
GENERAL NOTICES • ALGEMENE KENNISGEWINGS

DEPARTMENT OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT**NOTICE 288 OF 2018****DEPARTMENT OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT
PUBLICATION OF EXPLANATORY SUMMARY OF THE STATE LIABILITY AMENDMENT
BILL, 2018 AND THE CRIMINAL PROCEDURE AMENDMENT BILL, 2018**

1. Notice is hereby given in terms of Rule 276(1)(b) of the Rules of the National Assembly that the Minister of Justice and Correctional Services intends to introduce the State Liability Amendment Bill, 2018, and the Criminal Procedure Amendment Bill, 2018, in the National Assembly shortly.

2.1 The explanatory summary of the Bills is hereby published in accordance with Rule 276(1)(c) of the Rules of the National Assembly.

2.2 The State Liability Amendment Bill, 2018, seeks to amend the State Liability Act, 1957 (Act No. 20 of 1957), so as to provide for structured settlements for the satisfaction of claims against the State as a result of wrongful medical treatment of persons by servants of the State; and to provide for matters connected therewith.

2.3 The Criminal Procedure Amendment Bill, 2018, seeks to amend the Criminal Procedure Act, 1977 (Act No. 51 of 1977), so as to extend the list of offences in respect of which a prosecution may be instituted after a period of 20 years has lapsed since the date of the alleged commission of an offence; and to provide for matters connected therewith.

3. Copies of the Bills can be found on the websites of the Department and Parliamentary Monitoring Group at <http://www.justice.gov.za> and <http://www.pmg.org.za> and, after introduction, may also be obtained from: Government Printers: Cape Town (Telephone number: (021) 465-7531).

DEPARTEMENT VAN JUSTISIE EN STAATKUNDIGE ONTWIKKELING**KENNISGEWING 288 VAN 2018****DEPARTEMENT VAN JUSTISIE EN STAATKUNDIGE ONTWIKKELING****PUBLIKASIE VAN VERDUIDELIKENDE OPSOMMING VAN DIE WYSIGINGSWETSONTWERP OP STAATSAANSPREEKLIKHEID, 2018, EN DIE STRAFPROSES WYSIGINGSWETS-ONTWERP, 2018**

1. Kragtens Reël 276(1)(b) van die Reëls van die Nasionale Vergadering word hiermee kennis gegee dat die Minister van Justisie en Korrektiewe Dienste beoog om die Wysigingswetsontwerp op Staatsaanspreeklikheid, 2018, en die Strafproseswysigingswetsontwerp, 2018, eersdaags in die Nasionale Vergadering in te dien.

2.1 Die verduidelikende opsomming van die Wetsontwerpe word hierby ooreenkomstig Reël 276(1)(c) van die Reëls van die Nasionale Vergadering gepubliseer.

2.2 Die Wysigingswetsontwerp op Staatsaanspreeklikheid, 2018, het ten doel om die Wet op Staatsaanspreeklikheid, 1957 (Wet No. 20 van 1957), te wysig, ten einde vir die gestruktureerde skikking vir die voldoening van eise teen die Staat as gevolg van wederregtelike mediese behandeling van persone deur dienaars van die Staat, voorsiening te maak; en om voorsiening te maak vir aangeleenthede wat daarmee in verband staan.

2.3 Die Strafproseswysigingswetsontwerp het ten doel om die Strafproseswet, 1977 (Wet No. 51 van 1977), te wysig, ten einde die lys van seksuele misdrywe uit te bry ten opsigte waarvan 'n vervolging na verloop van 'n tydperk van 20 jaar na die datum van die beweerde pleging van 'n misdryf, ingestel kan word; en om voorsiening te maak vir aangeleenthede wat daarmee in verband staan.

3. Afskrifte van die Wetsontwerpe kan op die webtuistes van die Departement en Parlementêre Moniteringsgroep by <http://www.justice.gov.za> en <http://www.pmg.org.za> gevind word en kan, na indiening, ook verkry word van: Staatsdrukkers: Kaapstad (Telefoon nommer: (021) 465-7531).

REPUBLIC OF SOUTH AFRICA

STATE LIABILITY AMENDMENT BILL

*(As introduced in the National Assembly (proposed section 76); explanatory summary of
Bill published in Government Gazette No. 41658 of 25 May 2018)
(The English text is the official text of the Bill)*

(MINISTER OF JUSTICE AND CORRECTIONAL SERVICES)

[B 16—2018]

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- (b) The court may—
 (i) in lieu of the amount; or
 (ii) at a reduced amount,

of compensation that would have been paid for the future medical treatment of the injured party, order the State to provide such treatment to the injured party at a public health establishment.

(c) Where the State is ordered to provide future medical treatment at a public health establishment, the public health establishment concerned must be compliant with the norms and standards as determined by the Office of Health Standards Compliance established in terms of section 77 of the National Health Act, 2003 (Act No. 61 of 2003).

(d) In circumstances where future medical treatment has to be delivered in a private health establishment, the liability of the State shall be limited to the potential costs that would be incurred if such care was provided in a public health establishment.

(3) The amount payable by way of periodic payments must increase annually in accordance with the average of the consumer price index, as published from time to time by Statistics South Africa established in terms of section 4 of the Statistics Act, 1999 (Act No. 6 of 1999), for the immediately preceding period of 12 months.

(4) The State or creditor referred to in subsection (1) may apply to the court for a variation of the frequency, or amount, of periodic payments, or for a variation of both the frequency and amount of periodic payments, should a substantial change in the condition or the circumstances of the injured party necessitate such a variation.

Substitution of section 4 of Act 20 of 1957, as substituted by section 3 of Act 201 of 1993

2. The following section is hereby substituted for section 4 of the principal Act:

“Savings

4. (1) Nothing in this Act contained shall affect any provision of any law which—

- (a) limits the liability of the State or the national government or a provincial government or any department thereof in respect of any act or omission of its servants; or
 (b) prescribes specified periods within which a claim is to be made in respect of any such liability; or
 (c) imposes conditions on the institution of any action.

(2) Proceedings for purposes of claiming compensation from the State for damages resulting from the wrongful medical treatment of a person by a servant of the State and which have not been instituted or concluded prior to the commencement of section 2A, must be instituted, continued and concluded in accordance with the provisions of section 2A.”

Amendment of section 4A of Act 20 of 1957, as inserted by section 3 of Act 14 of 2011

3. Section 4A of the principal Act is hereby amended by the insertion after the definition of “appropriate budget” of the following definition:

“ ‘**creditor**’, for purposes of section 2A, means—

- (a) an injured party who has suffered damages resulting from the wrongful medical treatment of him or her by a servant of the State; or
 (b) anyone acting on behalf of an injured party who is not able to act in his or her own name.”

Short title and commencement

4. This Act is called the State Liability Amendment Act, 2018, and commences on a date determined by the President by proclamation in the *Gazette*.

**MEMORANDUM ON THE OBJECTS OF THE STATE LIABILITY
AMENDMENT BILL, 2018**

1. PURPOSE OF BILL

- 1.1 A person who suffers damages as a result of negligent medical treatment has to claim compensation or satisfaction for damages in terms of the common law “once and for all” rule. A plaintiff must therefore claim damages once for all damages already sustained or expected in future. The surge in medico-legal claims places an increasing strain on the budgets of provincial hospitals.
- 1.2 The State Liability Amendment Bill, 2018 (“the Bill”), therefore aims to amend the principal Act so as to provide for structured settlements for the satisfaction of claims against the State as a result of wrongful medical treatment of persons by servants of the State. The Bill is promoted in the interim pending the outcome of the larger investigation into medico-legal claims by the South African Law Reform Commission.

2. OBJECTS OF BILL

- 2.1 Clause 1 of the Bill aims to introduce a new provision dealing with the structured settlement of claims. The proposed new section 2A(1) provides that a court must, in a successful claim against the State that exceeds R1 million, order that compensation be paid to the creditor in terms of a structured settlement which may provide for, among others, past expenses and damages, necessary immediate expenses and periodic payments for future costs referred to in the proposed new section 2A(2). The proposed new subsection (2)(a) requires that, insofar as the cost of future care, future medical treatment and future loss of earnings are concerned, the court must order that compensation for those costs be paid by way of periodic payments. The proposed new subsection (2)(b), (c) and (d) make provision for those instances where the State can provide treatment to injured parties.
- 2.2 Provision will also be made that the amount payable by way of periodic payments will increase annually in accordance with the consumer price index. The proposed new section 2A finally makes provision for any party to apply to the court for a variation of the periodic payment order if a substantial change in the condition or the circumstances of the injured party necessitate such a variation.
- 2.3 Since the proposed new section 2A will exclude medico-legal claims insofar as future medical expenses are concerned from the “once and for all” rule, it is necessary to amend section 4, the savings provision, of the principal Act. Clause 2 aims to insert a provision in section 4 in order to clarify that proceedings resulting from the negligent medical treatment which have not been instituted or concluded prior to the commencement of section 2A must be instituted, continued and concluded in accordance with the new section 2A.
- 2.4 The term “creditor” is used in the proposed new section 2A. The term implies the injured party or anyone acting on behalf of an injured party who is not able to act in his or her own name. Clause 3 of the Bill, therefore, aims to amend section 4A of the principal Act, which section is the definitions section, by inserting a definition of creditor for purposes of the proposed new section 2A.

3. DEPARTMENTS/BODIES/PERSONS CONSULTED

- 3.1 The Department of Justice and Constitutional Development (Department) requested comments from the National Treasury, the National Department of Health and the Directors-General in the offices of the Premiers.
- 3.2 The Department received comments from the National Treasury, the National Department of Health, the Office of the Director-General: Mpumalanga, the

Office of the Director-General: Western Cape, the Provincial Treasury of the Eastern Cape province and Legal Aid South Africa.

4. IMPLICATIONS FOR PROVINCES

The introduction of periodic payments with regard to future medical expenses will require that provincial hospitals have the necessary capacity for the administration of periodic payments.

5. FINANCIAL IMPLICATIONS FOR STATE

The surge in medico-legal claims places an increasing strain on the budgets of provincial hospitals. The introduction of structured payments is intended to reduce the impact of lump sum payments.

6. PARLIAMENTARY PROCEDURE

- 6.1 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 76 of the Constitution, since it contains a provision to which the procedure set out in section 76 of the Constitution applies.
- 6.2 The principles in the case of *Tongoane and Others v National Minister for Agriculture and Land Affairs and Others* 2010 (8) BCLR 741 (CC) (the “*Tongoane case*”) is important when determining if a Bill ought to be tagged as either a section 75 or 76 Bill. The test for determining the procedure to be followed in enacting a Bill is whether the provisions of the Bill fall within a functional area listed in Schedule 4 or, in substantial measure, affect the interests of the provinces.
- 6.3 The tagging of the Bill requires firstly, considering all the provisions of the Bill and determining whether they substantially impact the interests of the provinces. Thereafter a consideration of whether or not the impact of these provisions is not so small as to be regarded as trivial must be carried out.
- 6.4 The tagging of Bills before Parliament must be informed by the need to ensure that provinces fully and effectively exercise their appropriate role in the process of considering national legislation that substantially affects them. Paying less attention to the provisions of a Bill once its substance, or purpose and effect, has been identified undermines the role that provinces should play in the enactment of national legislation affecting them.
- 6.5 If we have to take into consideration the legal principles expounded by the *Tongoane case*, the following may be deduced from a reading of this Bill:
 - The introduction of periodic payments with regard to future medical expenses will require that provincial hospitals have the necessary capacity for the administration of periodic payments.
 - It would seem that the Bill, in its current form, would substantially affect the provinces. The Bill, therefore, should be dealt with in terms of section 76 of the Constitution.
- 6.6 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 No. 41 of 2003), since it does not contain provisions pertaining to customary law or customs of traditional communities.

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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. 41658 of 25 May 2018)
(The English text is the official text of the Bill)*

(MINISTER OF JUSTICE AND CORRECTIONAL SERVICES)

[B 15—2018]

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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 extend the list of offences in respect of which a prosecution may be instituted after a period of 20 years has lapsed since the date of the alleged commission of an offence; and to provide for matters connected therewith.

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

Substitution of section 18 of Act 51 of 1977, as substituted by section 68 of Act 32 of 2007 and amended by section 48 of Act 7 of 2013 and section 8 of Act 8 of 2017

1. The following section is hereby substituted for section 18 of the Criminal Procedure Act, 1977: 5

“Prescription of right to institute prosecution

18. The right to institute a prosecution for any offence, other than **[the offences of]**—

- (a) murder; 10
- (b) treason committed when the Republic is in a state of war;
- (c) robbery, if aggravating circumstances were present;
- (d) kidnapping;
- (e) child-stealing;
- (f) **[rape or compelled rape as contemplated in section 3 or 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively;]** the offences— 15
 - (i) of rape, indecent assault, incest, or violation of a corpse, insofar as it relates to the commission of a sexual act with a corpse, which was committed before 16 December 2007; 20
 - (ii) as provided for in sections 9, 12, 13, 14 or 15, read with section 22, of the Sexual Offences Act, 1957 (Act No. 23 of 1957);
 - (iii) of possession of child pornography as contemplated in section 2(1) of the Indecent or Obscene Photographic Matter Act, 1967 (Act No. 37 of 1967); 25

- (iv) of commercial sexual exploitation of children as contemplated in section 50A of the Child Care Act, 1983 (Act No. 74 of 1983);
- (v) of possession or distribution of child pornography as contemplated in section 24B of the Films and Publications Act, 1996 (Act No. 65 of 1996);
- (vi) of commercial sexual exploitation of children as contemplated in section 141(1)(b), read with section 305(1)(c), of the Children's Act, 2005 (Act No. 38 of 2005); or
- (vii) as provided for in sections 3 to 10, 12, 14 to 26, 55 and 71 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (Act No. 32 of 2007);
- (g) genocide, crimes against humanity and war crimes, as contemplated in section 4 of the Implementation of the Rome Statute of the International Criminal Court Act, 2002;
- (h) any contravention of section 4, 5 or 7 and involvement in these offences as provided for in section 10 of the Prevention and Combating of Trafficking in Persons Act, 2013 (Act No. 7 of 2013);
- [(hA) trafficking in persons for sexual purposes by a person as contemplated in section 71(1) or (2) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007;**
- (i) using a child or person who is mentally disabled for pornographic purposes as contemplated in sections 20(1) and 26(1) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007;]** or
- (j) torture as contemplated in section 4(1) and (2) of the Prevention and Combating of Torture of Persons Act, 2013 (Act No. 13 of 2013), shall, unless some other period is expressly provided for by law, lapse after the expiration of a period of 20 years from the time when the offence was committed.”.

Short title

2. This Act is called the Criminal Procedure Amendment Act, 2018.

MEMORANDUM ON THE OBJECTS OF THE CRIMINAL PROCEDURE AMENDMENT BILL, 2018

1. BACKGROUND OF BILL

- 1.1 On 15 June 2017 the South Gauteng High Court declared section 18 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977) (“the Act”), inconsistent with the Constitution and invalid to the extent that it bars, in all circumstances, the right to institute a prosecution for all sexual offences, other than those listed in section 18(f), (h) and (i), after the lapse of a period of 20 years from the time when the offence was committed.
- 1.2 The High Court’s declaration of invalidity was referred to the Constitutional Court for confirmation and was heard by the Court on 14 November 2017 but to date the Constitutional Court has not delivered its judgment. The Criminal Procedure Amendment Bill, 2018 (“the Bill”), aims to amend the Act so as to extend the list of offences in respect of which a prosecution may be instituted after a period of 20 years has lapsed since the date of the alleged commission of an offence.

2. OBJECTS OF BILL

- 2.1 Section 18 of the Act regulates the prescription of the right to institute prosecutions after a period of 20 years has lapsed after the alleged commission of certain offences. A prosecution may, in terms of section 18, only be instituted after a period of 20 years has lapsed after the alleged commission of—
 - (a) murder;
 - (b) treason committed when the Republic is in a state of war;
 - (c) robbery, if aggravating circumstances were present;
 - (d) kidnapping;
 - (e) child-stealing;
 - (f) rape or compelled rape as contemplated in section 3 or 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (Act No. 32 of 2007), respectively;
 - (g) the crime of genocide, crimes against humanity and war crimes, as contemplated in section 4 of the Implementation of the Rome Statute of the International Criminal Court Act, 2002 (Act No. 27 of 2002);
 - (h) offences as provided for in sections 4, 5 and 7, and involvement in these offences as provided for in section 10, of the Prevention and Combating of Trafficking in Persons Act, 2013 (Act No. 7 of 2013); or
 - (i) using a child or person who is mentally disabled for pornographic purposes as contemplated in sections 20(1) and 26(1) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007.
- 2.2 Clause 1 of the Bill aims to give effect to the judgment of the High Court. Clause 1 aims to amend section 18 of the Act in order to ensure that certain sexual offences, whether they have been committed under the common or statutory law, are included in section 18 of the Act.

3. ORGANISATIONS AND INSTITUTIONS CONSULTED

The Department of Justice and Constitutional Development circulated the Bill in order to solicit the comments of interested parties. The Women’s Legal Centre, the South African Police Service, a Clinical Psychologist, the organisation Shukumisa, Women and Men Against Child Abuse, the Legal Resources Centre, the Parliamentary Committee of the General Council of the Bar, the Centre for Applied Legal Studies, Lawyers Against Abuse, a feminist writer and researcher, Norton Rose and Fulbright and the Commission for Gender Equality have submitted comments.

4. IMPLICATIONS FOR PROVINCES

None.

5. FINANCIAL IMPLICATIONS FOR STATE

None.

6. PARLIAMENTARY PROCEDURE

- 6.1 The Constitution prescribes the classification of Bills, therefore a Bill must be correctly classified otherwise it will be constitutionally out of order.
- 6.2 The State Law Advisers and the Department have considered the Bill against the provisions of the Constitution relating to the tagging of Bills, and against the functional areas listed in Schedule 4 (functional areas of concurrent national and provincial legislative competence) and Schedule 5 (functional areas of exclusive provincial legislative competence) to the Constitution.
- 6.3 For the purposes of tagging, the constitutional court case of *Tongoane and Others v Minister for Agriculture and Land Affairs and Others*¹ confirmed the “substantial measure” test indicated in *Ex Parte President of the Republic of South Africa: In re Constitutionality of the Liquor Bill*. The test entailed that “any Bill whose provisions in substantial measure” fall within a specific Schedule must be classified in terms of that Schedule.
- 6.4 In terms of section 76(3) of the Constitution a Bill must be dealt with in accordance with the procedure established by either subsection (1) or (2) if it falls within a functional area listed in Schedule 4 to the Constitution.
- 6.5 The issue to be determined is whether the proposed amendments as contained in the Bill, in substantial measure, fall within a functional area listed in Schedule 4 to the Constitution.
- 6.6 As was pointed out above the Bill seeks to comply with the judgment of the High Court in which the Court declared section 18 of the Act inconsistent with the Constitution and inconsistent to the extent that the section bars, in all circumstances, the right to institute a prosecution for all sexual offences other than those listed in section 18(f), (h) and (i) of the Act after the lapse of a period of 20 years from the time when the offence was committed.
- 6.7 The provisions of the Bill have been carefully examined to establish whether, in substantial measure, they fall within any of the functional areas listed in Schedule 4 to the Constitution.
- 6.8 The provisions of the Bill do not, in substantial measure, fall within a functional areas listed in Schedule 4. The State Law Advisers are therefore of the opinion that this Bill must be dealt with in accordance with the procedure set out in section 75 of the Constitution.
- 6.9 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 No. 41 of 2003), since it does not contain provisions pertaining to customary law or customs of traditional communities.

¹ CCT 100/09 [2010] ZACC 10.

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