

REPUBLIC OF SOUTH AFRICA

CRIMINAL PROCEDURE AMENDMENT BILL

*(As amended by the Portfolio Committee on Justice and Constitutional Development
(National Assembly))
(The English text is the official text of the Bill)*

(MINISTER FOR JUSTICE AND CONSTITUTIONAL DEVELOPMENT)

[B 42D—2008]

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- point to follow the proceedings and see and hear all the appropriate persons;
- (d) **'court point'** means the courtroom or other place where the court having jurisdiction is sitting;
 - (e) **'correctional facility'** means a correctional facility as defined in the Correctional Services Act, 1998 (Act No. 111 of 1998), but does not include a police cell or lock-up; and
 - (f) **'remote point'** means the room or place at the designated correctional facility where the accused person appearing through audiovisual link is located.
- (2) An accused person—
- (a) who is over the age of 18 years;
 - (b) who is in custody in a correctional facility in respect of an offence;
 - (c) who has already appeared before a court;
 - (d) whose case has been postponed and who is in custody pending his or her trial; and
 - (e) who is required to appear or to be brought before a court in any subsequent proceedings (whether before, during or after the trial or conviction and sentence) for the purpose of—
 - (i) a further postponement of the case; or
 - (ii) consideration of release on bail in terms of section 60, 63, 63A, 307, 308A or 321, where the granting of bail is not opposed by the prosecutor or where the granting of bail does not require the leading of evidence,
- is not required to appear or to be brought physically before the court but may, subject to the provisions of this section, sections 159B, 159C and 159D, appear before court by audiovisual link and is deemed to be physically before court, unless the court directs, in the interests of justice, that he or she appears or be brought physically before it.
- (3) Any proceedings in terms of subsection (2) shall be regarded as having been held in the presence of the accused person if, during the proceedings that person—
- (a) is held in custody in a correctional facility; and
 - (b) is able to follow the court proceedings and the court is able to see and hear the accused person by means of audiovisual link.
- (4) The remote point shall be regarded as being a part of the court.

Requirements for audiovisual appearance by accused person

- 159B.** (1) An accused person appearing before a court by audiovisual link must do so from a place at which the requirements referred to in subsections (2) and (3) and section 159C are complied with.
- (2) The Minister may, subject to the provisions of this section, designate any correctional facility which has been suitably equipped as a place where proceedings in terms of section 159A can be held.
- (3) Both the court point and the remote point in the correctional facility designated in terms of subsection (2) must be equipped with facilities that, in accordance with any requirements prescribed by regulations and any directions of the court referred to in section 159C, allow—
- (a) private communication to take place between the accused person and any legal practitioner representing that person in the proceedings at the court point; and
 - (b) documents to be transmitted between both points by the persons referred to in paragraph (a)—
 - (i) at any time during the proceedings;
 - (ii) during any adjournment of the hearing in the proceedings referred to in paragraph (a); or
 - (iii) at any time on the day of a hearing, shortly before or after the hearing.
- (4) The court must, at every appearance of an accused person in terms of section 159A, inquire into the physical and mental well-being of the accused person and for that purpose may, where necessary, direct that the facilities referred to in section 159C be used in such a manner which will

enable the presiding officer to satisfy himself or herself as to the accused person's well-being as that presiding officer would be able to do if the accused person were physically before the court.

Technical requirements for use of audiovisual link

159C. (1) For the purposes of proceedings in terms of section 159A, both the court point and the remote point must be equipped with facilities that enable all appropriate persons—

- (a) at the court point to see and hear a person appearing before the court or making a submission or any other appropriate person at the remote point and to follow the proceedings; and
- (b) at the remote point to see and hear all appropriate persons at the court point and to follow the proceedings.

(2) (a) In the event of—

- (i) an interruption of an audiovisual link;
- (ii) an audiovisual link being of a poor quality which, in the opinion of the court, is not in the interests of justice to continue the proceedings by way of audiovisual link; or
- (iii) any of the facilities referred to in subsection (1) malfunctioning,

the court must, subject to paragraph (b), direct that the matter stand down and cause the accused person to be brought physically before the court on the day in question.

(b) If it is not reasonably practicable to bring the accused person to court on the day, as provided for in paragraph (a), the court must, prior to the expiry of the existing court order for the accused person's detention, postpone the proceedings in the absence of the accused person, to the next court day.

(3) The Minister may make any regulations necessary to give effect to the technical requirements referred to in subsection (1).

(4) A court may, in order to ensure a fair trial, give any directions in any case as it may deem necessary, which may not be inconsistent with any provision of this Act or any regulation made thereunder.

Protection of communication between accused person and legal representative

159D. Without limiting any other protection applying to it, a communication by audio link or audiovisual link, or a document transmitted between an accused person and his or her legal representative as provided for in section 159B(3), is confidential and inadmissible in any proceedings as if the communication took place or the document was produced while they were in the presence of each other.”

Substitution of section 271A of Act 51 of 1977, as inserted by section 12 of Act 5 of 1991 and amended by section 6 of Act 4 of 1992

2. The following section is hereby substituted for section 271A of the principal Act:

“Certain convictions fall away as previous convictions after expiration of 10 years

271A. Where a court has convicted a person of—

- (a) [an] any offence [for] in respect of which [the punishment] a sentence [may be a period] of imprisonment for a period exceeding six months without the option of a fine, may be imposed [and] but—
 - (i) has postponed the passing of sentence in terms of section 297(1)(a) and has discharged that person in terms of section 297(2) without passing sentence or has not called upon him to appear before the court in terms of section 297(3); or
 - (ii) has discharged that person with a caution or reprimand in terms of section 297(1)(c); or

(b) any [other] offence [than that for] in respect of which [the punishment] a sentence [may be a period] of imprisonment for a period not exceeding six months without the option of a fine, may be imposed,
 that conviction shall fall away as a previous conviction if a period of 10 years has elapsed after the date of conviction of the said offence, unless during that period [such] the person has been convicted of an offence [for] in respect of which [the punishment] a sentence [may a period] of imprisonment for a period exceeding six months without the option of a fine, may be imposed.”

Insertion of sections 271B, 271C, 271D and 271E in Act 51 of 1977

3. The following sections are hereby inserted in the principal Act, after section 271A:

“Expungement of certain criminal records

271B. (1) (a) Where a court has imposed any of the following sentences on a person convicted of an offence, the criminal record of that person, containing the conviction and sentence in question, must, subject to paragraph (b) and subsection (2) and section 271D, on the person’s written application, be expunged after a period of 10 years has elapsed after the date of conviction for that offence, unless during that period the person in question has been convicted of an offence and has been sentenced to a period of imprisonment without the option of a fine:

- (i) A sentence postponing the passing of sentence in terms of section 297(1)(a) where that person was discharged in terms of section 297(2), without the passing of sentence, or where that person was not called upon to appear before the court in terms of section 297(3);
- (ii) a sentence discharging that person with a caution or reprimand in terms of section 297(1)(c);
- (iii) a sentence in the form of a fine only, not exceeding R20 000;
- (iv) a sentence of corporal punishment before corporal punishment was declared to be unconstitutional as a sentencing option;
- (v) any sentence of imprisonment with the option of a fine, not exceeding R20 000;
- (vi) any sentence of imprisonment which was suspended wholly;
- (vii) a sentence of correctional supervision, referred to in section 276(1)(h) or (i); or
- (viii) a sentence of periodical imprisonment, referred to in section 276(1)(c).

(b) A person—

- (i) who has been convicted of a sexual offence against a child or a person who is mentally disabled and whose name has been included in the National Register for Sex Offenders, as provided for in section 50 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (Act No. 32 of 2007); or
- (ii) whose name has been included in the National Child Protection Register as a result of a conviction for an offence, as provided for in section 120(1)(b) of the Children’s Act, 2005 (Act No. 38 of 2005), does not qualify to have the criminal record in question expunged in terms of this section, unless his or her name has been removed from the National Register of Sex Offenders, as provided for in section 51 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, or section 128 of the Children’s Act, 2005, as the case may be.

(2) The Director-General: Justice and Constitutional Development must, on receipt of the written application of a person referred to in subsection (1), issue a certificate of expungement, directing that the criminal record of that person be expunged, if the Director-General is satisfied that the person applying for expungement complies with the criteria set out in subsection (1).

(3) The Director-General: Justice and Constitutional Development must submit every certificate of expungement that has been issued as provided for in subsection (2) to the head of the Criminal Record Centre of the South African Police Service, to be dealt with in accordance with section 271D.

Expungement of certain criminal records under legislation enacted before the Constitution of the Republic of South Africa, 1993, took effect 5

271C. (1) Where a court has convicted a person of any of the following offences, the criminal record, containing the conviction and sentence in question, of that person in respect of that offence must be expunged automatically by the Criminal Record Centre of the South African Police Service, as provided for in section 271D: 10

- (a) A contravention of section 1 of the Black Land Act, 1913 (Act No. 27 of 1913);
- (b) a contravention of section 12 of the Development Trust and Land Act, 1936 (Act No. 18 of 1936); 15
- (c) a contravention of section 5(1), read with section 5(2), or section 6, read with section 6(2), of the Blacks (Urban Areas) Consolidation Act, 1945 (Act No. 25 of 1945);
- (d) a contravention of section 8(1), read with section 8(3), of the Coloured Persons Settlement Act, 1946 (Act No. 7 of 1946); 20
- (e) a contravention of section 2 or 4 of the Prohibition of Mixed Marriages Act, 1949 (Act No. 55 of 1949);
- (f) a contravention of section 11 of the Internal Security Act, 1950 (Act No. 44 of 1950); 25
- (g) a contravention of section 10(6) and (7), 11(4), 14, 15, 16, 20(1), 28(7), 29(1) or 30 of the Black Building Workers Act, 1951 (Act No. 27 of 1951);
- (h) a contravention of section 15 of the Blacks (Abolition of Passes and Co-ordination of Documents) Act, 1952 (Act No. 67 of 1952); 30
- (i) a contravention of section 2 of the Criminal Law Amendment Act, 1953 (Act No. 8 of 1953);
- (j) a contravention of section 2(2) of the Reservation of Separate Amenities Act, 1953 (Act No. 49 of 1953);
- (k) a contravention of section 16 of the Sexual Offences Act, 1957 (Act No. 23 of 1957); 35
- (l) a contravention of section 46 of the Group Areas Act, 1966 (Act No. 36 of 1966);
- (m) a contravention of section 2 or 3 of the Terrorism Act, 1967 (Act No. 83 of 1967); or 40
- (n) a contravention of section 2 read with section 4(1), of the Prohibition of Foreign Financing of Political Parties Act, 1968 (Act No. 51 of 1968).

(2) (a) Where a court has convicted a person of contravening any provision of— 45

- (i) an Act of Parliament or subordinate legislation made thereunder;
- (ii) an ordinance of a provincial council;
- (iii) a municipal by-law;
- (iv) a proclamation;
- (v) a decree; or 50
- (vi) any other enactment having the force of law,

other than those provisions referred to in subsection (1), which were enacted in the former Republic of South Africa, the former Republic of Transkei, Bophuthatswana, Ciskei or Venda, or in any former self-governing territory, as provided for in the Self-governing Territories Constitution Act, 1971 (Act No. 21 of 1971), before the Constitution of the Republic of South Africa, 1993 (Act No. 200 of 1993) took effect, which created offences that were based on race or which created offences, which would not have been considered to be offences in an open and democratic society, based on human dignity, equality and freedom, under the constitutional dispensation after 27 April 1994, the criminal record, 55 60

containing the conviction and sentence in question, of that person must, on the person's written application, subject to subsection (3) and section 271D, be expunged.

(b) Where the criminal record of a person referred to in subsection (1) has not been expunged automatically as provided for in that subsection, the criminal record of that person must, on his or her written application, subject to subsection (3) and section 271D, be expunged. 5

(3) The Director-General: Justice and Constitutional Development must, on receipt of the written application of a person referred to in subsection (2)(a) or (b), issue a certificate of expungement, directing that the criminal record of the person be expunged, if the Director-General is satisfied that the person applying for expungement complies with the criteria set out in subsection (1) or subsection (2)(a), as the case may be. 10

(4) The Director-General: Justice and Constitutional Development must submit every certificate of expungement that has been issued as provided for in subsection (3) or (5)(b) to the head of the Criminal Record Centre of the South African Police Service, to be dealt with in accordance with section 271D. 15

(5) (a) In the case of a dispute or any uncertainty as to whether an offence is an offence as referred to in subsection (1) or (2)(a) or not, the matter must be referred to the Minister for a decision. 20

(b) If the Minister decides that the offence is an offence as referred to in subsection (1) or (2)(a), he or she must issue a certificate of expungement, directing that the criminal record of the person be expunged.

Expungement of certain criminal records by Criminal Record Centre 25

271D. (1) The head of the Criminal Record Centre of the South African Police Service or a senior person or persons at the rank of Director or above, employed at the Centre, who has or have been authorised, in writing, by the head of the Centre to do so, must expunge the criminal record of a person if— 30

- (i) he or she is furnished with a certificate of expungement by the Director-General: Justice and Constitutional Development as provided for in section 271B(2) or section 271C(3) or by the Minister as provided for in section 271C(5); or
- (ii) that person qualifies for the automatic expungement of his or her criminal record as provided for in section 271C(1). 35

(2) The head of the Criminal Record Centre of the South African Police Service must, on the written request of a person who—

- (a) has applied to have his or her criminal record expunged in terms of section 271B or section 271C(2); or
- (b) qualifies to have his or her criminal record expunged automatically in terms of section 271C(1), 40

in writing, confirm that the criminal record in question has been expunged.

- (3) Any person who—
 - (a) without the authority of a certificate of expungement as provided for in section 271B, 271C or this section; and
 - (b) intentionally or in a grossly negligent manner, expunges the criminal record of any person or confirms that a criminal record has been expunged as provided for in subsection (2), is guilty of an offence and is liable on conviction to a fine or to imprisonment for a period not exceeding 10 years or to both a fine and that imprisonment. 50

Regulations

271E. The Minister—

- (a) must make regulations regarding—
 - (i) the form on which a person's written application for the expungement of his or her criminal record must be made, as provided for in section 271B(1)(a) and section 271C(2)(a) and (b); 55

- (ii) the certificate of expungement to be issued by the Director-General: Justice and Constitutional Development or the Minister, as provided for in section 271B(2) and section 271C(3) and (5)(b); and 5
 - (iii) the manner in which the Director-General must submit certificates of expungement that have been issued, to the head of the Criminal Record Centre of the South African Police Service, as provided for in section 271B(3) and section 271C(4); and 10
- (b) may make regulations regarding any other matter which is necessary or expedient in order to achieve the objects of sections 271B, 271C and 271D.” 10

Short title and commencement

- 4. (1) This Act is called the Criminal Procedure Amendment Act, 2008, and comes into operation on a date fixed by the President by proclamation in the *Gazette*. 15
- (2) Different dates may be fixed in respect of different areas in the Republic.

MEMORANDUM ON THE OBJECTS OF THE CRIMINAL PROCEDURE AMENDMENT BILL, 2008

1. PURPOSE OF BILL AND BACKGROUND

- 1.1 Clause 1 of the Bill emanates from an investigation and report of the South African Law Reform Commission relating to the use of electronic equipment in court proceedings. It is intended to insert new sections 159A, 159B, 159C and 159D in the Criminal Procedure Act, 1977(Act 51 of 1977) (“the Act”), which will regulate the postponement of certain criminal proceedings against offenders in custody awaiting trial, by means of audiovisual link. Clause 2 amends the wording of section 271A of the Act without amending the substance of the section. This is intended to make the intention of the provision clearer. Clause 3 inserts new sections 271B, 271C, 271D and 271E in the Act. They provide for the expungement of certain criminal records, on application and after the expiry of a fixed period in certain circumstances, as well as for the automatic expungement of criminal records of persons who were convicted of offences under the previous constitutional dispensation, which would not have been considered to be offences under the new constitutional dispensation.
- 1.2 **Clause 1:** The Law Reform Commission noted the financial burden, as well as the security problems posed by the transportation of accused persons awaiting trial, to courts for postponements. The Law Reform Commission consequently concluded that there is a need for legislation to alleviate the financial burden and to address the security problems posed by the transportation of accused persons to and from the courts, by allowing for the postponement of certain criminal proceedings by means of audiovisual link. Provisions of this nature will also reduce the administrative processes for the Departments of Justice and Constitutional Development and Correctional Services, as well as the South African Police Service.
- 1.3 **Clauses 2 and 3:** Section 271A of the Act presently provides that the conviction of a person who is convicted of—
- (a) an offence for which the punishment may be a period of imprisonment longer than six months without the option of a fine and—
 - (i) the passing of sentence has been postponed in terms of section 297(1)(a) of the Act and the person has been discharged in terms of section 297(2) of the Act without the sentence being passed or the person has not been called to appear before the court in terms of section 297(3) of the Act; or
 - (ii) the person has been discharged with a caution or reprimand in terms of section 297(1)(c) of the Act; or
 - (b) any other offence than that for which the punishment may be a period of imprisonment longer than six months without the option of a fine, falls away as a previous conviction, after a period of 10 years has lapsed, unless the person is convicted, during that 10 year period, of an offence for which the punishment may be a period of imprisonment exceeding six months without the option of a fine. The automatic lapsing of previous convictions in terms of this provision, however, does not result in the automatic expungement of the conviction and sentence from the person’s criminal record. The lapsing of the criminal record also does not lead to the removal of the previous convictions from the criminal records of persons previously convicted. The records of deceased persons and those relating to decriminalised offences remain stored on the system of the Criminal Record Centre of the South African Police Service.

2. OBJECTS OF THE BILL

2.1 Clause 1:

- 2.1.1 Proposed new section 159(A)(1) contains self-explanatory definitions.

- 2.1.2 Proposed new section 159A(2) sets out the circumstances in which an accused person’s case may be postponed by means of audiovisual link. It provides that any accused person who is over the age of 18 years, who is in custody in a correctional facility in respect of an offence and who has already appeared in court, whose case has been postponed and who is in custody pending his or her trial and who is required to be brought before a court for the purpose of certain “subsequent proceedings”, is not required to appear or be brought physically before the court and may appear before the court by means of audiovisual link, unless the court directs that he or she appear or be brought physically before the court. Proceedings conducted by means of audiovisual link are deemed to have been conducted in the presence of the accused person if the accused person is able to follow the court proceedings and the court is able to see and hear the accused person, by means of audiovisual link. (Proposed new section 159A(3)) The remote point where the accused person appears is deemed to be part of the court. (Proposed new section 159A(4)).
- 2.1.3 Proposed new section 159B(1) provides that the technical requirements set out in proposed new section 159C, and proposed new section 159B(2) and (3), must be complied with for an accused person to appear before a court by means of audiovisual link. Proposed new section 159B (2) empowers the Minister to designate any correctional facility that has been suitably equipped, as a place where audiovisual “conferencing” may take place. Proposed section 159B (3) deals with private communications and the transmission of documents between the accused person and his or her legal representative where the legal representative is not present with the accused person at the remote point. In terms of proposed new section 159D, communication by means of audiovisual link is confidential between the accused person and his or her legal representative, and is inadmissible as evidence. Proposed section 159B(4) provides that the court must, at every appearance of an accused person in terms of section 159A, inquire into the physical and mental well-being of the accused person and for that purpose may, where necessary, direct that the audiovisual facilities be used in such a manner which will enable the presiding officer to satisfy himself or herself as to the accused person’s well-being as that presiding officer would be able to do if the accused person were physically before the court.
- 2.1.4 Proposed new section 159C requires the court point and the remote point to be equipped with facilities that enable all appropriate persons at the court point and remote point to see and follow the proceedings. It empowers the Minister to make regulations regarding the technical requirements for purposes of audiovisual postponements. It also empowers the court to give any direction it deems necessary to ensure a fair trial. Lastly, it provides that if there is an interruption of an audiovisual link, or if an audiovisual link is of a poor quality or if any of the audiovisual equipment malfunctions, the court must direct that the accused person be brought physically before the court.

2.2 Clauses 2 and 3:

- 2.2.1 Clause 2 amends the wording of section 271A of the Act.
- 2.2.2 Clause 3 inserts four new sections in the Act, namely sections 271B, 271C, 271D and 271E.
- 2.2.2.1 Proposed new section 271B sets out the category of sentences which qualify for expungement in certain circumstances, after a period of 10 years has lapsed since conviction. The clause also creates a procedure in terms of which persons may approach the Director-General: Justice and Constitutional

Development in order to have their criminal records expunged. If the Director-General is satisfied that the person complies with the criteria set out in the clause, he or she must issue a prescribed certificate of expungement, directing that the person's criminal record be expunged. The Director-General must then submit the certificate to the Criminal Record Centre of SAPS, which must expunge the record of the person and, at the request of the person in question, confirm in writing that the criminal record in question has been expunged. A number of exceptions have been created. A person does not qualify to have his or her criminal record expunged if his or her name appears in—

- (i) the National Register for Sex Offenders, as provided for in the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, as a result of a conviction for a sexual offence against a child or a mentally disabled person; or
- (ii) the National Child Protection Register as a result of a conviction for an offence, as provided for in the Children's Act, 2005.

2.2.2.2 Proposed new section 271C creates a mechanism for the automatic expungement of specific “apartheid offences” referred to in the provision, by the Criminal Record Centre. It also creates an application procedure in terms of which the Director-General: Justice and Constitutional Development can issue a certificate of expungement in the case of any “apartheid offence” not specifically referred to in the provision or in the case where the Criminal Record Centre, for any reason, has not expunged the record of a person automatically. The clause furthermore gives the Minister the final decision in the event of a dispute or any uncertainty as to whether an offence is an “apartheid offence” or not.

2.2.2.3 Proposed new section 271D details the role of the Criminal Record Centre in the expungement process.

2.2.2.4 Proposed new section 271E empowers the Minister to make regulations that are required in regard to these new provisions.

3. DEPARTMENTS/BODIES/PERSONS CONSULTED

During its investigation in respect of clause 1, the South African Law Reform Commission consulted widely and elicited comments from a variety of relevant parties in the public and private sector, including the judiciary, the legal profession, academics, the National Prosecuting Authority, the Department of Justice and Constitutional Development, the South African Police Service and the Department of Correctional Services.

4. IMPLICATION FOR PROVINCES

None.

5. ORGANISATIONAL AND PERSONNEL IMPLICATIONS

None.

6. FINANCIAL IMPLICATIONS FOR THE STATE

The costs incurred will be to install the court points and the remote points with the necessary technical equipment. The Department has developed a project imple-

mentation plan that envisages the roll-out of the audiovisual conferencing equipment to 40 of the largest courts. This requires funding in the region of R39,2 million, which has been set aside from the budget. An Impact Assessment Report on the Pilot Project of the Department in KwaZulu-Natal estimates that the operational cost savings as a result of offenders not being transported to court for postponements in respect of the current pilot project is approximately R59 159,09 per month.

7. COMMUNICATION IMPLICATIONS

None.

8. PARLIAMENTARY PROCEDURE

- 8.1 The State Law Advisers are of the opinion that this Bill must be dealt with in accordance with the procedure established by section 75 of the Constitution since it contains no provision to which the procedure set out in section 74 or 76 of the Constitution applies.
- 8.2 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 41 of 2003), since it does not contain provisions pertaining to customary law or customs of traditional communities.