

REPUBLIC OF SOUTH AFRICA

CRIMINAL PROCEDURE AMENDMENT BILL

*(As introduced in the National Assembly (proposed section 75); explanatory summary of
Bill published in Government Gazette No. 31115 of 2 June 2008)
(The English text is the official text of the Bill)*

(MINISTER FOR JUSTICE AND CONSTITUTIONAL DEVELOPMENT)

[B 42—2008]

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GENERAL EXPLANATORY NOTE:

[] Words in bold type in square brackets indicate omissions from existing enactments.

_____ Words underlined with a solid line indicate insertions in existing enactments.

BILL

To amend the Criminal Procedure Act, 1977, to provide for the postponement of certain criminal proceedings against an accused person in custody awaiting trial through audiovisual link or audio link; to provide for the expungement of criminal records of certain persons in respect of whom certain sentences have been imposed after the compliance with certain requirements and the expiry of a fixed period; and to provide for matters connected therewith.

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

Insertion of sections 159A, 159B, 159C and 159D in Act 51 of 1977

1. The following sections are hereby inserted in the Criminal Procedure Act, 1977 (hereinafter referred to as the principal Act), after section 159: 5

“Postponement of certain criminal proceedings through audiovisual link

159A. (1) For purposes of this section and sections 159B, 159C and 159D, unless the context indicates otherwise—

- (a) **‘appropriate person’** means any court official or any other person at the court point and remote point who is required to be, or may be present, at the proceedings, including the presiding officer, the prosecutor, the accused person’s legal representative, any technical assistant, the clerk of the court, any witnesses, and members of the public who are entitled to be present; 10
15
- (b) **‘audiovisual link’** means a live television link between the court point and the remote point which are both equipped with facilities which will enable all appropriate persons at the court point and the remote point to follow the proceedings and see and hear all the appropriate persons, and **‘audio link’** has a corresponding meaning; 20
- (c) **‘court point’** means the courtroom or other place where the court having jurisdiction is sitting;
- (d) **‘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 25

- (e) **‘remote point’** means the room or place at the designated correctional facility where the accused person appearing through the video 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—
- (a) he or she is held in custody in a correctional facility; and
 - (b) he or she 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 contemplated 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 contemplated in section 159C, allow—
- (a) private communication to take place between the accused person and any legal practitioner representing him or her in the proceedings at the court point; and
 - (b) documents to be transmitted between both points by the persons contemplated in paragraph (a)—
 - (i) at any time during the proceedings;
 - (ii) during any adjournment of the hearing in the proceedings contemplated in paragraph (a); or
 - (iii) at any time on the day of a hearing, shortly before or after the hearing.

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

(3) 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 contemplated 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:

“Expungement of records of [Certain] certain convictions [fall away as previous convictions after expiration of 10 years]

271A. (1) Where a court has imposed any of the following sentences on any person convicted [a person of—

(a) **an offence for which the punishment may be a period of imprisonment exceeding six months without the option of a fine, and—**

(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 which the punishment may be a period of imprisonment exceeding six months without the option of a fine, that] of any offence the conviction and sentence in question [shall] fall away as a previous conviction and the criminal record of that person must, subject to subsections (3) and (4) and section 271C, on the person’s written application in the prescribed form, be expunged [if] after a period of [10] five years has elapsed after the date of conviction of the said offence, unless during that period such person has been convicted of [an] any other offence [for which the punishment may be a period of imprisonment exceeding six months without the option of a fine];**

(a) A sentence postponing the passing of sentence in terms of section 297(1)(a) where the person in question was discharged in terms of section 297(2), without the passing of sentence, or where the person in question was not called upon to appear before the court in terms of section 297(3);

(b) a sentence discharging the person in question with a caution or reprimand in terms of section 297(1)(c);

(c) a sentence in the form of a fine only, not exceeding R10 000; or

(d) a sentence for corporal punishment before corporal punishment was declared to be unconstitutional as a sentencing option.

(2) Where a court has imposed any of the following sentences on a person convicted of an offence, the conviction and sentence in question fall away as a previous conviction and the criminal record of that person must, subject to subsections (3) and (4) and section 271C, on the person’s written application in the prescribed form, be expunged after a period of 10 years has elapsed after the date of conviction of the said offence, unless during

that period such person has been convicted of an offence and has been sentenced to a period of imprisonment exceeding six months without the option of a fine:

- (a) A sentence postponing the passing of sentence in terms of section 297(1)(a) where the person in question was discharged in terms of section 297(2), without the passing of sentence, or where the person in question was not called upon to appear before the court in terms of section 297(3); 5
- (b) a sentence discharging the person in question with a caution or reprimand in terms of section 297(1)(c); 10
- (c) a sentence in the form of a fine only, not exceeding R50 000;
- (d) a sentence for corporal punishment before corporal punishment was declared to be unconstitutional as a sentencing option;
- (e) a sentence of imprisonment for a period of six months or less, with or without the option of a fine; 15
- (f) a sentence of imprisonment for a period of six months or less, the period of which was suspended, either partially or wholly;
- (g) a sentence of imprisonment for a period of 12 months or less which was suspended partially, the effect of which was that only a period of six months or less was required to be served in a correctional facility by the person in question; 20
- (h) a sentence of correctional supervision, as contemplated in section 276(1)(h) or (i);
- (i) a sentence of periodical imprisonment, as contemplated in section 276(1)(c); or 25
- (j) a sentence of imprisonment for a period of two years or less, with or without the option of a fine, where the person was younger than 18 years at the time of the commission of the offence: Provided that this paragraph does not preclude a person who was younger than 18 years at the time of the commission of the offence from having his or her criminal record expunged in terms of paragraphs (a) to (i) of this subsection or paragraphs (a) to (d) of subsection (1), if any of the criteria contemplated in the said paragraphs are applicable. 30

(3) The Director-General: Justice must, on receipt of the written application of a person contemplated in subsection (1) or (2), issue a prescribed certificate of expungement, directing that the conviction and sentence of the person in question be expunged, if the Director-General is satisfied that the person applying for such expungement complies with the criteria set out in subsection (1) or (2), as the case may be. 35

(4) Despite the provisions of subsections (1), (2) and (3), the Minister may, on receipt of a person's written application in the prescribed form, issue a prescribed certificate of expungement, directing that the conviction and sentence of the person in question be expunged, if he or she is satisfied that exceptional circumstances exist which justify such expungement, where, in the case of such person— 45

- (a) the period of five years, as contemplated in subsection (1); or
- (b) the period of 10 years, as contemplated in subsection (2), has not yet elapsed, if the Minister is satisfied that such person otherwise complies with the criteria set out in subsection (1) or (2), as the case may be. 50

(5) A person to whom a certificate of expungement has been issued as contemplated in subsection (3) or (4) must, in the prescribed manner, submit such certificate to the head of the Criminal Record Centre of the South African Police Service, to be dealt with in accordance with section 271C.”

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

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

“Expungement of records of certain convictions under old order legislation enacted before the Constitution of the Republic of South Africa, 1993, took effect

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

- (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 Bantu Land and Trust Act, 1936 (Act No. 18 of 1936);
- (c) a contravention of section 5(1) read with section 5(2) or section 6 read with section 6(2) of the Bantu (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);
- (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 Suppression of Communism Act, 1950 (Act No. 44 of 1950);
- (g) a contravention of section 2 of the Criminal Law Amendment Act, 1953 (Act No. 8 of 1953);
- (h) a contravention of section 2(2) of the Reservation of Separate Amenities Act, 1953 (Act No. 49 of 1953);
- (i) a contravention of section 16 of the Immorality Act, 1957 (Act No. 23 of 1957);
- (j) a contravention of section 46 of the Group Areas Act, 1966 (Act No. 36 of 1966);
- (k) a contravention of section 2 or 3 of the Terrorism Act, 1967 (Act No. 83 of 1967); or
- (l) a contravention of section 2 read with section 4(1) of the Prohibition of Political Interference Act, 1968 (Act No. 51 of 1968).

(2)(a) Where a court has convicted a person of contravening any old order legislation other than those referred to in subsection (1), which was enacted either in the Republic or in any homeland, 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 with a view to promoting the policy of apartheid, 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 conviction and sentence in question fall away as a previous conviction and the criminal record of that person must, on the person’s written application in the prescribed form, subject to subsection (3) and section 271C, be expunged.

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

(3) The Director-General: Justice must, on receipt of the written application of a person contemplated in subsection (2)(a) or (b), issue a prescribed certificate of expungement, directing that the conviction and sentence of the person be expunged, if the Director-General is satisfied that the person applying for such expungement complies with the criteria set out in subsection (1) or subsection (2)(a), as the case may be.

(4) A person to whom a certificate of expungement has been issued as contemplated in subsection (3) must, in the prescribed manner, submit such certificate to the head of the Criminal Record Centre of the South African Police Service, to be dealt with in accordance with section 271C.

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

(b) If the Minister decides that the offence is an offence as contemplated in subsection (1) or (2)(a), he or she must issue a prescribed certificate of expungement, directing that the conviction and sentence of the person in question be expunged.

Expungement of records of certain convictions by Criminal Record Centre

271C. (1)(a) 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 said Centre, who has or have been authorised, in writing, by the head of the said Centre to do so, must expunge the criminal record of a person if—

- (i) he or she is furnished with a certificate of expungement by the Director-General: Justice as contemplated in section 271A(3) or section 271B(3) or by the Minister as contemplated in section 271A(4) or 271B(5); or
- (ii) that person qualifies for the automatic expungement of his or her criminal record as contemplated in section 271B(1).

(2) The head of the Criminal Record Centre of the South African Police Service must furnish any person whose criminal record has been expunged in accordance with section 271A, 271B or this section and who, in writing, so requests, with a certificate in accordance with national instructions issued by the National Commissioner of the South African Police Service, which does not reflect the criminal record or records which have been so expunged.

(3) Any person who—

- (a) without the authority of a certificate of expungement as contemplated in section 271A, 271B or this section; or
- (b) intentionally or in a grossly negligent manner, expunges the criminal record of any person or issues a certificate in accordance with 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 such imprisonment.

Regulations

271D. The Minister must make regulations which are necessary to prescribe in order to give effect to sections 159B, 271A, 271B and 271C of this Act.”.

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*.

(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 by the South African Law Reform Commission (Law Reform Commission) and is intended to insert new provisions in the Criminal Procedure Act, 1977 (Act No. 51 of 1977) (“the Act”), dealing with the postponement of certain criminal proceedings against offenders in custody awaiting trial, by means of audiovisual link. Clauses 2 and 3 amend and insert new provisions in the Act, dealing with the expungement of criminal records of certain persons, after the expiry of a fixed period in certain circumstances.
- 1.2 **Clause 1:** The Law Reform Commission noted the financial burden, as well as the security problems posed by the transportation of offenders 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 transportation of offenders to 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 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 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. This has necessitated the need to broaden the scope of convictions that can fall away after certain requirements have been complied with.

2. OBJECTS OF BILL

2.1 Clause 1:

- 2.1.1 Proposed new section 159A(1) contains self-explanatory definitions.
- 2.1.2 Proposed new section 159A(2) sets out the circumstances in which an offender’s case may be postponed by means of audiovisual link. It makes provision for any offender 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”, not to appear or be brought physically before the court and to appear before the court by means of audiovisual link, unless the court directs that he or she appears or be brought physically before the court. Proceedings conducted by means of audio-visual link are deemed to have been conducted in the presence of the offender if the offender is able to follow the court proceedings and the court is able to see and hear the offender, by means of audiovisual link. (Proposed new section 159A(3)). The remote point where the 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 the proposed new section 159C, and proposed new section 159B(2) and (3), must be complied with for an offender to appear before a court by means of an 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 the proposed new section 159D, communication by means of audiovisual link is confidential between the offender and his or her legal representative, and is inadmissible as evidence.
- 2.1.4 Proposed section 159C requires the court point and the remote point to be equipped with facilities that enable all appropriate persons at the court point to 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.

2.2 Clauses 2 and 3

- 2.2.1 Clause 2 amends section 271A of the Act. It proposes the creation of two categories of sentences which qualify for expungement in certain circumstances, one category after a period of five years has lapsed since the conviction in question and the other after a period of 10 years since conviction. The clause also creates a procedure in terms of which persons may approach the Director-General: Justice in order to have their criminal records expunged. If the Director-General is satisfied that the person complies with the criteria set out in either one of the two categories, he or she must issue a prescribed certificate of expungement, directing that the person’s criminal record be expunged. The Minister is also given a discretion, upon application by a person, to issue a certificate of expungement if he or she is satisfied that exceptional circumstances exist where the period of five or 10 years has not lapsed but the person otherwise complies with the criteria in question. The person in question must then submit the certificate to the Criminal Record Centre of SAPS, which must expunge the record of the person and issue a certificate which does not reflect the conviction and sentence so expunged.
- 2.2.2 Clause 3 inserts three new sections in the Act, namely sections 271B, 271C and 271D.
- 2.2.2.1 Proposed new section 271B 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 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 also 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.

2.2.2.2 Proposed new section 271C details the role of the Criminal Record Centre in the expungement process.

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

3. DEPARTMENTS AND PARTIES 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 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 implementation plan that envisages the roll-out of the audio-visual conferencing equipment to 40 of the largest courts. This requires funding in the region of R39,2 million. An Impact Assessment Report on the Pilot Project of the Department in KwaZulu-Natal estimates that the operational cost savings as a result of prisoners not being transported to court for adjournments in respect of the current pilot project is 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.

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