prison if the provisions of paragraph (b) are complied with.

(b) A person referred to in paragraph (a) shall only be so detained in a prison if an application for bail has been postponed in terms of section 50(6) or if bail has been refused in terms of section 60, and if the court is satisfied that—

(i) such person is accused of having committed an offence referred to in Schedule 8 or has been charged with such an offence or is awaiting trial in respect of an offence referred to in the said Schedule or has a previous conviction in respect of an offence referred to in Item 1 or 2 of the said Schedule: Provided that any such person under the age of 14 years may only be detained in terms of this subsection if a Director of Public Prosecutions or a prosecutor authorised thereto in writing by him or her issues a written confirmation that he or she intends charging the person concerned with an offence referred to in Schedule 8 and stating that there is sufficient evidence to institute a prosecution against the person;

(ii) such detention is necessary in the interests of the administration of justice or the safety or protection of the public or such person;

(iii) there is a likelihood that the person, on conviction, could be sentenced to imprisonment without the option of a fine; and

(iv) the person concerned cannot be placed, within a reasonable distance from the court in which the appearance will take place, in a place of safety referred to in section 28 of the Child Care Act, 1983 (Act No. 74 of 1983), which is intended to be used and is being used as a secure care facility for the appropriate physical, emotional and behavioral containment of persons under the age of 18 years who have been accused of having committed serious offences and who are awaiting trial or who are waiting to be sentenced.

(c) The court shall enter its reasons for ordering the detention of such a person in prison in terms of this section on the record of the proceedings.

(d) If, for the purposes of this section, the age of the person concerned is placed in dispute and the State cannot, on a balance of probabilities, prove that he or she is over the age of 18 years, the person concerned will be deemed to be under the age of 18 years.

(e) A person detained in prison in terms of this section must be brought before a court within every 14 days for the detention order to be reconsidered in terms of this subsection and the court shall enter its reasons for any decision made in this regard on the record of the proceedings.

(f) Whenever the order for the further detention of a person is to be reconsidered as contemplated in paragraph (e), and the presiding officer that made the order is not available for any reason, the order shall be reconsidered by a presiding officer of the court that made the order or, by a presiding officer of any available lower court within the jurisdiction of the regional court in which the person is to appear.

(7) Before a court makes any decision in terms of subsection (6) to detain or further detain such a person in prison the court shall consider any appropriate evidence placed before the court by the State or, where appropriate, by any other person having an interest in the matter, including evidence, where applicable, in respect of—

(a) the requirements referred to in subsection (6)(b)(i) to (iv);

(b) the best interests of the child;

(c) the age of the person, particularly if he or she is under the age of 14 years;

- (d) the availability or otherwise of a secure care facility within the meaning of subsection (1), including the sworn statement referred to in subsection (8);
- (e) the risk of the person causing harm to other persons in a secure care facility within the meaning of subsection (6)(b)(iv); 5
- (f) the period for which the person has already been in custody since his or her arrest;
- (g) the probable period of detention until the disposal or conclusion of the trial;
- (h) the reason for any delay in the disposal or conclusion of the trial and any fault on the part of the person in question or his or her legal representative or the State with regard to such delay; 10
- (i) any impediment to the preparation of the person's defence or any delay in obtaining legal representation which may be brought about by the detention of the person; 15
- (j) the state of health of the person;
- (k) the disposition of the person to commit serious offences, particularly those mentioned in Schedule 8;
- (l) the risk of the person absconding from a secure care facility within the meaning of subsection (6)(b)(iv); 20
- (m) the reports referred to in subsection (4)(a) or (b);
- (n) the seriousness of the offence in question; or
- (o) any other factor which the court deems necessary.
- (8) (a) Whenever the court is required to make a decision in terms of subsection (6) to detain or further detain a person in a prison any functionary responsible for the provision and management of a secure care facility within the meaning of subsection (6)(b)(iv), within a reasonable distance from such court, shall, upon the request of the presiding officer, investigating officer, prosecutor or legal representative, as the case may be, forthwith submit to the court and, where applicable, such other person making the request, a sworn statement providing information in respect of - 25
- (i) the availability or otherwise of accommodation for the person in question; and
- (ii) all other relevant information relating to the amenities and features of the facility which enable it to be used as **such** a secure care facility. 35
- (b) Whenever the court is required to make a decision in terms of subsection (6) to detain or further detain a person in a prison and, on the evidence placed before it, is unable to ascertain whether a secure care facility within the meaning of subsection (6)(b)(iv) is available or not for the accommodation of the person in question, the court shall then be competent to make an order for the person concerned to be detained in a specific secure care facility within the meaning of subsection (6)(b)(iv), as stated in the order: Provided that if the person concerned cannot for any reason be accommodated in such secure care facility, the person shall be detained in the prison mentioned in the said order. 40
- (c) The Director-General of the Department of Welfare shall, for purposes of circulating to stakeholders, from time to time, provide the Director-General of the Department of Justice with all relevant information relating to this section in order to ensure the effective and proper application thereof. 50
- (9) A person detained in terms of subsection (6) shall, as soon as possible after his or her arrest, where applicable, be afforded the opportunity to obtain legal representation as contemplated in the Legal Aid Act, 1969, (Act No. 22 of 1969). 55
- (10) The highest priority shall be given to, the most expeditious processing of the trial of a person detained in terms of subsection (6).

(11) A person referred to in subsection (2), (3) or (6) who is detained in a prison or a police cell or lock-up or who is being moved in custody to or from a court or who, while in custody, attends a court or a preparatory examination, shall be kept separately from any person over the age of 18 years who is in custody and a person referred to in subsection (2) shall be kept separately from any person referred to in subsection (3) or (6), and shall be treated in a manner, and kept in conditions, that take account of the child's age: Provided that he or she may be permitted to communicate with such a person in custody who has been or is to be charged jointly with him or her, if the correctional official in charge of the prison or the police official in charge of the police cell or lock-up in which he or she is detained, is of the opinion that such communication will not be detrimental to him or her: Provided further that any female person under the age of 18 years detained under this section shall, while in detention, be kept separately from any male person.

(12) When a female person under the age of 18 years is detained or is in custody, she shall be under the care of a woman.

(13) For the purposes of this section, 'unconvicted person' means a person who is awaiting trial and who has not been sentenced, in respect of the offence or offences in terms of which he or she is or may be brought before the court."

Addition of Schedule 8 to Act 51 of 1977

2. The following Schedule is hereby added to the Criminal Procedure Act, 1977, after schedule 7:

"SCHEDULE 8

(Section 71A)

1. Murder
2. Rape
3. Robbery—
 - (a) when there are aggravating circumstances; or
 - (b) involving the taking of a motor-vehicle
4. Assault involving the infliction of grievous bodily harm
5. Indecent assault involving the infliction of grievous bodily harm
6. Indecent assault on a child under the age of 16 years
7. Kidnapping
8. Public violence
9. Any offence referred to in section 1 or 1A of the Intimidation Act, 1982 (Act No. 72 of 1982)
10. Any offence referred to in section 13(f) of the Drugs and Drugs Trafficking Act, 1992 (Act No. 140 of 1992), if it is alleged that—
 - (a) the value of the dependence-producing substance in question is more than R50 000; or
 - (b) the value of the dependence-producing substance in question is more than R 10 000 and that the offence was committed by a person, group of persons, syndicate or any enterprise acting in the execution or furtherance of a common purpose or conspiracy
11. Any offence relating to—
 - (a) the dealing in or smuggling of ammunition, firearms, explosives or armament; or
 - (b) the possession of an automatic or semi-automatic firearm, explosives or armament
12. Any offence relating to exchange control, corruption, extortion, fraud, forgery, uttering or theft—
 - (a) involving amounts of more than R50 000; or
 - (b) involving amounts of more than R 10 000, if it is alleged that the offence was committed by a person, group of persons, syndicate or any enterprise

- acting in the execution or furtherance of a common purpose or conspiracy
13. Any other offence of a serious nature if it is alleged that the offence was committed by a person, group of persons, syndicate or any enterprise, acting in the execution or furtherance of a common purpose or conspiracy
14. Any conspiracy or incitement to commit any offence referred to in this Schedule or an attempt to commit any of the offences referred to in Item 1.2 or 3 of the Schedule.”

Repeal of laws

3. Section 29 of, and Schedule 2 to, the **Correctional Services Act**, 1959 (Act No. 8 of 1959), are hereby repealed.

Monitoring of section 71A of Act 51 of 1977

- 4.(a) The Minister of Justice—
- (i) shall make regulations prescribing the procedures to be put in place to assess the proper application of, or compliance, with the provisions of section 71 A of the principal Act and to assess the implications or effectiveness thereof;
 - (ii) shall make regulations prescribing the form and contents of the reports required in terms of subsection (4)(a) and (b) of the said section; and
 - (iii) may make regulations prescribing any other matter which, in the opinion of the Minister, is necessary to ensure compliance with the provisions of the said section and the effectiveness thereof.
- (b) The Minister of Justice may, in the manner prescribed by regulation, direct that the application of section 71 A of the principal Act be monitored and evaluated by the Director-General of the Department of Justice, and, where applicable, by any other relevant departments, annually or at other specified intervals, with the object of assessing the implications, or effectiveness, or the proper application of or compliance with the provisions of that section.
- (c) Each directive issued in terms of paragraph (b) shall be formulated after consultation with the ministers responsible for welfare, safety and security and correctional services, as the case may be.

Transitional Arrangements

5. (1) Within 7 days after the commencement of this Act, or such longer period as may be agreed to by the court, every unconvicted person under the age of 18 years, who is in detention in a police cell, lock-up or prison and who is accused of having committed an offence, other than an offence referred to in Schedule 8 to the principal Act must be brought before court in order to be dealt with in terms of section 71A of the principal Act.
- (2) Within 14 days after the commencement of this Act, or such longer period as may be agreed to by the court, every unconvicted person under the age of 18 years who is in detention in a prison and who is accused of having committed an offence referred to in Schedule 8 to the principal Act or who has been charged with such an offence or who is awaiting-trial in respect of an offence referred to in the said Schedule or who has a previous conviction in respect of an offence referred to in Item 1 or 2 of the said Schedule, must be brought before court in order to be dealt with in terms of section 71, 4 of the principal Act.
- (3) For the purposes of this section ‘unconvicted person’ has the meaning given to it in section 71 A of the principal Act.

Short title and commencement

6. This is the Criminal Procedure Amendment Act, 1998, which takes effect on a date fixed by the President by notice in the *Gazette*.

**MEMORANDUM ON THE OBJECTS OF THE CRIMINAL
PROCEDURE AMENDMENT BILL, 1998**

1. Section 28(1)(g) of the Constitution of the Republic of South Africa, 1996, states as follows:

“(1) Every child has the right—

- (g) not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be—
 - (i) kept separately from detained persons over the age of 18 years; and
 - (ii) treated in a manner, and kept in conditions, that take account of the child’s age.”.

2. Section 29 of the Correctional Services Act, 1959 (Act 8 of 1959), which provides for the detention of unconvicted juveniles, was amended in 1994. The effect of this amendment, which came into operation on 8 May 1995, was, in general terms, that an unconvicted person under the age of 18 years could not be kept in a prison, police cell or lock-up. The commencement of this 1994 Amendment Act gave rise to numerous practical problems which impacted negatively on the criminal justice system. The main problem was the lack of adequate secure care facilities and the fact that these places are generally not geared to cater for the hardened juvenile criminal. As a result, these juveniles were released or taken up in institutions or places of safety where little or no security existed, from where they often absconded, only to commit further serious crimes. In order to address this problem section 29 was amended in 1996 again by way of a Private Member’s Bill. The aim of this Amendment was to give the courts a limited discretion to order the detention of unconvicted young persons accused of having committed certain serious crimes in prisons after their first appearance in court. It, amongst others, gave the courts a discretion to order the detention of accused persons between the ages of 14 and 18 years in prison, if the presiding officer had reason to believe that such detention was necessary in the interests of justice and the safety and protection of the public and that no secure place of safety was available for such detention. This category of offenders could, however, only be detained if they were accused of having committed certain serious crimes mentioned in Schedule 2 to the Correctional Services Act, “or any other offence, in circumstances of such a serious nature as to warrant such detention” (the latter category often being referred to as “non-scheduled offences”). A further safety mechanism was built in by requiring the courts, which order the detention of youths, to review these orders every 14 days. In determining whether the interests of the administration of justice and the safety and protection of the public necessitate the detention of a child as set out above the courts are obliged, on the strength of oral evidence led by the State, to take into account, amongst others, the following factors:

- * the risk of the child absconding from a place of safety;
- * the risk of causing harm to other persons awaiting trial in a place of safety; and
- * the disposition of the child to commit offences.

3. This 1996 Amendment was primarily intended, as a temporary measure, to address the lack of secure care facilities to hold children who are alleged to have committed serious crimes, pending the establishment of suitable facilities. Because the 1996 Amendment was intended to be of a temporary nature, certain provisions thereof were designed to lapse automatically on 10 May 1998. Before 10 May 1998, section 29(2) provided that juveniles could be detained in a prison, police cell or lock-up after arrest until they are brought before a court, for a period not exceeding 24 hours if the juvenile is under 14 years and for a period not exceeding 48 hours if the juvenile is 14 years or older, but under 18 years. Since 10 May 1998, when the “lapsing” of these provisions took effect, the position is that juvenile “offenders can still be detained in prisons, police cells or lock-ups before their first appearance in court, but not for longer than 24 hours. There are still not enough secure care facilities to revert to the ideal situation, namely a general prohibition on the detention of children under the age of 18 years in prisons,

police cells and lock-ups and until then, in order to protect the public, dangerous juvenile criminals will have to be kept in prisons, where the Departments of Welfare and Correctional Services will ensure that they are kept separate from adults and that their special needs as children are catered for.

4. Some of the more important aspects of the Bill are highlighted hereunder, Clause 1 of the Bill inserts a new section **71A** in the Criminal Procedure Act, 1977 (Act No. 51 of 1977), to deal with the detention of unconvicted young persons.

4.1 Proposed section 71A(1) states, as a general rule, that an unconvicted person under the age of 18 years cannot be detained in a police cell, lock-up or prison. The exceptions to this general rule and the circumstances in which the exceptions apply, are set out in the other provisions in this new section 71A, Proposed section 71A(1) is also intended to focus presiding officers on other provisions in the Criminal Procedure Act, 1977, which could be applied in appropriate circumstances where it would be in the best interests of the child to do so; hence the reference to Chapter 9, dealing with bail, and sections 50, 71 and 72, which also regulate the position of children after arrest. The broad structure of the Bill allows for three categories of children to be detained, pending the finalisation of their trials and sentences. These categories are largely determined by the offences committed by the persons in question which are set out in the proposed new Schedule 8 to the Criminal Procedure Act, 1977. The offences set out in this Schedule include the most serious of all offences. This means that only the most dangerous and hardened awaiting-trial juvenile offenders will be detained in a police cell, lock-up or prison.

4.2 Proposed subsections (2) and (3) of section 71A provide that children under the age of 18 years can be detained in a police cell or lock-up for a maximum of 48 hours, pending their first appearance in court. The 48 hour limit is in line with section 35 of the Constitution and section 50 of the Criminal Procedure Act, which set similar time limits. Proposed subsection (2) deals with the position of children who have committed any offence other than an offence referred to in Schedule 8, whilst proposed subsection (3) deals with the position of children who have committed Schedule 8 offences. In the case of non-Schedule 8 offences the criteria which have to be met before a person can be detained in a police cell or lock-up are very stringent. These criteria are set out in proposed subsection (2)(a) to (e). In the case of children accused of having committed Schedule 8 offences, the criteria are less onerous.

4.3 Proposed section 71A(6) provides that children under the age of 18 years who have committed Schedule 8 offences or who are awaiting trial in respect of an offence referred to in Schedule 8 or who have a previous conviction in respect of rape or murder may be detained in a prison after their first appearance in court. A person under the age of 14 years who falls in this category can only be so detained if the prosecuting authority has confirmed that the child is to be charged with a Schedule 8 offence and that there is sufficient evidence to institute a prosecution against the person. Again, certain criteria have to be satisfied before detention in a prison can be ordered. These criteria are set out in proposed section 71A(6)(b)(i) to (iv). One of these is that the detention must be in the interests of the administration of justice or the safety of the public. Such detention can also only take place if it can be shown that the person cannot be placed in a secure place of safety which is specially designed to accommodate hardened juvenile offenders. This subsection furthermore obliges presiding officers to enter reasons for ordering the detention of juveniles on the record of the proceedings and to reconsider their orders of detention every 14 days.

4.4 When the criteria contemplated in subsection (6) are considered in order to make a decision regarding the detention of a child in prison, the court must, in terms of proposed section 71A(7) consider appropriate evidence placed before it by the State or any other interested party.

4.5 The Bill also requires a police official who detains a child to provide the court with a report, explaining why it was necessary to detain the child in a police cell or lock-up prior to his or her first court appearance.

4.6 In terms of proposed section 71A(8) a sworn statement must, when there is a request to this effect, be provided to the court, prosecutor, investigating officer or legal

representative of the child by the Department of Welfare, setting out the availability or otherwise of accommodation in a secure care facility or all other information relating to the features of a secure care facility.

4.7 Clause 4 contains provisions enabling the Minister of Justice to create a mechanism to monitor the proper application of these new provisions.

5. The Departments of Welfare, Correctional Services and Safety and Security were consulted and other role-players, such as magistrates, attorneys-general and the legal professions were invited to submit comments.