

REPUBLIC OF SOUTH AFRICA

**CRIMINAL PROCEDURE
AMENDMENT BILL**

(As introduced in the National Assembly)

(MINISTER OF JUSTICE)

[B 59—98]

REPUBLIEK VAN SUID-AFRIKA

**STRAFPROSESWYSIGINGS-
WETSONTWERP**

(Soos ingedien in die Nasionale Vergadering)

(MINISTER VAN JUSTISIE)

[W 59—98]

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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 detention of unconvicted young persons 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, after section 71:

“Detention of unconvicted young persons

71A. (1) Notwithstanding anything to the contrary contained in any law and without derogating from sections 50(4), (5) and (6), 71 and 72(1)(b)—

(a) but subject to subsection (2), an unconvicted person under the age of 16 years;

(b) but subject to subsections (2) and (5), an unconvicted person who is 16 years of age or older but under the age of 18 years, shall not be detained in a prison or a police cell or lock-up.

(2) A person referred to in subsection (1) may be detained in a police cell or lock-up for a period not exceeding 48 hours pending such person’s first appearance in court after arrest if—

(a) such detention is necessary and in the interests of justice; and

(b) the person concerned cannot be placed in the care of his or her parent or guardian, any other suitable person or any institution or place of safety as defined in section 1 of the Child Care Act, 1983 (Act No. 74 of 1983), for the period in question.

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

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- (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; or 5
- (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. 10
- (4) The report referred to in subsection (3)(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.
- (5) (a) A person referred to in subsection (1)(b) who is accused of having committed an offence referred to in Schedule 8 may, after his or her first appearance in court and before his or her conviction and sentence, and subject to paragraph (b), be detained in a prison but not in a police cell or a lock-up: Provided that the court shall enter its reasons for ordering the detention of such a person on the record of the proceedings, 15
- (b) A person referred to in paragraph (a) shall only be so detained in a prison if— 20
- (i) his or her detention is a measure of last resort as contemplated in section 28(1)(g) of the Constitution;
- (ii) such detention is necessary in the interests of the administration of justice and the protection of the public or such person; 25
- (iii) there is a substantial likelihood that the person, on conviction for the offence which he or she is alleged to have committed, could be sentenced to imprisonment exceeding two years; and
- (iv) no secure place of safety mentioned in section 28 of the Child Care Act, 1983 (Act No. 74 of 1983), is available, within a reasonable distance from the court, for such person's detention. 30
- (c) A person detained in terms of this subsection shall be brought before the court that made the detention order, every 14 days after such order has been made to enable such court to reconsider the order and the court shall enter its reasons for ordering the further detention of such a person on the record of the proceedings. 35
- (d) In the absence of the presiding officer any other presiding officer of that court may, after considering the evidence recorded and in the absence of the said person, make such order as the presiding officer who is absent could lawfully have made in the proceedings in question. 40
- (6) In order to enable a court to determine whether the interests of the administration of justice and the safety and protection of the public or the person in question necessitate the detention or further detention of a person referred to in subsection (5) in a prison, appropriate oral evidence shall be placed before the court by the State, including evidence, where applicable, in respect of— 45
- (a) the risk of the person absconding from a place of safety mentioned in section 28 of the Child Care Act, 1983 (Act No. 74 of 1983);
- (b) the risk of the person causing harm to other persons in a place of safety; 50
- (c) the period for which the person has already been in custody since his or her arrest;
- (d) the probable period of detention until the conclusion of the trial;
- (e) 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; 55

- (f) 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;
- (g) the state of health of the person; or
- (h) the disposition of the person to commit serious offences, particularly those mentioned in Schedule 8. 5

(7) A person detained in terms of subsection (5) shall, as soon as possible after his or her arrest, be afforded the opportunity to obtain legal representation as contemplated in section 35 of the Constitution and section 3 of the Legal Aid Act, 1969 (Act No. 22 of 1969). 10

(8) The highest priority shall be given to the most expeditious processing of the trial of a person detained in terms of subsection (5).

(9) For the purposes of this section, 'unconvicted person' means a person who has not been convicted or sentenced."

Addition of Schedule 8 to Act 51 of 1977 15

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

"SCHEDULE 8

(Section 71A)

Murder	20
Rape	
Robbery where the wielding of a fire-arm or any other dangerous weapon or the infliction of grievous bodily harm or the taking of a motor vehicle is involved	
Assault with intent to commit grievous bodily harm, or where a dangerous wound is inflicted	25
Assault of a sexual nature	
Kidnapping	
Any offence under any law relating to the illicit conveyance or supply of dependence-producing drugs	
Any conspiracy, incitement or attempt to commit any offence referred to in this Schedule."	30

Repeal of laws

3. Section 29(1), (2), (3), (4), (5), (5A) and (8) of, and Schedule 2 to the Correctional Services Act, 1959 (Act No. 8 of 1959), are hereby repealed.

Transitional Arrangements 35

4. (1) Within 48 hours after the commencement of this Act—

- (a) every unconvicted person under the age of 18 years who is in detention in a police cell or lock-up;
- (b) every unconvicted person under the age of 16 years who is in detention in a prison; and 40
- (c) every unconvicted person under the age of 18 years who is in detention in a prison and who is not alleged to have committed an offence mentioned in Schedule 8 to the Criminal Procedure Act, 1977 (Act No. 51 of 1977),

must be brought before court in order to be dealt with in terms of section 71A of the Criminal Procedure Act, 1977. 45

(2) Within 14 days after the commencement of this Act every unconvicted person between the ages of 16 and 18 years who is in detention in a prison and who is alleged to have committed an offence mentioned in Schedule 8 to the Criminal Procedure Act, 1977, must be brought before court in order to be dealt with in terms of section 71A of the Criminal Procedure Act, 1977. 50

(3) For the purposes of this section “unconvicted person” has the meaning given to it in section 71A of the Criminal Procedure Act, 1977.

Short title and commencement

5. 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 No. 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 in prisons of unconvicted young persons accused of having committed certain serious crimes. It 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 ordering such detention 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 were obliged, on the strength of oral evidence led by the State, to take into account factors such as—

- * 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 and 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. The approach followed in drafting the Bill has been to further restrict the detention of awaiting trial children and to adhere to the present wording of section 29 as far as possible, only making changes where problems have been experienced in practice. This Bill is seen as an interim measure, pending the legislative recommendations of the South African Law Commission in its investigation into the establishment of a separate juvenile criminal justice system which, amongst others, will deal with the detention of juveniles; hence it only introduces changes which are deemed absolutely necessary for the interim period. The Bill seeks to insert 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 The proposed section 71A(1) is intended to focus the attention of 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; hence the reference to sections 50, 71 and 72, which also regulate the position of children after arrest. In terms of the present provisions, juveniles from the ages of 14 to 17 years can be detained in prisons after their first appearance in court. It is suggested in this proposed section 71A that this age be increased to 16 years. According to rough estimates, this increase in age will almost halve the number of children detained in terms of the present provisions. Statistics also indicate that the most dangerous juvenile offenders are those who are 16 years of age or older.

4.2 The proposed section 71A(2) changes the current position of allowing a juvenile to be held for only 24 hours before being brought to court, to 48 hours. This is deemed necessary to alleviate practical problems. In most cases it is well nigh impossible for members of the South African Police Service to carry out the necessary investigation in 24 hours. The 48 hour limit is furthermore in line with section 35 of the Constitution and section 50 of the Criminal Procedure Act, which set similar time limits.

4.3 The proposed section 71A(5) constitutes a restructuring of the current section 29(5) of the Correctional Services Act, 1959. By its proposed new wording it also seeks to make it clear that juveniles who are 16 or 17 years old can only be held in prisons after their first appearance in court and not in police cells or lock-ups and only in respect of the offences mentioned in Schedule 8 to the Act. The present provisions are sometimes incorrectly interpreted as allowing juveniles to be remanded in custody in police cells, which is often, not in the best interests of the child, since police cells, particularly in the rural areas, often do not have the facilities and protection offered by prisons. Schedule 8 is a re-enactment of the present Schedule 2 to the Correctional Services Act and has been left unamended due to the temporary nature of these provisions.

4.4 The discretion of presiding officers to detain children for non-scheduled offences has been deleted in the Bill, since so many children are detained on the strength of these provisions. This deletion will reduce the number of children in detention who should, in the first place, never have been detained. This subsection obliges presiding officers to enter reasons for ordering the detention of juveniles on the record of the proceedings.

4.5 It also sets out clearly the criteria which need to be complied with before a juvenile can be so detained, namely if—

- * the detention is a measure of last resort as contemplated in the Constitution;
- * the detention is necessary in the interests of the administration of justice and protection of the public or the person concerned;
- * the person concerned, on conviction for the offence which he or she has allegedly committed, could be sentenced to imprisonment exceeding 2 years; and
- * no secure place of safety is available within a reasonable distance from the court for the person's detention.

4.6 Again, this subsection requires presiding officers to reconsider their orders of detention every 14 days, but adds that they must enter their reasons for ordering the further detention of the person concerned on the record of the proceedings. Similarly to the present provisions, the presiding officer must determine whether the interests of the administration of justice and the safety and protection of the public or the person concerned necessitate the detention of the person by having regard to oral evidence

produced by the State in respect of certain factors. These factors have been extended and the courts are given a discretion to decide which factors to apply as are best suited to the circumstances.

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, have been requested to submit their comments to the Portfolio Committee on Justice.

6. The Department of Justice and the State Law Advisers are of the opinion that the parliamentary procedure established by section 75 of the Constitution must be applied in respect of this Bill.