

**MEMORANDUM ON OBJECTS OF CRIMINAL PROCEDURE
AMENDMENT BILL**

1. PURPOSE OF BILL

- 1.1 Section 154 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977) (the “Act”), prohibits the publication of certain information relating to criminal proceedings. Section 154(3) provides that no person shall publish in any manner whatsoever any information which reveals or may reveal the identity of an accused under the age of 18 years or of a witness at criminal proceedings who is under the age of 18 years: Provided that the presiding judge or judicial officer may authorise the publication of so much of such information as he or she may deem fit if the publication thereof would in his or her opinion be just and equitable and in the interest of any particular person.
- 1.2 In *Centre for Child Law and Others v Media 24 Limited and Others* 2019 ZACC 46 (the “*Centre for Child Law* judgment”), the Constitutional Court held that section 154(3) of the Act does not afford protection to child victims of criminal offences and that the protection does not continue to apply even after a child accused, witness or victim turns 18 years of age, whereas it ought to, and section 154(3) is, for those reasons, inconsistent with the Constitution of the Republic of South Africa, 1996 (the “Constitution”). The declaration of constitutional invalidity was suspended for 24 months to afford Parliament an opportunity to correct the defect giving rise to the constitutional invalidity. The Constitutional Court granted interim relief by way of a reading-in to ensure that, during the period of suspension of invalidity, the protection—
- (a) afforded by section 154(3) is also extended to child victims of criminal offences; and
 - (b) continues to apply after a child accused, witness or victim turns 18 years of age.
- 1.3 The Criminal Procedure Amendment Bill, 2021 (the “Bill”), seeks to amend section 154 to address the constitutional invalidity of the provision.

2. OBJECTS OF BILL

- 2.1 **Clause 1** of the Bill seeks to effect the following amendments to section 154 of the Act:
- 2.1.1 Subsection (3) is amended to provide that—
- (a) no person shall before, during or at any stage after the conclusion of criminal proceedings, in any manner, including on any social media or electronic platform, publish any information which reveals or may reveal the identity of—
 - (i) an accused who is or was under the age of 18 years at the time of the alleged commission of an offence;
 - (ii) a witness who is or was under the age of 18 years at the time of the alleged commission of an offence; or
 - (iii) a person against whom an offence has allegedly been committed who is or was under the age of 18 years at the time of the alleged commission of the offence,
 unless the publication of such information is authorised in terms of subsection (3B); and
 - (b) the presiding judge or judicial officer at such criminal proceedings may authorise the publication of so much of any information relating to the proceedings as he or she may deem fit, if the publication thereof would in his or her opinion be just and equitable and in the interest of any particular person.
- 2.1.2 A new subsection (3A) is inserted to provide that a police official or a person who is authorised by the National Commissioner of the South African Police Service (the “SAPS”) may in certain circumstances publish information which reveals the identity of an accused, a witness, a person against whom an offence has allegedly been

committed or any other person, who is under the age of 18 years, if the requirements of subsection (3A) are complied with. These requirements are as follows:

- (a) *An accused under the age of 18 years:*
 - (i) There must be reasonable grounds to suspect that the accused committed an offence listed in Schedule 3 to the Child Justice Act, 2008 (Act No. 75 of 2008), or an offence which, if committed by an adult, would have justified a term of imprisonment exceeding 10 years or the accused escaped from lawful custody or other place of detention or was released on bail or a warning and failed to attend or remain in attendance at the proceedings;
 - (ii) the SAPS has been unsuccessful in locating the whereabouts of the accused;
 - (iii) the information so published does not reveal the age of the accused or the fact that the accused was involved in the commission of the offence; and
 - (iv) it is necessary as a measure to locate the whereabouts of the accused.
- (b) *A witness under the age of 18 years:*
 - (i) It is necessary as a measure to locate the whereabouts of the witness to obtain a statement from him or her concerning the commission of any alleged offence, or to testify in criminal proceedings; and
 - (ii) the information so published does not reveal the age of the person or the fact that he or she may be a witness at criminal proceedings.
- (c) *A person under the age of 18 years against whom an offence has allegedly been committed:*
 - (i) It is necessary to locate the whereabouts of the person to prevent harm to such a person; and
 - (ii) the information so published is reasonably necessary in the circumstances to identify the person, or any other person who may have relevant information about the alleged offence or whereabouts of the person.
- (d) *A person under the age of 18 years, whether or not an offence has allegedly been committed against the person:*
 - (i) It is necessary to locate the whereabouts of the person to prevent harm to such a person; and
 - (ii) the information so published is reasonably necessary in the circumstances to identify the person, or any other person who may have relevant information about an alleged offence which may have been committed against the person or the whereabouts of the person.

- 2.1.3 (a) In terms of the *Centre for Child Law* judgment, the accused, witness, or person against whom an offence has allegedly been committed, who is under the age of 18 years “*does not forfeit the protections afforded by that subsection upon reaching the age of eighteen years but may consent to the publication of their identity after reaching the age of eighteen years, or if consent is refused their identity may be published at the discretion of a competent court*”. A new subsection (3B) is inserted in section 154 to provide for the circumstances under which the identity of such an accused, witness or person against whom an offence has allegedly been committed, may be revealed.
- (b) In terms of the proposed subsection (3B), consent is not the sole criteria for the publication of information which may reveal the identity of a person who has attained the age of 18 years. The reason therefor is that the publication of such information may reveal the identity of other persons who may wish to rely on the protection afforded by section 154(1), (2), (3)(a) or (5). The

amendments to section 154 therefore provide that the protection afforded by subsection (3) is on-going, unless a competent court authorises the publication of such information.

- (c) Subsection (3B)(a) provides that the court before which criminal proceedings contemplated in subsection (3) have been concluded, may on application of an accused, witness or person against whom an offence has allegedly been committed, who has attained the age of 18 years, and where the court has granted an order that extends into adulthood, grant an order authorising the publication of information which reveals the identity of the applicant to whom the application relates, if the court is satisfied that the applicant understands the nature and effect of his or her decision to apply to the court for the order.
- (d) Subsection (3B)(b) provides that the High Court before which, or in whose area of jurisdiction, the criminal proceedings contemplated in subsection (3) have been concluded may, on the application of an interested person, grant an order authorising the publication of information which may reveal the identity of a person contemplated in subsection (3)(a).
- (e) Subsection (3B)(c) provides that a court referred to in subsection (3B)(a) or (b) must consider all relevant factors to determine whether an order may be granted for the publication of information which may reveal the identity of a person referred to in subsection (3)(a), including—
 - (i) the nature of charges against the accused;
 - (ii) the age of the persons referred to in subsection (3)(a);
 - (iii) the period which has elapsed since completion of the criminal proceedings and the application;
 - (iv) the interest of the public or any person or category of persons in the publication of such information;
 - (v) the interest of society to encourage the reporting of offences and the participation of witnesses and victims of offences in criminal justice processes;
 - (vi) the likelihood that the publication of such information, which reveals the identity of a person contemplated in subsection (3)(a), will also reveal the identity of any other person contemplated in subsection (1), (2), (3)(a) or (5);
 - (vii) the nature and extent of any hardship that a person contemplated in subsection (3)(a) or any person related to such a person may suffer if such information is published; and
 - (viii) the effect of the order on the freedom of expression, dignity, security and privacy of a person referred to in subsection 3(a) or any person related to such a person.
- (f) Subsection (3B)(d) to (g) provides that a court may, if it deems it in the interest of the administration of justice, hold a hearing to determine whether an order should be granted. The hearing must take place behind closed doors and no person may disclose any information pertaining to the hearing or which may reveal the identity of a person contemplated in subsection (3)(a), unless it is authorised by the court or required in the course of further legal proceedings relating to the hearing or in the course of the administration of justice. The verdict of the court must, however, be delivered in open court and a court may decline to state in open court all or any of the facts, reasons or other considerations that it has taken into account in reaching its verdict, if it is of the opinion that the identity of a person contemplated in subsection (3)(a) may be revealed thereby.

2.2 **Clause 2** of the Bill contains the short title and commencement.

3. CONSULTATION

3.1 The provisions of the Bill arise from the *Centre for Child Law* judgment.

3.2 Legal Aid South Africa, Pro Bono, Centre for Child Law, Media Monitoring Africa, the National Prosecuting Authority and the SAPS were consulted on the Bill.

4. IMPLICATIONS FOR PROVINCES

There are no implications for the provinces.

5. FINANCIAL IMPLICATIONS FOR STATE

There are no financial implications for the State.

6. PARLIAMENTARY PROCEDURE

6.1 The Constitution distinguishes between four categories of Bills as follows: 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 classified or tagged, otherwise it would be constitutionally invalid.

6.2 The Bill has been considered against the provisions of the Constitution relating to the tagging of Bills, and against the functional areas listed in Schedule 4¹ to the Constitution.

6.3 The crux of tagging has been explained by the courts, especially the Constitutional Court in the case of *Tongoane and Others v Minister of Agriculture and Land Affairs and Others* 2010 (8) BCLR 741 (CC). The Court, in its judgment, stated as follows:

“[58] What matters for the purpose 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”. This statement refers to the test to be adopted when tagging Bills. This test for classification or tagging is different from that used by this court to characterise a Bill in order to determine legislative competence. This “involves the determination of the subject matter or the substance of the legislation, its essence, or true purpose and effect, that is, what the [legislation] is about.

[59] . . .

[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. The process is concerned with the question of how the Bill should be considered by the provinces and in the NCOP, and how a Bill must be considered by the provincial legislatures depends on whether it affects the provinces. The more it affects the interests, concerns and capacities of the provinces, the more say the provinces should have on its content.” (Footnotes omitted.)

* Functional areas of concurrent national and provincial legislative competence.

- 6.4 In light of what the Constitutional Court stated in the abovementioned case, the test for tagging essentially entails that “any Bill whose provisions in substantial measure” affects the provinces must be classified to follow the section 76 procedure.
- 6.5 The Bill seeks to amend section 154(3) of the Act in order to give effect to a judgment of the Constitutional Court. The subject matter of the Bill, in our view, does not fall within any of the functional areas listed in Schedule 4 or Schedule 5 to the Constitution.
- 6.6 The State Law Advisers and the Department of Justice and Constitutional Development are consequently of the opinion that the Bill should 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. REFERRAL TO NATIONAL HOUSE OF TRADITIONAL AND KHOI-SAN LEADERS

The opinion is held 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) 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 or matters contemplated in section 154(2) of the Constitution.