



HELENSUZMAN  
FOUNDATION

Submission in response to the Correctional Matters Amendment Bill, B 32 of 2020

28 December 2020

For attention: Mr. Jacques Van Wyk

Per email: [jacques.vanwyk@dcs.gov.za](mailto:jacques.vanwyk@dcs.gov.za)

Parliamentary Committee: Justice and Correctional Services

We attach a written submission on the Correctional Matters Amendment Bill, B 32 of 2020. The HSF would also appreciate the opportunity to make an oral presentation.

Should you have any queries, kindly contact [catherine@hsf.org.za](mailto:catherine@hsf.org.za).

Yours sincerely

Francis Antonie

Director

## **1. Introduction**

The Helen Suzman Foundation (“HSF”) welcomes the opportunity to make submissions to the Parliamentary Committee on Justice and Correctional Services (“the Committee”) on the Correctional Matters Amendment Bill, 2020 (“the Bill”).

The HSF is a non-governmental organisation whose main objective is to promote and defend the values of our constitutional democracy in South Africa, with a focus on the rule of law, transparency and accountability.

## **2. Background to this Submission**

The HSF recognises the work of this Committee to bring the provisions of the Correctional Services Act in line with the Constitution and the judgment of the Constitutional Court in *OC Phaahla v Minister of Justice and Correctional Services and Another* CCT 44/18 [2019] ZACC 18 (“Phaahla”).

The Correctional Services Act 111 of 1998 (“Act”) creates a dual system of assessment, consideration and placement on parole of inmates determined by their date of sentence.<sup>1</sup> Section 73(6)(b)(iv) of the Act imposes a parole regime (“the new regime”) in terms of which inmates sentenced to life imprisonment are eligible for parole only after serving 25 years. The new regime applies to inmates sentenced on or after the date on which it came into effect (1 October 2004). Section 136(1) of the Act preserves the parole regime (“the old regime”) that was in place prior to the coming into effect of the new regime. In terms of the old regime inmates sentenced to life imprisonment are eligible for parole after serving 20 years.<sup>2</sup> The old regime applies to inmates sentenced before the date on which the new regime came into effect so as to avoid the retroactive application of the new regime.

The Constitutional Court held that the effect of these provisions was to impose different punishments on persons in similar positions (persons who committed the same offence at the same time) on the basis of their date of sentence. The Court held that this denied persons

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<sup>1</sup> Phaahla at para 9.

<sup>2</sup> Read with section 136(3)

the equal protection of the law and amounted to unfair discrimination – violating sections 9(1) and (3) of the Constitution.

The Constitutional Court further held that the provisions lengthening the periods of parole non-eligibility have the effect of imposing a more severe punishment than the prescribed punishment applicable at the time the offence was committed – violating section 35(3)(n) of the Constitution.

The Constitutional Court accordingly declared sections 136(1) and 73(6)(b)(iv) of the Correctional Services Act inconsistent with the Constitution. The Court gave Parliament 24 months to amend the Act to apply parole regimes on the basis of date of commission of an offence.

### **3. Substantive comments**

#### **3.1. Redundant amendments**

There is no need to amend sections 73(6)(a) and (b) of the Correctional Services Act. The new regime contained in section 73 of the Act applies prospectively from 1 October 2004 – the date of Chapter VII coming into effect. The amended section 136(1) in the Bill preserves the old regime in respect of all inmates serving a sentence of incarceration (of any length) for an offence committed *before* the commencement of the new regime. The defect identified by the Constitutional Court in *Phaahla* is accordingly fully remedied by the amendment to section 136(1) in the Bill.

#### **3.2. Additional amendments required**

We recommend that section 136(4)<sup>3</sup> be amended to harmonise it with the Constitutional Court's judgment in *Phaahla* (and with section 136(1) as amended in the Bill) which links the applicable parole regime to the date of commission of an offence.

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<sup>3</sup> Section 136(4) reads:

We recommend that section 136(4) be amended to read:

If a person is sentenced to life incarceration for an offence committed after the commencement of Chapters IV, VI and VII while serving a life sentence imposed for an offence committed prior to the commencement, the matter must be referred to the Minister who must, in consultation with the National Council, consider him or her for placement under day parole or parole.

### **3.3. Continuing and multiple offences**

In his dissenting judgment in *Phaahla*, Justice Froneman highlighted the difficulty raised by the use of the date of commission of an offence for determining the applicable parole regime in cases of continuing<sup>4</sup> and multiple offences.<sup>5</sup>

The Bill provides no certainty on the applicable parole regime for inmates convicted and sentenced in these very common types of cases. We recommend that the Bill specify that the date of commission in cases of continuous or multiple offences is the *earliest date* connected with the commission of the offence(s). This ensures that the inmate will receive the least severe of the prescribed punishments where the offence(s) extend on both sides of the operative date on which the new regime came into effect. This is in line with the substantive rights guarantee of section 35(3)(n) of the Constitution, as understood by the Constitutional Court in *Phaahla*.

*Catherine Kruyer*

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“If a person is sentenced to life incarceration after the commencement of Chapters IV, VI and VII while serving a life sentence imposed prior to the commencement, the matter must be referred to the Minister who must, in consultation with the National Council, consider him or her for placement under day parole or parole.”

<sup>4</sup> Continuing offences are defined in Black’s Law Dictionary as “1. A crime that continues after an initial illegal act has been consummated; a crime that involves ongoing elements [...] 2. A crime (such as driving a stolen vehicle) that continues over an extended period.

<sup>5</sup> Multiple offences refer to the situation where a person is convicted of more than one offence in a criminal trial. These may be either multiple concurrent offences or multiple previous offences.