

DRAFT AMENDMENT BILL
(20/06/2016)

CRIMINAL PROCEDURE AMENDMENT BILL

(.....)

(.....)

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.

CHAPTER 13**ACCUSED: CAPACITY TO UNDERSTAND PROCEEDINGS: MENTAL ILLNESS AND
CRIMINAL RESPONSIBILITY (ss 77-79)****Capacity of accused to understand proceedings**

77. (1) If it appears to the court at any stage of criminal proceedings that the accused is by reason of mental illness or **[mental defect]** intellectual disability not capable of understanding the proceedings so as to make a proper defence, the court shall direct that the matter be enquired into and be reported on in accordance with the provisions of section 79.

(1A) At proceedings in terms of sections 77(1) and 78(2) the court may, if it is of the opinion that substantial injustice would otherwise result, order that the accused be provided with the services of a legal practitioner in terms of section 22 of the Legal Aid South Africa Act, 2014.

(2) If the finding contained in the relevant report is the unanimous finding of the persons who under section 79 enquired into the mental condition of the accused and the finding is not disputed by the prosecutor or the accused, the court may determine the matter on such report without hearing further evidence.

(3) If the said finding is not unanimous or, if unanimous, is disputed by the prosecutor or the accused, the court shall determine the matter after hearing evidence, and the prosecutor and the accused may to that end present evidence to the court, including the evidence of any person who under section 79 enquired into the mental condition of the accused.

(4) Where the said finding is disputed, the party disputing the finding may subpoena and cross-examine any person who under section 79 has enquired into the mental condition of the accused.

(5) If the court finds that the accused is capable of understanding the proceedings so as to make a proper defence, the proceedings shall be continued in the ordinary way.

(6) (a) If the court which has jurisdiction in terms of section 75 to try the case, finds that the accused is not capable of understanding the proceedings so as to make a proper defence, the court may, if it is of the opinion that it is in the interests of the accused, taking into account the nature of the accused's incapacity contemplated in subsection (1), and unless it can be proved on a balance of probabilities that, on the limited evidence available the accused committed the act in question, order that such information or evidence be placed before the court as it deems fit so as to determine whether the accused has committed the act in question and the court **[shall]** may direct that the accused—

(i) in the case of a charge of murder or culpable homicide or rape or compelled rape as contemplated in **[sections]** section 3 or 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively, or a charge involving serious violence or if the court considers it to be necessary in the public interest, where the court finds that the accused has committed the act in question, or any other offence involving serious violence, be—

(aa) detained in a psychiatric hospital; or

(bb) be detained in a correctional health facility of a prison where a bed is not immediately available in a psychiatric hospital, if the court is of the opinion that it is necessary to do so on the grounds that the accused poses a serious danger or threat to him- or herself or to members of the public or to any property belonging to him or her or any other person;

pending the decision of a judge in chambers in terms of section 47 of the Mental Health Care Act, 2002;

(cc) admitted to and detained in an institution stated in the order as if he or she were an involuntary mental health care user contemplated in section 37 of the Mental Health Care Act, 2002; or

(dd) released subject to such conditions as the court considers appropriate; or

(ii) where the court finds that the accused has committed an offence other than one contemplated in subparagraph (i) or that he or she has not committed any offence—

(aa) be admitted to and detained in an institution stated in the order as if he or she were an involuntary mental health care user contemplated in section 37 of the Mental Health Care Act, 2002[.];

(bb) be released subject to such conditions as the court considers appropriate; or

(cc) be released unconditionally, where the court has found that the accused has not committed any offence and deems it appropriate to do so,

and if the court so directs after the accused has pleaded to the charge, the accused shall not be entitled under section 106(4) to be acquitted or to be convicted in respect of the charge in question.

(b) If the court makes a finding in terms of paragraph (a) after the accused has been convicted of the offence charged but before sentence is passed, the court shall set the conviction aside, and if the accused has pleaded guilty it shall be deemed that he or she has pleaded not guilty.

(7) Where a direction is issued in terms of subsection (6) or (9), the accused may at any time thereafter, when he or she is capable of understanding the proceedings so as to make a proper defence, be prosecuted and tried for the offence in question.

(8) (a) An accused against whom a finding is made—

- (i) under subsection (5) and who is convicted;
- (ii) under subsection (6) and against whom the finding is not made in consequence of an allegation by the accused under subsection (1),

may appeal against such finding.

(b) Such an appeal shall be made in the same manner and subject to the same conditions as an appeal against a conviction by the court for an offence.

(9) Where an appeal against a finding in terms of subsection (5) is allowed, the court of appeal shall set aside the conviction and sentence and **[direct that the person concerned be detained]** remit the case to the court which made the finding, whereupon that court must deal with the person concerned in accordance with the provisions of subsection (6).

(10) Where an appeal against a finding under subsection (6) is allowed, the court of appeal shall set aside the direction issued under that subsection and remit the case to the court which made the finding, whereupon the relevant proceedings shall be continued in the ordinary way.

Mental illness or [mental defect] intellectual disability and criminal responsibility

78. (1) A person who commits an act or makes an omission which constitutes an offence and who at the time of such commission or omission suffers from a mental illness or **[mental defect] intellectual disability** which makes him or her incapable—

- (a) of appreciating the wrongfulness of his or her act or omission; or
- (b) of acting in accordance with an appreciation of the wrongfulness of his or her act or omission,

shall not be criminally responsible for such act or omission.

(1A) Every person is presumed not to suffer from a mental illness or **[mental defect]** intellectual disability so as not to be criminally responsible in terms of section 78(1), until the contrary is proved on a balance of probabilities.

(1B) Whenever the criminal responsibility of an accused with reference to the commission of an act or an omission which constitutes an offence is in issue, the burden of proof with reference to the criminal responsibility of the accused shall be on the party who raises the issue.

(2) If it is alleged at criminal proceedings that the accused is by reason of mental illness or **[mental defect]** intellectual disability or for any other reason not criminally responsible for the offence charged, or if it appears to the court at criminal proceedings that the accused might for such a reason not be so responsible, the court shall in the case of an allegation or appearance of mental illness or **[mental defect]** intellectual disability, and may, in any other case, direct that the matter be enquired into and be reported on in accordance with the provisions of section 79.

(3) If the finding contained in the relevant report is the unanimous finding of the persons who under section 79 enquired into the relevant mental condition of the accused, and the finding is not disputed by the prosecutor or the accused, the court may determine the matter on such report without hearing further evidence.

(4) If the said finding is not unanimous or, if unanimous, is disputed by the prosecutor or the accused, the court shall determine the matter after hearing evidence, and the prosecutor and the accused may to that end present evidence to the court, including the evidence of any person who under section 79 enquired into the mental condition of the accused.

(5) Where the said finding is disputed, the party disputing the finding may subpoena and cross-examine any person who under section 79 enquired into the mental condition of the accused.

(6) If the court finds that the accused committed the act in question and that he or she at the time of such commission was by reason of mental illness or intellectual disability not criminally responsible for such act—

- (a) the court shall find the accused not guilty; or
- (b) if the court so finds after the accused has been convicted of the offence charged but before sentence is passed, the court shall set the conviction aside and find the accused not guilty,

by reason of mental illness or intellectual disability, as the case may be, and direct—

- (i) in a case where the accused is charged with murder or culpable homicide or rape or compelled rape as contemplated in **[sections]** section 3 or 4 of the Criminal Law

(Sexual Offences and Related Matters) Amendment Act, 2007, respectively, or another charge involving serious violence, or if the court considers it to be necessary in the public interest that the accused be—

(aa) detained in a psychiatric hospital; or

(bb) be detained in a correctional health facility of a prison where a bed is not immediately available in a psychiatric hospital, if the court is of the opinion that it is necessary to do so on the grounds that the accused poses a serious danger or threat to him- or herself or to members of the public or to any property belonging to him or her or any other person;

pending the decision of a judge in chambers in terms of section 47 of the Mental Health Care Act, 2002;

[(bb)] *(cc)* admitted to and detained in an institution stated in the order and treated as if he or she were an involuntary mental **[care health]** health care user contemplated in section 37 of the Mental Health Care Act, 2002;

(cc)

(dd) released subject to such conditions as the court considers appropriate; or

(ee) released unconditionally;

(ii) in any other case than a case contemplated in subparagraph (i), that the accused—

(aa) be admitted to and detained in an institution stated in the order and treated as if he or she were an involuntary mental health care user contemplated in section 37 of the Mental Health Care Act, 2002;

(bb)

(cc) be released subject to such conditions as the court considers appropriate; or

(dd) be released unconditionally.

(7) If the court finds that the accused at the time of the commission of the act in question was criminally responsible for the act but that his capacity to appreciate the wrongfulness of the act or to act in accordance with an appreciation of the wrongfulness of the act was diminished by reason of mental illness or **[mental defect]** intellectual disability, the court may take the fact of such diminished responsibility into account when sentencing the accused.

(8) *(a)* An accused against whom a finding is made under subsection (6) may appeal against such finding if the finding is not made in consequence of an allegation by the accused under subsection (2).

(b) Such an appeal shall be made in the same manner and subject to the same conditions as an appeal against a conviction by the court for an offence.

(9) Where an appeal against a finding under subsection (6) is allowed, the court of appeal shall set aside the finding and the direction under that subsection and remit the case to the court which made the finding, whereupon the relevant proceedings shall be continued in the ordinary course.

Panel for purposes of enquiry and report under sections 77 and 78

79. (1) Where a court issues a direction under section 77(1) or 78(2), the relevant enquiry shall be conducted and be reported on—

- (a) where the accused is charged with an offence other than one referred to in paragraph (b), by the **[medical superintendent of a psychiatric hospital]** head of a health establishment, as defined in section 1 of the Mental Health Care Act, 2002, designated by the court, if he or she is a psychiatrist, [designated by the court,] or if he or she is not a psychiatrist, by a psychiatrist appointed by the **[medical superintendent at the request of the court]** head of the health establishment concerned; or
- (b) where the accused is charged with murder or culpable homicide or rape or compelled rape as provided for in sections 3 or 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively, or another charge involving serious violence, or if the court considers it to be necessary in the public interest, or where the court in any particular case so directs—
- (i) by the **[medical superintendent of a psychiatric hospital designated by the court]** head of a health establishment, as defined in section 1 of the Mental Health Care Act, 2002, designated by the court, if he or she is a psychiatrist, or if he or she is not a psychiatrist, by a psychiatrist appointed by the **[medical superintendent at the request of the court]** head of the health establishment concerned;
- (ii) by a psychiatrist or clinical psychologist appointed by the court **[and who is not in the full-time service of the State unless the court directs otherwise, upon application of the prosecutor, in accordance with directives issued under subsection (13) by the National Director of Public Prosecutions];** and
- (iii) by a psychiatrist or clinical psychologist appointed **[for]** by the court upon application by the accused [by the court; and
- (iv) **by a clinical psychologist where the court so directs].**

(1A) The prosecutor undertaking the prosecution of the accused or any other prosecutor attached to the same court shall provide the persons who, in terms of subsection (1),

have to conduct the enquiry and report on the accused's mental condition or mental capacity with a report in which the following are stated, namely—

- (a) whether the referral is taking place in terms of section 77 or 78;
- (b) at whose request or on whose initiative the referral is taking place;
- (c) the nature of the charge against the accused;
- (d) the stage of the proceedings at which the referral took place;
- (e) the purport of any statement made by the accused before or during the court proceedings that is relevant with regard to his or her mental condition or mental capacity;
- (f) the purport of evidence that has been given that is relevant to the accused's mental condition or mental capacity;
- (g) in so far as it is within the knowledge of the prosecutor, the accused's social background and family composition and the names and addresses of his or her near relatives; and
- (h) any other fact that may in the opinion of the prosecutor be relevant in the evaluation of the accused's mental condition or mental capacity.

(2) (a) The court may for the purposes of the relevant enquiry commit the accused to a psychiatric hospital or to any other place designated by the court, for such periods, not exceeding thirty days at a time, as the court may from time to time determine, and where an accused is in custody when he is so committed, he shall, while he is so committed, be deemed to be in the lawful custody of the person or the authority in whose custody he was at the time of such committal.

(b) When the period of committal is for the first time extended under paragraph (a), such extension may be granted in the absence of the accused unless the accused or his legal representative requests otherwise.

(c) The court may make the following orders after the enquiry referred to in subsection (1) has been conducted—

- (i) postpone the case for such periods referred to in paragraph (a), as the court may from time to time determine;
- (ii) refer the accused at the request of the prosecutor to the court referred to in section 77(6) which has jurisdiction to try the case;
- (iii) make any other order it deems fit regarding the custody of the accused; or
- (iv) any other order.

(3) The relevant report shall be in writing and shall be submitted in triplicate to the registrar or, as the case may be, the clerk of the court in question, who shall make a copy thereof available to the prosecutor and the accused.

(4) The report shall—

- (a) include a description of the nature of the enquiry; and
- (b) include a diagnosis of the mental condition of the accused; and
- (c) if the enquiry is under section 77(1), include a finding as to whether the accused is capable of understanding the proceedings in question so as to make a proper defence; or
- (d) if the enquiry is in terms of section 78(2), include a finding as to the extent to which the capacity of the accused to appreciate the wrongfulness of the act in question or to act in accordance with an appreciation of the wrongfulness of that act was, at the time of the commission thereof, affected by mental illness or **[mental defect]** intellectual disability or by any other cause.

(5) If the persons conducting the relevant enquiry are not unanimous in their finding under paragraph (c) or (d) of subsection (4), such fact shall be mentioned in the report and each of such persons shall give his finding on the matter in question.

(6) Subject to the provisions of subsection (7), the contents of the report shall be admissible in evidence at criminal proceedings.

(7) A statement made by an accused at the relevant enquiry shall not be admissible in evidence against the accused at criminal proceedings, except to the extent to which it may be relevant to the determination of the mental condition of the accused, in which event such statement shall be admissible notwithstanding that it may otherwise be inadmissible.

(8) A psychiatrist and a clinical psychologist appointed under subsection (1)**], other than a psychiatrist and a clinical psychologist appointed for the accused,** shall, subject to the provisions of subsection (10), be appointed from the list of psychiatrists and clinical psychologists referred to in subsection (9)(a).

(9) The Director-General: Health shall compile and keep a list of—

- (a) psychiatrists and clinical psychologists who are prepared to conduct any enquiry under this section; and
- (b) psychiatrists who are prepared to conduct any enquiry under section 286A(3), and shall provide the registrars of the High Courts and all clerks of magistrate's courts with a copy thereof.

(10) Where the list compiled and kept under subsection (9)(a) does not include a sufficient number of psychiatrists and clinical psychologists who may conveniently be appointed for any enquiry under this section, a psychiatrist and clinical psychologist may be appointed for the purposes of such enquiry notwithstanding that his or her name does not appear on such list.

(11) (a) A psychiatrist or clinical psychologist designated or appointed under subsection (1) by or at the request of the court to enquire into the mental condition of an accused and who is not in the full-time service of the State, shall be compensated for his or her services in connection with the enquiry from public funds in accordance with a tariff determined by the Minister in consultation with the Minister of Finance.

(b) A psychiatrist or clinical psychologist appointed under subsection (1)(b)(iii) **[for the accused]** to enquire into the mental condition of the accused and who is not in the full-time service of the State, shall be compensated for his or her services from public funds in the circumstances and in accordance with a tariff determined by the Minister in consultation with the Minister of Finance.

(12) For the purposes of this section a psychiatrist or a clinical psychologist means a person registered as a psychiatrist or a clinical psychologist under the Health Professions Act, 1974 (Act No. 56 of 1974).

[(13) (a) The National Director of Public Prosecutions must, in consultation with the Minister, issue directives regarding the cases and circumstances in which a prosecutor must apply to the court for the appointment of a psychiatrist as provided for in subsection (1)(b)(ii) and any directive so issued must be observed in the application of this section.

(b) The directives referred to in paragraph (a) must ensure that adequate disciplinary steps will be taken against a prosecutor who fails to comply with any directive.

(c) The Minister must submit any directives issued under this subsection to Parliament before those directives take effect, and the first directives so issued, must be submitted to Parliament within four months of the commencement of this subsection.

(d) Any directive issued under this subsection may be amended or withdrawn in like manner.]

