

REPUBLIC OF SOUTH AFRICA

JUDICIAL MATTERS THIRD AMENDMENT BILL

*(As introduced in the National Assembly (proposed section 76)
(The English text is the official text of the Bill)*

(PORTFOLIO COMMITTEE ON JUSTICE AND CONSTITUTIONAL DEVELOPMENT)

[B 53—2013]

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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 Attorneys Act, 1979, so as to further regulate the powers of the board of control of the Attorneys Fidelity Fund;
- the Child Justice Act, 2008, so as to further regulate the evaluation of the criminal capacity of a child; to provide for the delegation of certain powers and assignment of certain duties by the Cabinet member responsible for social development in respect of the accreditation of diversion programmes and diversion service providers; to repeal provisions that make the Criminal Law Amendment Act, 1997, applicable to persons under the age of 18 years; and to provide for matters connected therewith.

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

Amendment of section 78 of Act 53 of 1979, as substituted by section 28 of Act 87 of 1989

1. Section 78 of the Attorneys Act, 1979, is hereby amended by the substitution for subsection (8) of the following subsection: 5

“(8) The court may on application made by the society of the province concerned or by the board of control, in consultation with the society of the province concerned, and on good cause shown, prohibit any practitioner from operating in any way on his or her trust account, and may appoint a *curator bonis* to control and administer such trust account, with such rights, duties and powers in relation thereto as the court may deem fit.” 10

Amendment of section 11 of Act 75 of 2008

2. Section 11 of the Child Justice Act, 2008, is hereby amended—

(a) by the substitution for subsections (2) and (3) of the following subsections, 15 respectively:

“(2) In making a decision regarding the criminal capacity of the child in question—

(a) (i) the inquiry magistrate, for purposes of diversion; or

[(b)] (ii) if the matter has not been diverted, the child justice court, for 20 purposes of plea and trial,

must consider the assessment report of the probation officer referred to in section 40 and all evidence placed before the inquiry magistrate or child justice court prior to diversion or conviction, as the case may be, which evidence may include a report of an evaluation referred to in subsection (3);
and

(b) the inquiry magistrate or the child justice court must consider the cognitive, moral, emotional, psychological and social development of the child.

(3) An inquiry magistrate or child justice court may, on own accord, or on the request of the prosecutor or the child's legal representative, order an evaluation of the criminal capacity of the child referred to in subsection (1), in the prescribed manner, by a suitably qualified person[, **which must include an assessment of the cognitive, moral, emotional, psychological and social development of the child**]."; and

(b) by the insertion after subsection (4) of the following subsection:

"(4A) The provisions of section 77(2), (3) and (4) of the Criminal Procedure Act apply with the changes required by the context to a report referred to in subsection (4)."

Amendment of section 56 of Act 75 of 2008

3. Section 56 of the Child Justice Act, 2008, is hereby amended by the addition of the following subsection:

"(4) (a) The Cabinet member responsible for social development may delegate any power or assign any duty conferred on or imposed upon him or her by this section to any member of the Executive Council of a province responsible for welfare services, except the powers and duties referred to in subsection (2)(a)."

(b) A delegation or an assignment in terms of paragraph (a)—

- (i) is subject to any limitation, condition and direction that the Cabinet member responsible for social development may impose;
- (ii) must be in writing; and
- (iii) does not divest the Cabinet member responsible for social development of the responsibility concerning the exercise of the power or the performance of the duty.

(c) The Cabinet member responsible for social development may—

- (i) confirm, vary or revoke any decision taken in consequence of a delegation or assignment in terms of this section, subject to any rights that may have accrued to a person as a result of the decision; and
- (ii) at any time withdraw a delegation or assignment."

Amendment of section 77 of Act 75 of 2008

4. Section 77 of the Child Justice Act, 2008, is hereby amended—

(a) by the deletion of subsection (2);

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

"(3) A child who is 14 years or older at the time of being sentenced for the offence [, and in respect of whom subsection (2) does not apply,] may only be sentenced to imprisonment, if the child is convicted of an offence referred to in—

(a) Schedule 3;

(b) Schedule 2, if substantial and compelling reasons exist for imposing a sentence of imprisonment;

(c) Schedule 1, if the child has a record of relevant previous convictions and substantial and compelling reasons exist for imposing a sentence of imprisonment."

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

"(4) A child referred to in subsection (3) may be sentenced to a sentence of imprisonment—

(a) for a period not exceeding 25 years; or

(b) envisaged in section 276(1)(i) of the Criminal Procedure Act."; and

(d) by the substitution for subsection (5) of the following subsection:

“(5) A child justice court imposing a sentence of imprisonment must **[antedate the term of imprisonment by]** take into account the number of days that the child has spent in prison or a child and youth care centre prior to the sentence being imposed.”

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Amendment of section 78 of Act 75 of 2008

5. Section 78 of the Child Justice Act, 2008, is hereby amended by the substitution for subsection (1) of the following subsection:

“(1) **[Subject to section 77(2), the]** The provisions of section 297 of the Criminal Procedure Act apply in relation to the postponement or suspension of passing of sentence by a child justice court in terms of this Act.”

Amendment of section 97 of Act 75 of 2008

6. Section 97 of the Child Justice Act, 2008, is hereby amended by the substitution for subsection (3) of the following subsection:

“(3) (a) The Cabinet member responsible for the administration of justice must by notice in the *Gazette*—

[(a)] (i) determine the persons or the category or class of persons who are competent to conduct the evaluation of the criminal capacity of a child referred to in section 11(3); and

[(b)] (ii) in consultation with the Cabinet member responsible for finance, determine the allowances and remuneration of those persons.

(b) Different categories or classes of persons may be determined for the purposes of the different aspects of development of a child referred to in section 11(2)(b).

(c) Different allowances and tariffs of remuneration may be determined for the persons referred to in paragraph (a), according to their calling, occupation and stations in life.”

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Short title and commencement

7. (1) This Act is called the Judicial Matters Third Amendment Act, 2013.

(2) Sections 2, 3 and 6 come into operation on a date fixed by the President by proclamation in the *Gazette*.

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**MEMORANDUM ON THE OBJECTS OF THE JUDICIAL MATTERS
THIRD AMENDMENT BILL, 2013**

1. PURPOSE OF BILL

The primary aim of the Judicial Matters Third Amendment Bill, 2013 (the “Bill”), is to amend the Attorneys Act, 1979 (Act No. 53 of 1979), and the Child Justice Act, 2008 (Act No. 75 of 2008), in order to address practical and technical issues of a non—contentious nature.

2. OBJECTS OF BILL

2.1 Clause 1 amends section 78 of the Attorneys Act, 1979 (Act No. 53 of 1979) (the “Attorneys Act”). The board of control (the “board”) of the Attorneys Fidelity Fund (the “Fund”) requested the amendment due to the constantly increasing number of theft by attorneys. The board wants to be able to act proactively to prevent damage, rather than only be obliged to pay out after the fact. Section 78(8) of the Attorneys Act provides that the court may, on application made by the society of the province concerned, prohibit a practitioner from operating in any way on his trust account, and may appoint a *curator bonis* to control and administer such trust account. At the request of the board, clause 1 seeks to amend section 78(8) of the Act to provide that the Fund may also apply for this remedy, in consultation with the law society of the province concerned. According to the board, some law societies often take a long time after they have been alerted to irregularities, to bring an application to “freeze” an attorney’s trust account, during which time the Fund’s exposure is increased.

2.2 Clauses 2 and 6 propose amendments to sections 11 and 97 of the Child Justice Act, respectively, dealing with the proof of criminal capacity of children who are 10 years or older but under the age of 14 years and who are alleged to have committed an offence.

2.2.1 In terms of section 11(2), an inquiry magistrate or child justice court, when making a decision regarding the criminal capacity of a child, must consider the assessment report of the probation officer and all other evidence placed before the court, which may include a report of an evaluation done by a suitably qualified person referred to in section 11(3). In terms of section 11(3), an inquiry magistrate or child justice court may, on its own accord or at the request of the prosecutor or the child’s legal representative, order an evaluation of the child’s criminal capacity by a suitably qualified person which must include an assessment of the cognitive, moral, emotional, psychological and social development of the child.

2.2.2 In terms of section 97(3), the Cabinet member responsible for the administration of justice must determine the persons or category or class of persons who are competent to conduct the evaluation of the criminal capacity of children in accordance with section 11(3).

2.2.3 After thorough consultation with all roleplayers, the Minister of Justice and Constitutional Development determined that psychiatrists and clinical psychologists are competent to conduct the evaluations. The Department of Health has, however, indicated that psychiatrists and clinical psychologists are not able to assess the moral development of a child and are only equipped to assess the cognitive, emotional, psychological and social development of a child.

2.2.4 The amendments proposed in clause 2 therefore require the inquiry magistrate or child justice court to consider the cognitive, moral, emotional, psychological and social development of the child on the basis of all evidence placed before the court, including the report of the person appointed to evaluate the criminal capacity of the child, if such

an order is made. A new subclause (4A) is proposed to regulate the handing in of the report during court proceedings, setting out how the report is to be dealt with if all parties agree with its findings and also how the report is to be dealt with if its findings are disputed by any of the parties.

- 2.2.5 Clause 6 seeks to amend section 97 of the Child Justice Act consequentially and provides that different categories or classes of persons may be determined for the purposes of the different aspects of development of a child referred to in the amended section 11(2)(b). It also provides that the Minister may determine different allowances and tariffs of remuneration for the different categories or classes of persons who do the assessments.
- 2.3 Clause 3 seeks to allow the Minister of Social Development to delegate certain of the powers contained in section 56 of the Child Justice Act to the provincial level. Section 56 confers a number of powers on and assigns a number of duties to the Minister of Social Development relating to the accreditation of diversion programmes and diversion service providers. The Minister must develop and table in Parliament a policy framework and system for accreditation, which has already been done. The Minister must thereafter invite applications for accreditation, consider the applications and issue certificates of accreditation to the successful applicants. Because welfare services falls within functional areas of concurrent national and provincial competence in terms of Part A of Schedule 4 to the Constitution, the Minister of Social Development has requested an amendment to section 56 in order to allow him or her to delegate his or her powers in terms of section 56 to the provincial level to facilitate the successful implementation of the accreditation process. The implementation of the policy framework for accreditation of diversion services will essentially take place in the provinces which also have the budgets to fund the programmes and service providers.
- 2.4 Clauses 4 and 5 propose amendments to sections 77 and 78 of the Child Justice Act, respectively. These amendments are consequential to the amendment of section 51 of the Criminal Law Amendment Act, 1997 (Act No. 105 of 1997), which was occasioned by the Constitutional Court's judgment in the case of *Centre for Child Law v Minister of Justice and Constitutional Development and Others* 2009(2) SACR 477 (CC); 2009 (6) 632 (CC); 2009 (11) BCLR 1105 (CC) (15 July 2009). The amendment of the said section 51 was dealt with in the Judicial Matters Amendment Act, 2013.
- 2.5 Clause 7 deals with the short title and the coming into operation of the Act, once the Bill becomes an Act of Parliament after it has been assented to and signed by the President of the Republic.

3. FINANCIAL IMPLICATIONS

There are no financial implications foreseen in the implementation of the Bill.

4. DEPARTMENTS AND PARTIES CONSULTED

- 4.1 The amendments contained in the Bill originally formed part of the Judicial Matters Amendment Bill, 2013, before they were excised from that Bill in order to be dealt with in accordance with the procedure established by section 76 of the Constitution. These amendments, before they were excised as indicated, were submitted to the Chief Justice, the respective Judges President, magistrates, the Magistrates Commission, the Law Society of South Africa, the General Council of the Bar, the various Bar Councils, the Chief Family Advocate, NADEL, BLA, Centre for Child Law, the South African Police Service and the National Director of Public Prosecutions, for

comments. The provisions in question were also made available on the Website of the Department, together with a document explaining their objects and which invited the public to comment on the Bill.

- 4.2 Comments on the Bill, before it was split, were received from the Tshwaranang Advocacy Centre, the Chief Directorate: Legal Administration within the Department of Justice and Constitutional Development, the National Prosecuting Authority of South Africa, the South African Police Service, the Cape Bar Council, Bell Dewar Attorneys on behalf of Avusa Media Limited, the Law Society of South Africa, the Aids Law Project, the Commission for Gender Equality, the Magistrate: Wynberg, Centre for Child Law and the Magistrate: Tembisa, which were accommodated where possible.
- 4.3 The amendments proposed to the Attorneys Act were requested by the board of the Attorneys Fidelity Fund.

5. PARLIAMENTARY PROCEDURE

- 5.1 The Joint Tagging Mechanism of Parliament was of the view that the Bill must be dealt with in accordance with the procedure established by section 76 of the Constitution since its provisions deal with functional areas of concurrent national and provincial legislative competence as set out in Schedule 4 to the Constitution.
- 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.

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