

REPUBLIC OF SOUTH AFRICA

CORRECTIONAL SERVICES AMENDMENT BILL

*(As introduced in the National Assembly (proposed section 75); explanatory summary of
Bill and prior notice of its introduction published in Government Gazette No. 48670 of 26
May 2023)*
(The English text is the official text of the Bill)

(MINISTER OF JUSTICE AND CORRECTIONAL SERVICES)

[B 14—2023]

ISBN 978-1-4850-0872-9

No. of copies printed150

Amendment of section 31 of Act 111 of 1998, as amended by section 25 of Act 25 of 2008

3. Section 31 of the principal Act is hereby amended by the substitution for subsection (5) of the following subsection:

“(5) (a) An inmate who is subjected to such restraints must be informed of the right to appeal and may appeal against the decision to the Inspecting Judge who must decide thereon within 72 hours after receipt thereof. 5

(b) The Head of the Correctional Centre or the Head of the Remand Detention Facility must, upon request, provide all relevant information relating to the matter contemplated in paragraph (a) to the Inspecting Judge within 24 hours of receiving the request.”. 10

Amendment of section 88A of Act 111 of 1998

4. Section 88A of the principal Act is hereby amended—

(a) by the substitution in subsection (1) for paragraph (a) of the following paragraph: 15

“(a) is responsible for all administrative, financial and clerical functions of the Judicial Inspectorate; and”;

(b) by the deletion in subsection (1) of paragraph (b);

(c) by the substitution for subsection (2) of the following subsection: 20

“(2) The person contemplated in subsection (1) must be appointed by the [National Commissioner] Minister.”;

(d) by the substitution for subsection (3) of the following subsection:

“(3) The appointment, career incidents and other conditions of service, including salary and allowances of the Chief Executive Officer are regulated by the Public Service Act.”; and 25

(e) by the substitution for subsection (4) of the following subsection:

“(4) Any matters relating to misconduct and incapacity of the Chief Executive Officer [must be referred to the National Commissioner by] vests in the Inspecting Judge who shall refer his or her decision to the Minister for implementation.” 30

Substitution of section 91 of Act 111 of 1998

5. The following section is hereby substituted for section 91 of the principal Act:

“Expenses of Judicial Inspectorate

91. (1) The [Department is responsible for all] expenses [of the Judicial Inspectorate] incurred in connection with— 35

(a) the exercise of the powers, the carrying out of the duties and the performance of the functions of the Judicial Inspectorate; and

(b) the remuneration and other conditions of service of members of the Judicial Inspectorate,

shall be defrayed from monies appropriated by Parliament for this purpose to the departmental vote in terms of the Public Finance Management Act, 1999 (Act No. 1 of 1999). 40

(2) The Chief Executive Officer, in consultation with the Inspecting Judge, shall prepare and provide National Treasury with the necessary estimate of revenue and expenditure of the Judicial Inspectorate. 45

(3) The Chief Executive Officer, as the accounting officer of the Judicial Inspectorate, must, subject to the Public Finance Management Act, 1999, and subsection (2)—

(a) be charged with the responsibility of accounting for State monies received or paid out for or on account of the Judicial Inspectorate; and 50

(b) cause the necessary accounting and other records to be kept.

Insertion of section 95D in Act 111 of 1998

6. The following section is hereby inserted in the principal Act after section 95C:

“Mandatory reporting obligations of Department to Inspecting Judge

- 95D.** (1) The Head of the Correctional Centre or the Head of the Remand Detention Facility, or any official of the Department must immediately, after becoming aware, report all instances and notify the Inspecting Judge of—
- (a) any deaths of inmates in correctional centres in terms of section 15(2);
 - (b) segregation and extended segregation of inmates in terms of section 30(6);
 - (c) the use of mechanical restraints in terms of section 31(3)(d);
 - (d) the use of force in correctional centres and remand detention facilities in terms of section 32(6);
 - (e) assault of an inmate by a correctional official;
 - (f) assault of a correctional official by an inmate;
 - (g) any act constituting torture or cruel, inhuman or degrading treatment or punishment;
 - (h) any sexual violations;
 - (i) any hunger strikes;
 - (j) any attempted suicides;
 - (k) any escape of an inmate; and
 - (l) matters related to dishonest practices or corrupt activities in correctional centres or remand detention facilities.
- (2) The Head of the Correctional Centre or the Head of the Remand Detention Facility, or any official of the Department must within 24 hours after notifying the Inspecting Judge in terms of subsection (1), submit a written report to the Inspecting Judge in the prescribed form and manner on the matters contemplated in subsection (1)(a) to (l).
- (3) The Inspecting Judge may investigate or instruct the National Commissioner or request any appropriate authority to investigate any matter contemplated in subsection (1).”.

Amendment of Table of Content in Act 111 of 1998

7. The Table of Content after the Preamble to the principal Act is hereby amended by the insertion after “95C. Report of Commissioner” of the following:
 “95D. Mandatory reporting obligations of Department to Inspecting Judge”. 35

Short title and commencement

8. This Act is called the Correctional Services Amendment Act, 2023, and comes into operation on a date determined by the President by proclamation in the *Gazette*.

MEMORANDUM ON THE OBJECTS OF THE CORRECTIONAL SERVICES AMENDMENT BILL, 2023

1. BACKGROUND

- 1.1 The review of the Correctional Services Act, 1998 (Act No. 111 of 1998) (“principal Act”), was necessary in view of the following:
- (a) The Constitutional Court in its judgment dated 4 December 2020 of *Sonke Gender Justice NPC v the President of the Republic of the Republic of South Africa, [2020] ZACC 26* (“*Sonke* judgment”) confirmed the declaration by the High Court, Western Cape Division, Cape Town, that sections 88A(1)(b) and 91 of the principal Act are constitutionally invalid to the extent that they fail to provide an adequate level of independence to the Judicial Inspectorate for Correctional Services (“the JICS”).
 - (b) The Constitutional Court ordered that the declaration of constitutional invalidity is suspended for 24 months to afford Parliament an opportunity to correct the defect giving rise to the constitutional invalidity.
 - (c) For the purpose of the practical application of the principal Act and in light of the *Sonke* judgment, certain provisions of the principal Act require amendments.

2. OBJECTS OF BILL

The Bill seeks to amend the principal Act to align it with the Constitution of the Republic of South Africa, 1996 (“the Constitution”) and the *Sonke* judgment to provide for an adequate level of independence to the JICS, and matters related thereto.

3. SUMMARY OF CLAUSES

- 3.1 **Clause 1** seeks to amend section 1 of the principal Act, which provides for the definitions of the terms used in the Bill.
- 3.2 **Clause 2** seeks to amend section 30 of the principal Act, which provides for segregation. This clause amends section 30(7).
- 3.3 **Clause 3** seeks to amend section 31 of the principal Act, which provides for mechanical restraints. This clause amends section 31(5).
- 3.4 **Clause 4** seeks to amend section 88A of the principal Act, which provides for the appointment of the Chief Executive Officer. This clause amends section 88A(1)(b) and subsection (2).
- 3.5 **Clause 5** seeks to substitute section 91 of the principal Act, which provides for the expenses of the Judicial Inspectorate.
- 3.6 **Clause 6** seeks to insert section 95D in the principal Act, which provides for the mandatory reporting obligations of the Department to the Inspecting Judge.
- 3.7 **Clause 7** seeks to amend the Table of Content of the principal Act by the insertion of section 95D.
- 3.8 **Clause 8** provides for the short title and commencement of the Act.

4. INSTITUTIONS/PERSONS/BODIES CONSULTED

- 4.1 JICS;
- 4.2 National Council for Correctional Services;
- 4.3 National Management Committee of the Department of Correctional Services;

- 4.4 Development Committee for the Justice Cluster;
- 4.5 The Minister of Public Service and Administration; and
- 4.6 The Minister of Finance.

5. FINANCIAL IMPLICATIONS FOR STATE

The financial implications of the introduction and effects of the Bill will mainly consist of the publication costs thereof and the training of all role players in the revised provisions. However, the implementation of the provisions is already catered for in the baseline budgetary allocation of the Department of Correctional Services (“the Department”). The expenses for the JICS shall be defrayed from monies appropriated by Parliament through the departmental vote in terms of the Public Finance Management Act, 1999 (Act No. 1 of 1999) (“Public Finance Management Act”).

6. COMMUNICATION IMPLICATIONS

The Department will communicate to the criminal justice system role players, stakeholders in civil society, the general public and the internal implementers in relation to the content of these regulatory changes. The Government Communication and Information Systems will be utilised for broader communication of the regulatory changes and their implication with regard to the JICS.

7. PARLIAMENTARY PROCEDURE

- 7.1 The Constitution regulates the manner in which legislation may be enacted by Parliament and prescribes the different procedures to be followed for such enactment. Four categories of Bills are distinguished in the Constitution, namely: Bills amending the Constitution (section 74); ordinary Bills not affecting provinces (section 75); ordinary Bills affecting provinces (section 76); and money Bills (section 77). A Bill must be correctly tagged otherwise it is constitutionally invalid.
- 7.2 We 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.
- 7.3 In terms of section 44(1)(a)(ii) of the Constitution the national legislative authority confers on the National Assembly the power to pass legislation regarding any matter, including a matter within a functional area listed in Schedule 4, but excluding, subject to subsection (2), a matter within a functional area listed in Schedule 5. The national legislative authority thus has concurrent competence with a provincial legislative authority within a functional area listed in Schedule 4.
- 7.4 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.
- 7.5 For the purposes of tagging, the Constitutional Court case of *Tongoane and Others v Minister for Agriculture and Land Affairs and Others 2010 (8) BCLR 741 (CC)* (“*Tongoane judgment*”) confirmed and upheld the “substantial measure” test as formulated in *Ex Parte President of the Republic of South Africa: In re Constitutionality of the Liquor Bill (CCT12/99) [1999] ZACC 15; 2000 (1) SA 732; 2000 (1) BCLR 1 (11 November 1999)*.

7.6 The Constitutional Court held in the *Tongoane judgment* as follows:

“[58] What matters for the purposes of tagging is not the substance or the true purpose and effect of the Bill, rather, what matters is whether the provisions of the Bill “in substantial measure fall within a functional area listed in Schedule 4”.

[59] The tagging test is distinct from the question of legislative competence. It focuses on all the provisions of the Bill in order to determine the extent to which they substantially affect functional areas listed in Schedule 4 and not on whether any of its provisions are incidental to its substance.

[60] The test for tagging must be informed by its purpose. Tagging is not concerned with determining the sphere of government that has the competence to legislate on a matter. Nor is the process concerned with preventing interference in the legislative competence of another sphere of government.

[70] Therefore the test for determining how a Bill is to be tagged must be broader than that for determining legislative competence.

[72] Whether a Bill is a section 76 Bill is determined in two ways. First, by the explicit list of legislative matters in section 76(3) (a)–(f), and second by whether the provisions of a Bill in substantial measure fall within a concurrent provincial legislative competence.”.

7.7 The “substantial measure test” essentially entails that any Bill whose provisions in substantial measure affects the provinces must be dealt with in terms of the procedure set out in section 76 of the Constitution.

7.8 To determine whether the provisions of the Bill in substantial measure fall within a functional area listed in Schedule 4, the Bill needs to be considered against the provisions of the Constitution relating to the tagging of Bills as well as against the functional areas listed in Schedule 4 and Schedule 5 to the Constitution. This test compels the consideration of the substance, purpose and effect of the subject matter of the Bill.

7.9 The proposed amendments seek to give effect to the *Sonke* judgment by providing for the custody of all inmates under conditions of human dignity, matters relating to the JICS and to provide for matters connected therewith. The Bill does not in any measure fall within a concurrent provincial legislative competence.

7.10 The State Law Advisers and the Department are of the view that the Bill must be dealt with in accordance with the procedure set out in section 75 of the Constitution since it contains no provisions to which the procedure set out in section 74 or 76 of the Constitution applies.

7.11 The State Law Advisers are of the opinion that it is not necessary to refer this Bill to the National House of Traditional and Khoi-San Leaders in terms of section 39(1)(a)(i) of the Traditional and Khoi-San Leadership Act, 2019 (Act No. 3 of 2019), since it does not contain provisions pertaining to customary law or customs of traditional communities.

Printed by Creda Communications

ISBN 978-1-4850-0872-9