

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. 33619 of 7 October 2010)
(The English text is the official text of the Bill)*

(MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT)

[B 39—2010]

REPUBLIEK VAN SUID-AFRIKA

STRAFPROSESWYSIGINGS- WETSONTWERP

*(Soos by die Nasionale Vergadering ingedien (voorgestelde artikel 75); verduidelikende
opsomming van Wetsontwerp in Staatskoerant No. 33619 van 7 Oktober 2010 gepubliseer)
(Die Afrikaanse teks is die amptelike vertaling van die Wetsontwerp)*

(MINISTER VAN JUSTISIE EN STAATKUNDIGE ONTWIKKELING)

[W 39—2010]

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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, so as to substitute and align the provisions relating to the use of force in effecting arrest of a suspect with a judgment of the Constitutional Court; and to provide for matters connected therewith.

PARLIAMENT of the Republic of South Africa enacts, as follows:—

Substitution of section 49 of Act 51 of 1977, as substituted by section 7 of Act 122 of 1998

1. The following section is hereby substituted for section 49 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977):

“Use of force in effecting arrest

49. (1) For the purposes of this section—

- (a) **‘arrestor’** means any person authorised under this Act to arrest or to assist in arresting a suspect; **[and]** 10
- (b) **‘suspect’** means any person in respect of whom an arrestor has **[or had]** a reasonable suspicion that such person is committing or has committed an offence; and
- (c) **‘deadly force’** means force that is likely to cause serious bodily harm or death and includes, but is not limited to, shooting at a suspect with a firearm. 15

(2) If any arrestor attempts to arrest a suspect and the suspect resists the attempt, or flees, or resists the attempt and flees, when it is clear that an attempt to arrest him or her is being made, and the suspect cannot be arrested without the use of force, the arrestor may, in order to effect the arrest, use such force as may be reasonably necessary and proportional in the circumstances to overcome the resistance or to prevent the suspect from fleeing: Provided that the arrestor **[is justified in terms of this section in using deadly force that is intended or is likely to cause death or grievous bodily harm to a suspect, only if he or she believes on reasonable grounds—** 25

- (a) **that the force is immediately necessary for the purposes of protecting the arrestor, any person lawfully assisting the arrestor**

or any other person from imminent or future death or grievous bodily harm;

- (b) that there is a substantial risk that the suspect will cause imminent or future death or grievous bodily harm if the arrest is delayed; or
- (c) that the offence for which the arrest is sought is in progress and is of a forcible and serious nature and involves the use of life threatening violence or a strong likelihood that it will cause grievous bodily harm]

may use deadly force only if—

- (a) the suspect poses a threat of serious violence to the arrestor or any other person; or
- (b) the suspect is suspected on reasonable grounds of having committed a crime involving the infliction or threatened infliction of serious bodily harm and there are no other reasonable means of effecting the arrest, whether at that time or later.

Short title

2. This Act is called the Criminal Procedure Amendment Act, 2010.

MEMORANDUM ON THE OBJECTS OF THE CRIMINAL PROCEDURE AMENDMENT BILL, 2010

1. BACKGROUND AND OBJECTS

1.1 Section 49 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), governs the circumstances in which an arrestor may use force in effecting the arrest of a suspect and the degree of force that may be reasonable necessary in the circumstances.

1.2 The current text of section 49 was inserted through an amendment by the Judicial Matters Second Amendment Act, 1998 (Act No. 122 of 1998). It was anticipated at that time that the old text would not pass constitutional muster.

1.3 The current text only came into force in 2003, five years since Parliament enacted the Judicial Matters Second Amendment Act, 1998. In 2002, prior to the amendment referred to above coming into force, the Constitutional Court, in *Ex parte: The Minister of Safety and Security and Others: In re the State v Walters and Another* 2002 (2) SACR 105 (CC) ("*State v Walters*"), declared unconstitutional and invalid section 49(2) of the old text.

1.4 In addition, the Constitutional Court ruled that section 49(1) must be interpreted as set out by the Supreme Court of Appeal in *Govender v Minister of Safety and Security* 2001 (4) SA 273 (SCA).

1.5 In order to "make perfectly clear" what the law regarding this topic is, the Constitutional Court tabulated the main points as follows (paragraph [54] of *State v Walters*):

- "(a) *The purpose of arrest is to bring before court for trial persons suspected of having committed offences.*
- (b) *Arrest is not the only means of achieving this purpose, nor always the best.*
- (c) *Arrest may never be used to punish a suspect.*
- (d) *Where arrest is called for, force may be used only where it is necessary in order to carry out the arrest.*
- (e) *Where force is necessary, only the least degree of force reasonably necessary to carry out the arrest may be used.*
- (f) *In deciding what degree of force is both reasonable and necessary, all the circumstances must be taken into account, including the threat of violence the suspect poses to the arrestor or others, and the nature and circumstances of the offence the suspect is suspected of having committed; the force being proportional in all these circumstances.*
- (g) *Shooting a suspect solely in order to carry out an arrest is permitted in very limited circumstances only.*
- (h) ***Ordinarily such shooting is not permitted unless the suspect poses a threat of violence to the arrestor or others or is suspected on reasonable grounds of having committed a crime involving the infliction or threatened infliction of serious bodily harm and there are no other reasonable means of carrying out the arrest, whether at that time or later.***
- (i) *These limitations in no way detract from the rights of an arrestor attempting to carry out an arrest to kill a suspect in self-defence or in defence of any other person."*

(Emphasis added)

1.6 At the time of formulating the current text of section 49, Parliament did not have the benefit of the authoritative guidelines furnished by the Constitutional Court in the *State v Walters* case regarding the use of force for the purpose of effecting an arrest of a suspect. Furthermore, the South African Police Service raised serious concerns regarding the interpretation and application of the current text, especially in so far as appropriate training of police officers was concerned.

1.7 The above-mentioned concerns led to the five-year delay in the commencement of the current text.

1.8 Although no objection has to date been raised against the constitutionality of the current text, it has been the subject of criticism by legal scholars for, firstly, being difficult to interpret and, secondly, equating the use of force for the purpose of effecting arrest of a suspect in terms of section 49 to the established common law principles of private or self-defence, including acting in defence of others.

1.9 Some legal scholars suggested that it would have been better not to put the current text into operation, in which event the “more satisfactory” legal position set out in the *State v Walters* case would continue to apply. One particular scholar goes as far as suggesting that the current text has given a suspect a “right to flee” (Snyman: Criminal Law 5th Ed on 136).

1.10 In view of the above, legal certainty regarding the use of force in effecting an arrest of a suspect would be improved by aligning section 49 with the criteria laid down by the Constitutional Court ruling in the *State v Walters* case.

1.11 The object of the Criminal Procedure Amendment Bill, 2010 (“the Bill”), is to align section 49 with the criteria laid down in the *State v Walters* case.

2. PROVISIONS OF BILL

2.1 The Bill seeks to amend section 49(1) by inserting the definition of “deadly force”, and by deleting the words “that is intended or is likely to cause death or serious bodily harm to a suspect” in section 49(2).

2.2 The Bill also seeks to amend section 49(2) by aligning the words in the proviso, that sets out the criteria as to when deadly force may be used in order to effect the arrest of a suspect, with the criteria tabulated by the Constitutional Court in the *State v Walters* case.

3. DEPARTMENTS, BODIES AND PERSONS CONSULTED

Public comments on a draft version of the Bill were invited and received from the following departments, bodies and persons:

- Civilian Secretariat of Police;
- Eastern Cape High Court;
- Western Cape High Court (Law Researchers);
- Centre for Constitutional Rights (CCR);
- Centre for the Study of Violence and Reconciliation (CSVR);
- Commission on Gender Equality (CGE);
- Institute for Security Studies (ISS);
- People Opposing Women Abuse (POWA);
- South African Gun Owners Association;
- Southern African Catholic Bishops’ Conference;
- A number of individuals, including legal scholars; and
- Members of the National Prosecuting Authority.

4. FINANCIAL IMPLICATIONS FOR STATE

None.

5. PARLIAMENTARY PROCEDURE

5.1 The State Law Advisers and the Department of Justice and Constitutional Development are of the opinion that the 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.

5.2 The State Law Advisers are of the opinion that it is not necessary to refer the 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 No. 41 of 2003), since it does not contain provisions pertaining to customary law or customs of traditional communities.

