

Deciphering the Composition of Section 79- Assessment Panels in the Criminal Procedure Amendment Act 4 of 2017



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Abstract

Section 79 of the *Criminal Procedure Act* 51 of 1977 provides for the appointment of mental health professionals to assess an accused's fitness to stand trial and/or criminal capacity if the court orders such an enquiry in terms of sections 77 and 78 of the *Criminal Procedure Act*. In terms of section 79, one mental health professional must assess an accused charged with a non-violent offence, whereas a panel of such professionals must assess an accused charged with an offence involving serious violence.

The legislative provisions regarding the appointment of mental health professionals to a section 79-assessment panel are not without ambiguity. Section 79(1)(b) read with section 79(13) is problematic. Directives issued by the National Prosecuting Authority in terms of section 79(13) do not aid in clarifying the legal position either. The main point of contention is whether a section 79-assessment panel must consist of a minimum of two or three psychiatrists. This ambiguity creates challenges for presiding officers tasked with appointing section 79-assessment panels. When presiding officers appoint these panels incorrectly, it causes delays in the assessment process and the delivery of justice to the accused and the victim.

The court considered the interplay between section 79(1)(b) and section 79(13) in *S v Pedro* 2015 1 SACR 41 (WCC). The judgment highlights the need to clarify the position in the *Criminal Procedure Act* regarding the appointment of section 79-assessment panels. This case provided the impetus for the amendment of section 79 through the *Criminal Procedure Amendment Act* 4 of 2017.

This contribution explores the composition of section 79-assessment panels as provided for in the *Criminal Procedure Act*. Section 79(1)(b) and the seemingly contradictory provisions contained in section 79(13) are discussed. The *S v Pedro* judgment is discussed with a specific focus on the court's interpretation of the interplay between these two provisions.

Following the *S v Pedro* judgment, the Criminal Procedure Amendment Act 4 of 2017 amended section 79. This contribution explores the clarifying provisions of the Amendment Act regarding the composition of assessment panels.

Keywords

Criminal Procedure Amendment Act 4 of 2017, assessment panels, psychiatrists, clinical psychologists, section 79 of the *Criminal Procedure Act*, fitness to stand trial, criminal capacity, *S v Pedro*.

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1 Introduction

Section 79 of the *Criminal Procedure Act* 51 of 1977 (hereafter the "*Criminal Procedure Act*") sets out the procedure that applies when a court orders an enquiry into an accused's fitness to stand trial and/or criminal capacity.¹ This section provides for mental health professionals to be appointed to conduct the relevant assessment. The court appoints a panel of mental health professionals to assess an accused charged with an offence involving serious violence.² In this contribution, such a panel is referred to as a "section 79-assessment panel".

The provisions of the *Criminal Procedure Act* regarding the appointment of a section 79-assessment panel are not without ambiguity. Section 79(1)(b) read with section 79(13) is particularly problematic. These provisions promote two contrasting default positions on the required minimum number of psychiatrists for a section 79-assessment panel. While this might at first glance seem like a small or purely academic issue, it is not. Where a presiding officer appoints a section 79-assessment panel that does not consist of the prescribed number of psychiatrists, such a decision could be set aside on review.³ The court may have to appoint a section 79-assessment panel

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¹ Section 77 of the *Criminal Procedure Act* 51 of 1977 (*Criminal Procedure Act*) contains provisions regarding an accused's fitness to stand trial, whereas s 78 regulates the position where an accused's criminal capacity is at issue.

² Section 79(1)(b) of the *Criminal Procedure Act* sets out the provisions regarding the appointment of a panel of mental health professionals in cases involving accused persons charged with offences involving serious violence. In cases where the accused is charged with a non-violent offence, a panel need not be appointed. Such an accused is assessed by one psychiatrist only (s 79(1)(a)).

³ Many cases go on review because of the incorrect composition of assessment panels. In *S v Ramakoka* 2006 2 SACR 57 (W), (hereafter the "*Ramakoka* judgment") for instance, the accused, charged with a violent offence, was assessed by one psychiatrist only. The court referred the matter back to the magistrate's court with instructions to have the accused assessed by a panel of psychiatrists as prescribed by s 79(1)(b). The same occurred in *S v Thanda* 2015 JOL 34358 (ECG) (hereafter the "*Thanda* judgment"). In this case, a clinical psychologist that was not specifically appointed by the court assessed the accused as part of the s 79-assessment panel. This was irregular. The court explained at para 20 that it is the presiding officers that fill in the names of the mental health professionals who form part of the s 79-assessment panel on the form J138A. This is not usually done in open court but after proceedings and after the order has been made that the accused must be assessed for either fitness or criminal capacity. In *S v Pedro* 2015 1 SACR 41 (WCC) (hereafter the "*Pedro* judgment"), the assessment panel was also incorrectly established, in that the accused was assessed by two psychiatrists who both worked for the state – this is not in line with the provisions of s 79(1)(b), which prescribe the appointment of psychiatrists in various capacities to conduct such an assessment. This case was also referred back to the trial court for the panel to be appointed correctly.

afresh. The authenticity and usefulness of a fitness assessment or a criminal capacity assessment done by the newly appointed panel after the lapse of so much time becomes doubtful.⁴ This, in turn, affects the delivery of justice to the accused who had to undergo such assessment.

Appointing mental health professionals to these assessment panels is challenging because there is a shortage of psychiatrists in South Africa.⁵ This shortage of psychiatrists needed to conduct court-ordered assessments contributes to pre-trial delays.⁶

In *S v Pedro* 2015 1 SACR 41 (WCC) (hereafter the "*Pedro* judgment"), the court considered the position with regard to the appointment of section 79-assessment panels. The court emphasised the need for clarification in this regard. The *Pedro* judgment was the impetus behind legislative amendments aimed at clarifying the composition of assessment panels. The *Criminal Procedure Amendment Act* 4 of 2017 (hereafter the "*Amendment Act*") was recently enacted with the aim *inter alia* of clarifying the appointment of these assessment panels. The new provisions apply from 29 June 2017.⁷

This contribution explores the changes to the composition of section 79-assessment panels brought about by legislative amendments, including the most recent *Amendment Act*. A discussion of section 79(1)(b) and section 79(13) elucidates the ambiguity that exists by the mere co-existence of these

⁴ A criminal capacity assessment should be done as soon as possible since this inquiry is retrospective and a passage of time may eradicate the chances of determining with accuracy what the accused's state of mind was at the time of the commission of the alleged offence. Pillay 2014a *S Afr J Psychol* 50 confirms that a criminal capacity assessment becomes more complex the more time lapses between the alleged offence and the assessment.

⁵ Kruger *Hiemstra Suid-Afrikaanse Strafproses* 248. Also see the *Pedro* judgment para 38 where the court points out that there is a shortage of private psychiatrists in Gauteng who are willing to assist in court-ordered assessments, causing delays in matters involving mental illness and leading to cases being struck off the roll because assessments cannot be done.

⁶ A shortage of facilities licensed to conduct these assessments leads to accused persons waiting in prison for long periods for beds to become available at the designated facilities. The majority of accused persons referred for psychiatric evaluation (assessment) remain in prison, awaiting transfer to the relevant court-appointed psychiatric facility. See NPA date unknown http://www.lhr.org.za/sites/lhr.org.za/files/atd_guidelines_.pdf 37. Kruger *Hiemstra Suid-Afrikaanse Strafproses* 226 explains that referral for fitness to stand trial can be much harsher on an accused charged with a minor offence. This accused will probably spend more time awaiting and undergoing the assessment than the time s/he would have spent in prison had s/he been found guilty and had the issue of fitness to stand trial not been raised.

⁷ The *Criminal Procedure Amendment Act* 4 of 2017 (*Amendment Act*) was assented to on 27 June 2017 and published in GG 40946 of 29 June 2017. This Amendment Act is effective as of the date of its publication.

provisions and highlights the need to align these provisions. Insights offered by the court in the *Pedro* judgment, even though not explored in detail, are included, since this case provided the impetus for the amendment of section 79 by the *Amendment Act*. A section 79-assessment panel as envisaged by the *Amendment Act* is explored, and commentary is provided on the implications of these amendments.

2 Composition of section 79-assessment panels under the *Criminal Procedure Act*

2.1 Introduction

The section 79 procedure applies where the court orders an assessment of the accused's fitness to stand trial⁸ or criminal capacity.⁹ Courts often order an enquiry into both fitness to stand trial and criminal capacity.¹⁰ References to "assessment" throughout this contribution therefore include assessments for both fitness to stand trial and criminal capacity.

The seriousness of the charges against the accused, rather than the nature of the assessment, whether it is for fitness or criminal capacity, determines

⁸ Section 77(1) of the *Criminal Procedure Act* states: "If it appears to the court at any stage of criminal proceedings that the accused is by reason of mental illness or mental defect not capable of understanding the proceedings so as to make a proper defence, the court shall direct that the matter be enquired into and be reported on in accordance with the provisions of section 79." S 1(a) of the *Amendment Act* amended this section to replace "mental defect" with "intellectual disability".

⁹ Section 78(2) of the *Criminal Procedure Act* states: "If it is alleged at criminal proceedings that the accused is by reason of mental illness or mental defect or for any other reason not criminally responsible for the offence charged, or if it appears to the court at criminal proceedings that the accused might for such a reason not be so responsible, the court shall in the case of an allegation or appearance of mental illness or mental defect, and may, in any other case, direct that the matter be enquired into and be reported on in accordance with the provisions of section 79." S 2(b) of the *Amendment Act* amended this section to replace "mental defect" with "intellectual disability".

¹⁰ The practice seems to have developed to request an assessment in terms of both s 77 and s 78 rather than just one or the other. Calitz *et al* 2006 *SAJP* 49 explains that only a small number of referrals are for fitness assessments only. In the specific study, only 5,3% of the referrals were for fitness assessments only. Most of the referrals were in terms of both s 77 and s 78 of the *Criminal Procedure Act*. The reason for this is probably that it is convenient for a presiding officer to have an assessment conducted in respect of both sections simultaneously. Further, see Pillay 2014b *S Afr J Psychol* 378. The practice of conducting both assessments simultaneously possibly emerged as a cost- and time-saving initiative and because it is impossible for the court as a non-expert in mental health to establish if a suspected mental illness might have an impact on fitness alone or on fitness and criminal capacity.

the number of mental health professionals appointed to the section 79-assessment panel.¹¹

Only one psychiatrist¹² needs to assess an accused charged with a non-violent offence,¹³ whereas a panel of mental health professionals must assess an accused charged with an offence involving serious violence such as murder, culpable homicide or rape.¹⁴ Composing the assessment panels in the latter case is particularly problematic because of the seemingly

¹¹ This distinction between violent and non-violent offences for the purposes of assessments has been drawn since the inception of the *Criminal Procedure Act* on 22 July 1977. Also see the *Pedro* judgment para 14.

¹² Section 79(1)(a) of the *Criminal Procedure Act* states that where the charges against the accused are of a non-violent nature, the accused must be assessed "by the medical superintendent of a psychiatric hospital designated by the court, or by a psychiatrist appointed by the medical superintendent at the request of the court". It appears that the majority of referrals in terms of s 79 are for non-violent offences. Schutte 2013 *SAJBL* 65 discusses a study conducted at Sterkfontein Hospital in 2010. He points out that 55% of the referrals in terms of s 79 were for non-violent offences and thus necessitated an assessment by one psychiatrist only. The remaining 45% required the appointment of a panel of psychiatrists since the charges against these accused persons involved violence.

¹³ Section 79(1)(a) of the *Criminal Procedure Act* applies in the event that an accused is charged with a minor offence or an offence "other than one referred to in paragraph (b)", that is, paragraph 79(1)(b) of the *Criminal Procedure Act*. Schutte 2013 *SAJBL* 64 cites common assault, theft, common robbery and housebreaking as examples of such offences. Schutte explains further that the odd behaviour of an accused during arrest, in court or while in custody, is a more prominent reason for referral to a single psychiatrist than referral to a panel of psychiatrists. Such odd behaviour is consequently more likely associated with accused persons charged with a non-violent offence because the cases of non-violent accused persons are assessed by one psychiatrist only as opposed to a panel. Further, see Kruger *Hiemstra Suid-Afrikaanse Strafproses* 227.

¹⁴ Section 79(1)(b) of the *Criminal Procedure Act* sets out the members of the assessment panel who have to be appointed in cases where an accused is charged with murder or culpable homicide, rape or compelled rape as provided for in s 3 or s 4 of the *Criminal Law (Sexual Offences and Related Matters) Amendment Act* 32 of 2007, respectively, or another charge involving serious violence. This panel may also be appointed if the court considers it to be necessary in the public interest, or if the court in any particular case so directs. See Kruger *Hiemstra Suid-Afrikaanse Strafproses* 227, 248. The prosecutor has to establish from each psychiatrist and the clinical psychologist (if applicable) if they are available to conduct the requested assessment prior to referring the matter to the relevant professionals. The requirement that a panel of psychiatrists should assess an accused initially applied only in cases where the accused faced a murder charge. See Bateman 2005 *SAMJ* 212. Kruger *Mental Health Law* 165 explains that the initial position was that three psychiatrists had to assess a person only if the sentence for the charge against the accused was the death penalty. This was the position prior to the amendment of the Act by the *Criminal Law Amendment Act* 105 of 1997. Subsequent to this amendment, a panel of psychiatrists has to assess an accused for fitness or criminal capacity in terms of s 77 and/or s 78 in all cases where an accused faces charges involving violence, not just murder. Also see the *Pedro* judgment para 14.

contradictory provisions in the *Criminal Procedure Act*.¹⁵ These provisions are discussed later in this contribution.

Psychiatrists serve on assessment panels in different capacities. A short survey of the evolution of section 79-assessment panels explains the various capacities in which psychiatrists are appointed to such panels.

2.2 The evolution of section 79-assessment panels under the Criminal Procedure Act

Initially, when the *Criminal Procedure Act* first came into force, section 79-assessment panels had to consist of at least two psychiatrists.¹⁶ One of the psychiatrists on the panel was the medical superintendent of the designated psychiatric hospital where the court-ordered assessment had to take place, or a psychiatrist appointed on his/her behalf. This psychiatrist was in the employ of the state (hereafter the "state psychiatrist"). The other psychiatrist on the panel was a psychiatrist not in the full-time service of the state (hereafter the "private psychiatrist").¹⁷ An additional psychiatrist could serve on the panel on the request of the accused in his/her capacity as the psychiatrist for the accused.¹⁸

An assessment panel could thus consist of a minimum of two psychiatrists and a maximum of three psychiatrists. The *Criminal Procedure Act* did not provide for the appointment of clinical psychologists to these panels. This position prevailed until section 79 was amended in 2002.¹⁹

¹⁵ Section 79(1)(b)(ii) read with s 79(13).

¹⁶ Section 79(1)(b) in its initial form stated that an accused charged with a violent offence had to be assessed: (i) by the medical superintendent of a mental hospital designated by the court, or by a psychiatrist appointed by such medical superintendent at the request of the court; (ii) by a psychiatrist appointed by the court and who was not in the full-time service of the state; and (iii) by a psychiatrist appointed by the accused if s/he so wished.

¹⁷ Section 79(1)(b)(i) and (ii) of the *Criminal Procedure Act* prior to amendment. Also see the *Pedro* judgment para 16.

¹⁸ Section 79(1)(b)(iii) prior to amendment. Also see the *Pedro* judgment para 14.

¹⁹ Section 79(1)(b) was amended by the *Criminal Matters Amendment Act* 68 of 1998, which came into force in February 2002. There were minor amendments to this section prior to 2002, but these amendments are not canvassed here since the focus of this contribution is the composition of the assessment panels.

From 2002²⁰ an assessment panel had to consist of at least three psychiatrists.²¹ The major change the 2002 amendment brought about was the compulsory appointment of a psychiatrist for the accused by the court. The accused no longer needed to apply for such an appointment as had been the case previously. A further important change was the possibility of appointing a clinical psychologist to an assessment panel.²² An assessment panel could thus consist of a minimum of three psychiatrists: one state psychiatrist, one private psychiatrist and one psychiatrist for the accused. The panel could have a maximum of four members, consisting of a clinical psychologist where the court directed such an appointment, and the three psychiatrists in the capacities as set out above. This position prevailed until September 2010, when another important amendment of section 79 occurred.²³

The latter amendment resulted in considerable confusion about the correct composition of section 79-assessment panels and, in particular, the minimum number of psychiatrists that have to be appointed to such panels. A discussion of the legislative provisions at the centre of the confusion follows.

2.3 Problematic provisions in the Criminal Procedure Act

Section 79(1)(b)(ii) was amended in 2010 and section 79(13) was inserted by this amendment.²⁴ These two sections are seemingly contradictory.

Section 79(1)(b), prior to the 2010 amendment, mandated the appointment of three psychiatrists to an assessment panel.²⁵ The requirement to appoint

²⁰ The amendment was motivated by a report by the South African Law Commission (as it was called then) on Project 89. See SALC *Project 89*. The amendment of s 79 followed the proposed wording of the draft Bill that formed part of the Law Commission's report. The report suggested that the appointment of a psychiatrist for the accused must be compulsory and that such an appointment must be done by the court, not the accused. The Commission also suggested that a clinical psychologist may be appointed to the assessment panel where appropriate.

²¹ Section 79(1)(b) as amended by the *Criminal Matters Amendment Act 68 of 1998*. The section now reads that an accused charged with a violent offence (including murder, culpable homicide, rape or another charge involving serious violence or where the court so directs) must be assessed: (i) by the medical superintendent of a psychiatric hospital designated by the court, or by a psychiatrist appointed by such a medical superintendent at the request of the court; (ii) by a psychiatrist appointed by the court and who is not in the full-time service of the state; (iii) by a psychiatrist appointed for the accused by the court; and (iv) by a clinical psychologist where the court so directs.

²² Section 79(1)(b)(iv) after amendment by the *Criminal Matters Amendment Act 68 of 1998*.

²³ Section 79(1)(b) was amended by s 10 of the *Judicial Matters Amendment Act 66 of 2008* that came into force on 10 September 2010.

²⁴ The amendments were brought about by the *Judicial Matters Amendment Act 66 of 2008* that came into force on 10 September 2010.

²⁵ Section 79(1)(b), after its amendment by the *Criminal Matters Amendment Act 68 of*

three psychiatrists to conduct an assessment could lead to the postponement of court proceedings in the event that the psychiatrists are not available on the given court date to explain their findings to the court.²⁶ The general lack of availability of private psychiatrists made appointing three psychiatrists to an assessment panel as required by section 79(1) impractical in some provinces.²⁷

The purpose of section 79(1)(b) in its amended state was to provide scope for departure from the compulsory appointment of three psychiatrists.²⁸ Section 79(1)(b) of the *Criminal Procedure Act*, after the 2010 amendment, reads as follows:

- (b) where the accused is charged with murder or culpable homicide or rape or compelled rape as provided for in sections 3 or 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively, or another charge involving serious violence, or if the court considers it to be necessary in the public interest, or where the court in any particular case so directs-
 - (i) by the medical superintendent of a psychiatric hospital designated by the court, or by a psychiatrist appointed by the medical superintendent at the request of the court;
 - (ii) by a psychiatrist appointed by the court and who is not in the fulltime service of the State unless the court directs otherwise, upon application of the prosecutor, in accordance with directives issued under subsection (13) by the National Director of Public Prosecutions; [my emphasis]
 - (iii) by a psychiatrist appointed for the accused by the court; and

1998, made the appointment of three psychiatrists, including a psychiatrist appointed for the accused by the court, mandatory. The other two mandatory appointments were the superintendent of the psychiatric hospital and a psychiatrist appointed by the court but who was not in the full-time employment of the state. See the *Pedro* judgment para 21 where the development of s 79 prior to its amendment by the *Criminal Procedure Amendment Act 4 of 2017* is discussed.

²⁶ Psychiatrists reported logistical problems with assessments. See Bateman 2005 *SAMJ* 212. Those psychiatrists who had to visit accused persons in detention centres also reported problems. Detention centres cannot always identify detainees for assessment by psychiatrists for purposes of s 77 or 78 of the *Criminal Procedure Act*. This leads to the postponement of appointments with psychiatrists for purposes of assessments because the relevant accused cannot be located for such consultation. This inevitably causes delays in the assessment process. These challenges are acknowledged by the relevant authorities, as is evident from DCS date unknown http://www.dcs.gov.za/docs/landing/Discussion%20Document%20preceding%20Draft%20White%20Paper%20on%20Remand%20Detention_1.pdf 85.

²⁷ Kruger *Hiemstra Suid-Afrikaanse Strafproses* 248; *S v Lubisi* 2003 2 *SACR* 589 (T). Also see the *Pedro* judgment para 35 where the court points out that the low tariffs that were offered to private psychiatrists to conduct court-ordered psychiatric assessments made those psychiatrists who were available unwilling to assist. The court points out that in Gauteng there is a shortage of private psychiatrists who are willing to assist in court-ordered assessments, causing delays in matters involving mental illness and leading to cases being struck off the roll because assessments cannot be done (para 38).

²⁸ The *Pedro* judgment para 28.

- (iv) by a clinical psychologist where the court so directs.

Even though the default position promoted by section 79(1)(b) is that a section 79-assessment panel must comprise three psychiatrists in cases where the accused is charged with murder, culpable homicide, rape or another charge involving serious violence,²⁹ an assessment panel could, in fact, consist of two psychiatrists.³⁰ The compulsory two members of the panel are the state psychiatrist³¹ and the psychiatrist for the accused appointed by the court.³² A private psychiatrist is appointed as a third member of a section 79-assessment panel unless an application is made to dispense with such appointment.³³ If an application to dispense with the appointment of a private psychiatrist succeeds, the panel will therefore consist of only two psychiatrists. The appointment of a clinical psychologist to an assessment panel is optional.³⁴

²⁹ Section 79(1)(b) could be read to mean that at least three psychiatrists have to assess the accused in cases where the charge against the accused involves serious violence. S 79(1)(b) specifically refers to murder, culpable homicide and rape as such violent offences. Also, see in general the *Pedro* judgment for a discussion on the previous versions of the *Criminal Procedure Act* with regard to the appointment of the panel of experts to assess the accused.

³⁰ The *Pedro* judgment para 61. The court considered the explanatory memorandum to the *Judicial Matters Amendment Act* 66 of 2008. Of particular importance with regard to the *Judicial Matters Amendment Act* 66 of 2008 is section 10 thereof, which amended s 79(1)(b)(ii) and inserted subs 13 into s 79. A shortage of psychiatrists and cost considerations influenced these changes. Pillay 2014a *S Afr J Psychol* 51 confirms that at least two psychiatrists must assess an accused facing charges involving serious violence. Also see the *Pedro* judgment para 70, where this view is confirmed.

³¹ This psychiatrist is appointed in terms of s 79(1)(b)(i) of the *Criminal Procedure Act* for the state (the psychiatrist at the facility where the assessment has to be conducted). Also see the *Pedro* judgment para 16 where it is explained that the appointment of the superintendent as a psychiatrist by the court came about through the court's designation of a specific health establishment where the assessment should be conducted. The head of the health establishment is invariably a state employee and the appointment of a psychiatrist under s 79(1)(b)(i) is understood to be a psychiatrist in the employ of the state. The court may request the superintendent to appoint a psychiatrist, in which case the psychiatrist may be a private psychiatrist albeit so appointed by a state employee, namely, the superintendent of the hospital.

³² This psychiatrist is appointed by the court for the accused in terms of section 79(1)(b)(iii) of the *Criminal Procedure Act*. Also see Schutte 2013 *SAJBL* 64.

³³ Section 79(1)(b)(ii) of the *Criminal Procedure Act*. S 10 of the *Judicial Matters Amendment Act* 66 of 2008 amended s 79 of the *Criminal Procedure Act*. See the *Pedro* judgment para 24 where the confusion brought about by this amendment is discussed in detail and where the position prior to this amendment and thereafter is discussed. It is stated in the *Pedro* judgment para 15 that referring to the s 79(1)(b)(ii) psychiatrist as the "third psychiatrist" may be confusing since this psychiatrist's appointment is not listed third. This is, however, how such an appointment is often referred to in practice according to the court.

³⁴ Section 79(1)(b)(iv) of the *Criminal Procedure Act*.

Reading section 79(1)(b) in isolation is not problematic. Ambiguity is unavoidable, however, when section 79(1)(b) is read with section 79(13). It is necessary to read these sections together since an application to dispense with the appointment of a private psychiatrist (as referred to in section 79(1)(b)(ii) and often referred to as the “third psychiatrist”) must be made in terms of a directive issued under section 79(13)(a) of the *Criminal Procedure Act*. This provision was added to the *Criminal Procedure Act* by section 10 of the *Judicial Matters Amendment Act* 66 of 2008. Section 79(13)(a) provides the following:

The National Director of Public Prosecutions must, in consultation with the Minister, issue directives about the cases and circumstances in which a prosecutor must apply to the court for the appointment of a psychiatrist as provided for in subsection (1)(b)(ii) and any directive so issued must be observed in the application of this section.

Section 79(13) suggests that two psychiatrists are automatically appointed to a section 79-assessment panel and that application must be made by the prosecutor to the court to have a third psychiatrist (as referred to in section 79(1)(b)(ii)) appointed. The default position according to section 79(13) is thus that two psychiatrists are appointed to a section 79-assessment panel and that a third will be appointed only if a special application is made to this effect.

Section 79(1)(b)(ii), however, suggests the default position to be that a panel of three psychiatrists should be appointed unless application is made to dispense with the appointment of the third psychiatrist, in which case the panel may consist of two psychiatrists. A clinical psychologist is appointed to a section 79-assessment panel only if the court so directs.³⁵

Even though these two sections can eventually achieve the same outcome as far as the composition of a section 79-assessment panel is concerned,³⁶

³⁵ Section 79(1)(b)(iv) of the *Criminal Procedure Act*. Should a clinical psychologist be appointed to a panel without the court having directed so, the assessment panel could be found to have been compiled incorrectly and the matter could be referred back to the trial court for the correct appointment of the panel. In the *Thanda* judgment, a clinical psychologist assessed an accused whilst such an appointment had not been specifically directed by the court. The court found that the panel had been incorrectly appointed because the court had not specifically indicated that a clinical psychologist had to be appointed (para 12, 21). This illustrates that clinical psychologists are not routinely appointed to s 79-assessment panels, but have to be so appointed by specific direction of the court.

³⁶ A panel of two psychiatrists can be appointed if an application to dispense with the appointment of a third psychiatrist as prescribed by s 79(1)(b)(ii) succeeds. Similarly, a panel of two psychiatrists can be appointed if the prosecutor does not bring an application for the appointment of a third psychiatrist in terms of s 79(13). The appointment of the clinical psychologist remains optional.

they set out two contrasting default positions on the minimum number of psychiatrists required for a section 79-assessment panel tasked with assessing an accused charged with a violent offence. The default position promoted by section 79(13) seems to be favoured by the National Prosecuting Authority (hereafter the "NPA"), as explained below.

2.4 Directives by the NPA

The directives issued by the NPA under section 79(13) support the view that an assessment panel need consist of only two psychiatrists unless the prosecutor applies for a third to be appointed.³⁷

According to the Referral for Mental Observation directive issued by the NPA,³⁸ the prosecution may apply for the appointment of a third psychiatrist (a private psychiatrist) only on the written authority of the Director of Public Prosecutions. The factors that play a part in the motivation to apply for the appointment of a third psychiatrist include the seriousness of the offence, the complexity of the evidence, whether the accused person wishes the court to appoint a psychiatrist of his/her choice,³⁹ and the history of the particular accused person (e.g. previous observations of the accused person).⁴⁰ This directive was issued in 2014 and no doubt added to the confusion caused by the co-existence of section 79(1)(b)(ii) and section 79(13).

What we can construe from these seemingly contradictory provisions and the directives issued under section 79(13) is that the court may appoint a minimum of one psychiatrist to conduct an assessment in cases involving

³⁷ NPA 2014 <https://www.npa.gov.za/sites/default/files/Library/Criminal-Procedure-Act-Mental-Observation-Directives.pdf>. Also see the *Pedro* judgment para 45.

³⁸ The directive was issued in 2014 by the National Prosecuting Authority of South Africa. NPA 2014 <https://www.npa.gov.za/sites/default/files/Library/Criminal-Procedure-Act-Mental-Observation-Directives.pdf>.

³⁹ The court in the *Pedro* judgment para 46 finds this consideration puzzling, but states that the National Director of Public Prosecutions may have had in mind that if the psychiatrist appointed for the accused was a person appointed by the court with the specific approval of the accused, it might then be less critical to appoint a further private psychiatrist in addition to the state psychiatrist at the health establishment where the assessment is conducted,

⁴⁰ These factors are listed in NPA 2014 <https://www.npa.gov.za/sites/default/files/Library/Criminal-Procedure-Act-Mental-Observation-Directives.pdf> 1. This last factor is relevant in cases where the accused was diagnosed with a mental illness during a previous examination or assessment. In such a case, the appointment of a third psychiatrist might not be as pertinent. See the *Pedro* judgment para 47.

charges of a non-violent nature,⁴¹ and a maximum of three psychiatrists, plus a clinical psychologist in cases involving serious violence.⁴²

The court considered the interplay between section 79(1)(b)(ii) and section 79(13) in the *Pedro* judgment. The court's explanation of the correct composition of a section 79-assessment panel is set out below.

3 *S v Pedro* 2015 1 SACR 41 (WCC)

The accused in this case faced a charge of culpable homicide. In terms of section 79(1)(b) of the *Criminal Procedure Act*, a panel of mental health professionals had to assess this accused. Only two psychiatrists, both in the employ of the state, assessed the accused in this case. The court failed to appoint a psychiatrist for the accused in terms of section 79(1)(b)(iii), nor was a private psychiatrist appointed in terms of section 79(1)(b)(ii).⁴³ No application to dispense with the appointment of a private psychiatrist in terms of the latter provision had served before the court. The court had to establish whether the accused's assessment by the two psychiatrists in the employ of the state was in line with the provisions of section 79(1)(b) read with section 79(13).

In exploring the position on the appointment of section 79-assessment panels in terms of section 79, the court requested the NPA to explain the position on the appointment of these panels in the Western Cape, which was where the accused had been assessed. The NPA's response was as follows:

There was an irreconcilable difference of opinion within the Western Cape office regarding the composition of psychiatric panels and ... guidance was being sought from the National Director of Public Prosecutions.⁴⁴

The confusion caused by the interplay between section 79(1)(b)(ii) and section 79(13) is evident from this quote. The issue centres on whether the

⁴¹ In the event that an accused is charged with a minor offence or an offence "other than one referred to in paragraph (b)", that is, paragraph 79(1)(b) of the *Criminal Procedure Act*. Schutte 2013 *SAJBL* 64 cites common assault, theft, common robbery and housebreaking as examples of such offences. See s 79(1)(a) of the *Criminal Procedure Act*. Also see Kruger *Hiemstra Suid-Afrikaanse Strafproses* 227.

⁴² Section 79(1)(b)(i)-(iv) of the *Criminal Procedure Act*. Also see the *Pedro* judgment para 68: "For all these reasons, I consider that three psychiatrists, including a private psychiatrist, must be appointed when the case falls within s 79(1)(b) unless the court, upon application by the prosecutor, directs that a private psychiatrist need not be appointed, in which case there must be two psychiatrists. In either event, the court may appoint a clinical psychologist."

⁴³ The *Pedro* judgment para 9. Also see this case at para 75, where the court explains that a "psychiatrist appointed for the accused might regard it as proper to make more extensive enquiries into the accused's history and family circumstances and to ensure that nothing which might be favourable to the accused is overlooked."

⁴⁴ The *Pedro* judgment para 9.

appointment of a third psychiatrist is compulsory or not. The “third psychiatrist” refers to the psychiatrist who is not in the full-time employment of the state, as indicated in section 79(1)(b)(ii) of the *Criminal Procedure Act*. The term “third psychiatrist” instead of “private psychiatrist” is used throughout the discussion of the *Pedro* judgment, since one of the possible interpretations put to the court, as discussed below, is that the third psychiatrist need not necessarily be a private psychiatrist.

The court considered three possible interpretations of the co-existence of section 79(1)(b) and section 79(13). The first interpretation put to the court on behalf of the accused was that unless the court, on application by the prosecutor, directs otherwise, the panel must include the third psychiatrist. The directives issued under section 79(13) should guide the prosecutor in his/her decision on whether to make an application to dispense with such an appointment.⁴⁵ The second interpretation, supported by the Minister of Justice and Constitutional Development,⁴⁶ was that the court may, if the prosecutor applies to the court for the appointment of the third psychiatrist, appoint this psychiatrist and s/he must be a private psychiatrist unless the court directs that s/he may be a state psychiatrist. In deciding whether to apply for the appointment of the third psychiatrist (regardless of whether the proposed psychiatrist is a private or state psychiatrist), the prosecutor must be guided by directives issued under section 79(13).⁴⁷ Lastly, the court considered that these two provisions read together may be interpreted to mean that the court must always appoint a third psychiatrist, but if the prosecutor applies to the court to direct that the third psychiatrist need not be a private psychiatrist, the court may appoint a state psychiatrist as the third psychiatrist.⁴⁸

In considering the correct interpretation of section 79(1)(b) read with section 79(13), the court considered the wording of section 79 as amended over time, with particular focus on the goal of the legislature for the appointment of psychiatrists in various capacities to section 79-assessment panels.

The interpretation put to the court on behalf of the accused⁴⁹ was favoured by the court. The court found that the correct interpretation of the interplay between section 79(1)(b)(ii) and section 79(13) is that three psychiatrists

⁴⁵ The *Pedro* judgment para 29(a).

⁴⁶ The Minister was allowed to intervene because of the cost implications that the composition of s 79-assessment panels have for the state. See the *Pedro* judgment para 10.

⁴⁷ The *Pedro* judgment para 29(b). This interpretation was also supported by the Director of Public Prosecutions in the *Pedro* judgment para 10.

⁴⁸ The *Pedro* judgment para 29(c).

⁴⁹ The first interpretation as set out in the *Pedro* judgment para 29(a).

should be appointed by default unless an application is made to dispense with the appointment of a third psychiatrist.⁵⁰ The third psychiatrist must be a private psychiatrist. This reasoning is followed because section 79(1)(b)(ii), which indicates that three psychiatrists should be appointed, is the dominant provision as far as the appointment of a private psychiatrist (the third psychiatrist) as referred to in section 79(1)(b)(ii) is concerned, and section 79(13) is ancillary to it.⁵¹

The court was critical of the formulation of section 79(13). Rogers J, in considering the interpretation problems with respect to the appointment of assessment panels, mentioned that various interpretations of the current position could lead one to conclude that "something went wrong in the formulation of s 79(13)".⁵² The court held that the criteria set out in section 79(13) should be used not to decide in which circumstances a third psychiatrist should be appointed, but rather to decide in which cases the appointment of a third psychiatrist should be dispensed with.⁵³ Such an interpretation would bring section 79(13) in line with the meaning of section 79(1)(b)(ii), in particular.

The court held that the National Director of Public Prosecutions had issued the section 79(13) directives under a "misapprehension as to the default position" with regard to the composition of assessment panels.⁵⁴ As explained above, the default position the National Director of Public Prosecutions subscribed to was that the appointment of two psychiatrists to a section 79-assessment panel was sufficient unless a third psychiatrist was added to the panel on application by the prosecutor.

The court found:

(vi) The directives contemplated in s 79(1)(b)(ii) read with s 79(13) are directives regarding the cases and circumstances in which the prosecutor must apply to the court to dispense with the appointment of a private psychiatrist.

(vii) Pending the revision of the directives already issued by the NDPP pursuant to s 79(13), the directives currently in existence should be construed as determining the circumstances in which there should be a private psychiatrist and thus as defining by necessary implication the reverse cases and circumstances in which the prosecutor should apply to the court to dispense with the appointment of a private psychiatrist. It is, however, desirable, to avoid confusion, that the directives issued by the NDPP be

⁵⁰ The *Pedro* judgment para 60.

⁵¹ The *Pedro* judgment para 59.

⁵² The *Pedro* judgment para 48.

⁵³ The *Pedro* judgment paras 59-60.

⁵⁴ The *Pedro* judgment para 60.

revised to conform with the declared meaning of s 79(1)(b)(ii) as soon as may be expedient.⁵⁵

In this case, the prosecutor did not apply to the court to dispense with the appointment of a third psychiatrist. The assessment panel, according to the court's interpretation of the *Criminal Procedure Act* as set out above, therefore had to consist of a minimum of three psychiatrists, including a private psychiatrist.⁵⁶ The fact that the accused was assessed by two psychiatrists only, both working for the state in the absence of an application to dispense with the appointment of a private psychiatrist, was not in line with section 79(1)(b)(ii) read with section 79(13), as explained by the court. The trial court had to appoint an assessment panel afresh.⁵⁷

In identifying the need to clarify the position on the composition of assessment panels and, in particular, the appointment of a third psychiatrist, the *Pedro* judgment was one of the driving forces behind the *Criminal Procedure Amendment Act*. The relevant provisions of the *Amendment Act* as it applies to assessment panels are discussed below.

4 Composition of section 79-assessment panel under the Amendment Act

4.1 Introduction

The *Amendment Act* was enacted with the aim *inter alia* of eliminating⁵⁸ the confusion over the seemingly contradictory provisions of the *Criminal Procedure Act* as set out above. The *Amendment Act* changed the composition of section 79-assessment panels from June 2017.⁵⁹ The new position is discussed below.

4.2 Assessment of accused charged with non-violent offence

The amendment to section 79 did not affect the assessment of an accused charged with a non-violent offence. It is still the position that only one psychiatrist needs to conduct this assessment. The head of the health establishment designated by the court, or a psychiatrist delegated by the

⁵⁵ The *Pedro* judgment para 116.

⁵⁶ The *Pedro* judgment para 69.

⁵⁷ The *Pedro* judgment para 107.

⁵⁸ The preamble to the *Amendment Act* states that the Act aims to "clarify the composition of the panels provided for in section 79 to conduct enquiries into the mental condition of accused persons".

⁵⁹ The Act was assented to on 27 June 2017 and published in GG 40946 of 29 June 2017.

head concerned,⁶⁰ conducts the assessment. The term "head of the designated health establishment" replaces the term "superintendent" as it appeared in the previous version of section 79, seeing that the latter term no longer applies in psychiatric hospitals.⁶¹ This amendment also provides for the head of the health establishment to appoint a psychiatrist to do the assessment if the head him-/herself is not a psychiatrist.⁶²

4.3 Assessment of accused charged with an offence involving serious violence

The *Amendment Act* removed the problematic section 79(13) from the *Criminal Procedure Act* altogether. Section 79(1)(b), which sets out the composition of a section 79-assessment panel to assess persons accused of violent offences, was amended to the effect that a section 79-assessment panel need only consist of a minimum of two psychiatrists. An explanation of the composition of section 79-assessment panels under the *Amendment Act* follows.

Section 79(1)(b) in its amended form states that a section 79-assessment panel must consist of:

- (i) the head of the designated health establishment, or another psychiatrist delegated by the head concerned;⁶³

⁶⁰ Section 3 of the *Amendment Act*. S 79(1)(a), prior to its amendment, stated that such an accused had to be assessed "by the medical superintendent of a psychiatric hospital designated by the court, or by a psychiatrist appointed by the medical superintendent at the request of the court".

⁶¹ It is observed in the *Pedro* judgment para 76 that "the terminology in s 79(1)(b)(i) has not kept pace with changes of nomenclature in the health system. The post of 'medical superintendent' no longer exists in psychiatric hospitals. A public hospital has a 'Chief Medical Officer'. A psychiatric hospital, such as VBH, used to have a 'medical superintendent', who would be a psychiatrist. Nowadays, however, a psychiatric hospital has a 'Chief Executive Officer', who may be, but is not required to be, a medical doctor. We understand that the current Chief Executive Officer at VBH is not a psychiatrist".

⁶² The *Criminal Procedure Amendment Bill* B2 of 2017 sets out the purpose of this specific amendment as follows: "Subclause (a) aims to amend section 79(1) to clarify that in the case of less serious offences the relevant enquiry must be conducted and reported on by the head of a health establishment if the head is a psychiatrist or by a psychiatrist delegated by the head. Provision is also made that if the head is not a psychiatrist then he or she must appoint a psychiatrist to conduct the enquiry and report thereon". In the *Pedro* judgment para 76, for instance, the head of the health establishment (Valkenberg Hospital) was not a psychiatrist and the head therefore had to appoint a psychiatrist to conduct the court-ordered assessment.

⁶³ Prior to the amendment, s 79(1)(b)(i) read: "... the medical superintendent of a psychiatric hospital designated by the court or by a psychiatrist appointed by the medical superintendent at the request of the court".

- (ii) a psychiatrist appointed by the court,⁶⁴
- (iii) a psychiatrist appointed by the court, on application and on good cause shown by the accused for such appointment,⁶⁵ and
- (iv) a clinical psychologist where the court so directs.⁶⁶

The amendment leaves no doubt that an assessment panel must consist of at least two members. The two compulsory members of the panel are the head of the health establishment or a psychiatrist appointed by him (the state psychiatrist) and a psychiatrist appointed by the court. The *Amendment Act* does not indicate whether the latter appointment must be a private psychiatrist as the position was previously.⁶⁷ The psychiatrist appointed by the court could therefore arguably be either a private psychiatrist or a psychiatrist employed by the state. It may be that the appointment of this psychiatrist in the *Amendment Act* was intentionally not limited to private psychiatrists because of the resource shortages experienced in the forensic setting. Despite this intent, courts may continue to follow the previous practice where this psychiatrist is usually a private psychiatrist.

The court can appoint a psychiatrist for the accused. However, such an appointment will be made only after the accused has brought an application to this effect, showing good cause for such an appointment. Appointing a psychiatrist for the accused is therefore no longer automatic and compulsory,

⁶⁴ This subsection has been simplified and the part that caused confusion, namely, " ... and who is not in the full-time service of the State unless the court directs otherwise, upon application of the prosecutor, in accordance with directives issued under subsection (13) by the National Director of Public Prosecutions ..." was removed from the Act.

⁶⁵ This subsection prior to amendment by the Amendment Act used to read: "... a psychiatrist appointed for the accused by the court ...".

⁶⁶ This subsection remained unchanged.

⁶⁷ A psychiatrist appointed by the court and who is not in the full-time employment of the state (prior to amendment by this Amendment Act) in terms of s 79(1)(b)(ii) used to be referred to as the "private psychiatrist". Such a psychiatrist is also referred to as the "third psychiatrist", as pointed out in the *Pedro* judgment.

as was the case before this amendment.⁶⁸ The appointment of a clinical psychologist to a section 79-assessment panel remains optional.⁶⁹

The changes brought about by the *Amendment Act* mean that an assessment panel can take one of the following four forms:

- a) The panel can consist of two psychiatrists only as the minimum requirement.⁷⁰
- b) The panel can consist of three psychiatrists if the accused succeeds with his/her application for the appointment of a psychiatrist on good cause shown.⁷¹
- c) The panel can consist of three psychiatrists (as in (ii) above) and one clinical psychologist if the court directs the appointment of a clinical psychologist and approves the application by the accused for the appointment of a psychiatrist.⁷²
- d) The panel can consist of two psychiatrists (as in (i) above) and one clinical psychologist if the court directs the appointment of a clinical psychologist and the accused does not make an application for the

⁶⁸ Section 79(1)(b)(iii) stated that a “psychiatrist appointed by the court for the accused” had to form part of the assessment panel. The appointment of this psychiatrist was compulsory under the *Criminal Procedure Act*. This psychiatrist for the accused can be a private or state psychiatrist. It was pointed out in the *Pedro* judgment at para 51 that there was never a requirement that such a psychiatrist must be a private psychiatrist and in most cases this psychiatrist for the accused is a state psychiatrist. Interestingly, the provision in the *Amendment Act* that places the burden on the accused to apply for the appointment of a psychiatrist for him/her is in line with the provision in the *Criminal Procedure Act* in its initial form, where such an appointment was optional and made only on application by the accused. This was the position prior to the amendment of the *Criminal Procedure Act* by the *Criminal Matters Amendment Act* 68 of 1998 that came into force in 2002. Also see the *Pedro* judgment paras 17, 19. The legislature seems to have returned to the original provisions of the *Criminal Procedure Act* (prior to any amendment) on this issue.

⁶⁹ Section 3 of the *Amendment Act* amends s 79(1)(b) of the *Criminal Procedure Act* to this effect.

⁷⁰ The first psychiatrist is the head of the health establishment appointed by the court to conduct the assessment, or a psychiatrist appointed by him/her if s/he is not a psychiatrist. The second psychiatrist on the panel, according to the *Amendment Act*, is the psychiatrist appointed by the court (s 79(1)(b)(i) and (ii)).

⁷¹ Section 79(1)(b)(iii). The appointment of a psychiatrist for the accused is no longer compulsory, as was the case prior to the enactment of the *Amendment Act*.

⁷² This composition seems to represent the maximum capacity of an assessment panel. All possible appointments in terms of the Act will have been made if an assessment panel consists of three psychiatrists and one clinical psychologist.

appointment of a psychiatrist.⁷³

Table 1 below sketches the composition of section 79-assessment panels over time, up to the latest amendment.

Table 1: Changes to the appointment of section 79-assessment panels as brought about by major amendments to the *Criminal Procedure Act*

<i>Criminal Procedure Act 51 of 1977</i>	
Compulsory members	Optional members
superintendent of hospital, or psychiatrist appointed by him/her and psychiatrist not in full-time employ of state appointed by court	psychiatrist for the accused; appointment made only on application by accused
<i>Criminal Procedure Act after 2002 amendment</i>	
Compulsory members	Optional members
superintendent of hospital, or psychiatrist appointed by him/her and psychiatrist not in full-time employ of state appointed by court and psychiatrist for the accused appointed by the court	clinical psychologist if the court so directs
<i>Criminal Procedure Act after 2010 amendment (read with <i>Pedro</i> judgment)</i>	
Compulsory members	Optional members
superintendent of hospital, or psychiatrist appointed by him/her and psychiatrist not in full-time employ of state appointed by court – appointment can be dispensed with on application by prosecutor and psychiatrist for the accused appointed by the court	clinical psychologist if the court so directs

⁷³ This composition will also apply if an application by the accused for the appointment of a psychiatrist as referred to in s 79(1)(b)(iii) is denied by the court.

<i>Criminal Procedure Act after 2017 amendment</i>	
Compulsory members	Optional members
head of establishment, or psychiatrist appointed by him/her and psychiatrist appointed by the court	psychiatrist for the accused; appointment made only on good cause shown by the accused and/or clinical psychologist if the court so directs

It appears that the *Amendment Act*, through removing section 79(13) and amending section 79(1)(b) in the stated manner, ironically achieves what section 79(13) and the directives issued thereunder aimed to achieve, namely, to reduce the default number of psychiatrists appointed to a section 79-assessment panel.⁷⁴

4.4 Clinical psychologist as a member of assessment panel

A clinical psychologist can form part of a section 79-assessment panel if the court so directs.⁷⁵ The position on appointing a clinical psychologist to an assessment panel remains unchanged from the previous version of the *Criminal Procedure Act*. A clinical psychologist is still appointed at the discretion of the court in cases where the accused faces charges involving serious violence. The factors that will guide the court in deciding whether to appoint a clinical psychologist in a specific case are not clear.⁷⁶

Pillay⁷⁷ laments the fact that the court does not appoint clinical psychologists to section 79-assessment panels regularly even though the legislature clearly

⁷⁴ Section 79(13) as it was inserted into the *Criminal Procedure Act* by the *Judicial Matters Amendment Act 66 of 2008* provided for a prosecutor to apply for the appointment of a third psychiatrist to an assessment panel. By providing for such an appointment, the legislature justified the assumption that the assessment panel had to consist of only two psychiatrists and not three, as s 79(1)(b) seemed to suggest at the time.

⁷⁵ Section 79(1)(b)(iv) of the *Criminal Procedure Act*. Also see the objects of the *Criminal Procedure Amendment Bill B2 of 2017* as set out in para 2.3.2 of the Bill.

⁷⁶ Pillay 2014a *S Afr J Psychol* 52, 54 explains that courts tend to appoint clinical psychologists in cases where the actions of the accused might be indicative of psychological processes rather than a diagnosable mental illness. For criminal capacity assessments, clinical psychologists are appointed if the alleged offences seem particularly emotionally charged, for instance, if a victim was stabbed many times.

⁷⁷ Pillay 2014b *S Afr J Psychol* 379 points out that the court seldom appoints a clinical psychologist, despite the provision in the *Criminal Procedure Act* that empowers it to do so. This practice raises questions about the motive of the legislature in including clinical psychologists as competent persons to conduct forensic assessments, as there has been pressure in the past from this profession to be included. Pillay poses the question as to whether the inclusion was truly an acknowledgment of the skills of

recognises the ability of clinical psychologists to conduct the required forensic assessments.⁷⁸ He advocates the routine appointment of clinical psychologists to section 79-assessment panels.⁷⁹

Increasing the involvement of clinical psychologists in assessments could potentially relieve the strain on resources in the South African forensic setting, especially considering that there are almost four times more clinical psychologists than psychiatrists in South Africa.⁸⁰

5 Conclusion

The *Amendment Act* brings certainty regarding the number of psychiatrists that must be appointed to a section 79-assessment panel. A section 79-assessment panel must consist of at least two psychiatrists – this constitutes the default position.⁸¹ A section 79-assessment panel will consist of three psychiatrists only in cases where the accused applies for such appointment on good cause shown. The appointment of a clinical psychologist to an assessment panel remains optional.

As alluded to earlier, the ambiguous legislative provisions in terms of which presiding officers appointed section 79-assessment panels led to several reviews about the composition of such panels.⁸² The effect of a successful

this profession to assist in forensic assessments or if it was merely an attempt to pacify the profession after the pressure exerted. Pillay points out further that 10% of the training of clinical psychologist focusses on forensic mental health and most forensic assessment facilities provide training to psychologists in this regard.

⁷⁸ Section 79(1)(b)(iv) of the *Criminal Procedure Act*. Also see Pillay 2014b *S Afr J Psychol* 379; Pillay points out that the training of clinical psychologists includes training on forensic mental health, and that clinical psychologists indeed have the required competency and skills to conduct such assessments.

⁷⁹ Pillay 2014b *S Afr J Psychol* 379. He is of the view that it will reduce the waiting lists for these assessments since there are more psychologists than psychiatrists in South Africa. Clinical psychologists may therefore be more readily available to conduct these assessments, which will speed up pre-trial assessments of accused's fitness to stand trial and criminal capacity.

⁸⁰ Pillay 2014b *S Afr J Psychol* 379. Also see Pillay 2014a *S Afr J Psychol* 56; Pillay states that in 2013, 2725 clinical psychologists were registered with the Health Professions Council of South Africa as opposed to only 769 psychiatrists.

⁸¹ This default position pertains only to cases where the accused faces charges involving serious violence. Only one psychiatrist assesses an accused charged with a non-violent offence as per s 79(1)(a).

⁸² See in general the *Thanda* judgment, the *Pedro* judgment and the *Ramakoka* judgment. The s 79-assessment panels in these cases were inappropriately compiled and the matter was referred back to the trial court to appoint the panel afresh. Due to the time that would have lapsed since the accused was first assessed and since mental illnesses are not static, the outcome of a second assessment is likely to be vastly different from that of the initial assessment. The authenticity of the assessment *per se* and whether it serves its intended purpose becomes questionable. The appropriateness of the recommendations by the newly appointed panel as to fitness

review was that a newly appointed section 79-assessment panel would assess an accused for fitness and/or criminal capacity. Many months would have passed between the accused's first assessment and his/her second assessment. By the time the accused underwent the second assessment, his/her mental state might have changed and, in the case of a criminal capacity assessment, his/her recollection of the events about which s/he was undergoing the assessment may have faded. The authenticity and utility of these second assessments therefore became uncertain. The clearer guidance provided by the amended section 79 could arguably limit the occurrence of reviews and the undesirable practice of re-assessing an accused in the process.

Implementing the provisions of the *Amendment Act* will bring about questions of its own, such as what exactly is meant by "good cause shown" in respect of the appointment of a third psychiatrist on application by the accused. Perhaps the criteria that had to be considered under section 79(13)⁸³ of the *Criminal Procedure Act* before its deletion by the *Amendment Act* can be helpful.⁸⁴ It further remains to be seen whether a psychiatrist appointed by the court as provided for in section 79(1)(b)(ii) in its amended form must be a private psychiatrist or not.

Even though the law has developed to allow for the appointment of clinical psychologists to section 79-assessment panels, such appointment is not mandatory. In view of the enormous shortage of psychiatrists in the South African forensic setting and the delays associated with this shortage, it might be fitting to revisit the role of clinical psychologists in forensic assessments, with a view to intensifying their involvement.

and/or criminal capacity has to be questioned due to the substantial lapse of time since the arrest of the accused.

⁸³ The NPA's directives issued in terms of s 79(13) should be read with s 79(13).

⁸⁴ Section 79(13) of the *Criminal Procedure Act* (removed from the *Criminal Procedure Act* by the *Amendment Act*) stated that the prosecutor had to make application for the appointment of a third psychiatrist. Even though the *Amendment Act* now states that the accused must apply for the appointment of a (third) psychiatrist, the considerations that were listed for the purposes of s 79(13) can find application. Factors to consider for such appointment include the seriousness of the offence, the history of the accused, the complexity of the evidence and whether the accused wished to have such a psychiatrist appointed. These factors are listed in NPA 2014 <https://www.npa.gov.za/sites/default/files/Library/Criminal-Procedure-Act-Mental-Observation-Directives.pdf> 1.

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List of Abbreviations

DCS	Department of Correctional Services
NPA	National Prosecuting Authority
S Afr J Psychol	South African Journal of Psychology
SAJBL	South African Journal of Bioethics and Law
SAJP	South African Journal of Psychiatry
SALC	South African Law Commission
SAMJ	South African Medical Journal