CALS
Centre for Applied Legal Studies

DJ Du Plessis Building West Campus Wits Braamfontein
Private Bag 3 Wits University 2050 South Africa
Tel + 27 11 717-8600 Fax + 27 11 717 1702
www.law.wits.ac.za/cals

Submission

to the

Department of Justice and Correctional Services

on

Correctional Matters Amendment Bill, No. 43542

October 2020

Thandeka Kathi
Attorney
Centre for Applied Legal Studies
Emai:Thandeka.Kathi@wits.ac.za

Busisiwe Kamolane
Candidate Attorney
Centre for Applied Legal Studies
Email: Busisiwe.Kamolane@wits.ac.za

Caitlin Turok
Intern
Centre for Applied Legal Studies
Email: caitlinturok@hotmail.co.uk

Tshepiso Laka
Intern
Centre for Applied Legal Studies
Email: Tshepiso.laka@yahoo.com

CALS
Centre for Applied Legal Studies
DJ Du Plessis Building West Campus Wits Braamfontein
Private Bag 3 Wits University 2050 South Africa
Tel + 27 11 717-8600 Fax + 27 11 717 1702
www.law.wits.ac.za/cals

INTRODUCTION

About the Centre for Applied Legal Studies

1. The Centre for Applied Legal Studies ("***CALS***") welcomes the opportunity to submit comments on whether the proposed amendment of the Correctional Services Act 111 of 1998 (**"*the Act*"**) is in line with the judgment by the Constitutional Court in *OC Phaahla v Minister of Justice and Correctional Services and another* CCT 44/18 [2019] ZACC 18 (**"*Phaahla*"**).

2. In the event that the Minister hosts public hearings on the amendment, CALS hereby requests to make oral submissions.

3. CALS is a human rights organisation and law clinic (registered with the Legal Practice Council of the Northern Provinces) and is based at the School of Law at the University of the Witwatersrand. CALS is committed to the protection of human rights through partnering with individuals and communities in the pursuit of systemic change.

4. CALS' vision is a country and continent where human rights are respected, protected and fulfilled by the state, corporations, individuals and other repositories of power. We seek to dismantle systemic harm and we have a rigorous dedication to justice. CALS fulfils this mandate by –

    4.1. challenging and reforming systems within Africa which perpetuate harm, inequality and human rights violations;
    4.2. providing professional legal representation to survivors of human rights abuses; and
    4.3. using a combination of strategic litigation, advocacy and research, to challenge systems of power and act on behalf of vulnerable persons and communities.

CALS
Centre for Applied Legal Studies
DJ Du Plessis Building West Campus Wits Braamfontein
Private Bag 3 Wits University 2050 South Africa
Tel + 27 11 717-8600 Fax + 27 11 717 1702
www.law.wits.ac.za/cals

5. CALS operates across a range of five programmes, namely the Home, Land and Rural Democracy Programme, the Business and Human Rights Programme, the Environmental Justice Programme, the Gender Justice Programme, as well as the Civil and Political Justice Programme. We adopt a gendered and intersectional approach to interpreting, implementing and – where necessary – promoting the development of the law.

BRIEF HISTORY OF THE FACTS THAT LED TO THESE SUBMISSIONS

6. The request for submissions came about due to sections 136(1) and 73(6)(iv) of the Act being declared invalid by the Constitutional Court in *Phaahla*. Section 136(1) stipulates that anyone sentenced to life imprisonment before October 1 2004 would be eligible for parole after serving 20 years of their sentence in prison, in accordance with the old parole regime. While section 73(6)(b)(iv) states that a person sentenced to incarceration for life after 1 October 2004 may not be placed on parole until he or she has served at least 25 years of the sentence.

7. The Constitutional Court confirmed an order made by the High Court that sections 136(1) and 73(6)(b)(iv) of the Correctional Services Act of 1998 were constitutionally invalid and thus should be amended. The Constitutional Court stated that the use of date of sentence in s136(1) instead of the date of commission of offence breaches the constitutional right to equal protection of the law and the right to the benefit of the least severe punishment. It also amounts to retroactive application of the law which violates section 35(3)(n) of the Constitution and the principle of legality.

8. Mr Phaahla was convicted on 25 September 2004 and was sentenced to life imprisonment on 5 October 2004. His sentence was 4 days after the new parole

DJ Du Plessis Building West Campus Wits Braamfontein
Private Bag 3 Wits University 2050 South Africa
Tel + 27 11 717-8600 Fax + 27 11 717 1702
www.law.wits.ac.za/cals

regime came into effect, therefore he had to serve 5 extra years because of his sentencing date.

9. Mr Phaahla argued that sections 73(6)(b)(iv) and 136(1) of the Correctional Services Act 1998 breached his right to equal treatment and protection of the law in terms of section 9(1) of the Constitution and his right not to be discriminated against (section 9(3) Constitution). Mr Phaahla also argued that the impugned sections breach his right to a fair trial, more specifically the right to receive the least severe prescribed punishment if the prescribed punishment for the offence has changed between the time the offence was committed and the date of sentencing (s35(3) Constitution).

10. The Constitutional Court held that section 136 (1) should read as follows:

> *"Any person serving a sentence of incarceration for an offence committed before the commencement of Chapters 4, 6 and 7 of the Correctional Services Act is subject to the provisions of the Correctional Services Act 8 of 1959, relating to his or her placement under community corrections, and is to be considered for such release and placement by the Correctional Supervision and Parole Board in terms of the policy and guidelines applied by the former Parole Boards prior to the commencement of those chapters."*

The Proposed Amendment

11. Clause 2 of the Correctional Matters Amendment Bill, No. 43542 ("***the Bill***") states that:

> "*by the substitution in subsection (6)(b) for subparagraph (iv) of the following subparagraph:*

DJ Du Plessis Building West Campus Wits Braamfontein
Private Bag 3 Wits University 2050 South Africa
Tel + 27 11 717-8600 Fax + 27 11 717 1702
www.law.wits.ac.za/cals

"(iv) life incarceration for an offence committed after the commencement of Chapters IV, VI and this Chapter may not be placed on day parole or parole until he or she has served at least 25 years of the sentence; or"

12. Clause 3 of the Bill proposes the following amendment to section 136(1):

"*Section 136 of the principal Act, is hereby amended— (a) by the substitution for subsection (1) of the following subsection: "(1) Any person serving a sentence of incarceration [immediately] for an offence committed before the commencement of Chapters IV, VI and VII is subject to the provisions of the Correctional Services Act,1959 (Act 8 of 1959), relating to his or her placement under community corrections, and is to be considered for such release and placement by the Correctional Supervision and Parole Board in terms of the policy and guidelines applied by the former Parole Boards prior to the commencement of those Chapters*."

13. This amendment complies with the Constitutional Court's decision to determine the applicable parole regime by the date in which the offence was committed as opposed to the date in which the offender is sentenced. It is also in line with its proposed amendment.

CALS SUBMISSIONS

There is a need to define the process to be followed by offenders

14. The issue we submit is that not only did the Act fail to explain the main reason for an extra 5 years from the 20 years of imprisonment before one can be eligible for a parole, which violates the principle of legality and s35(3)(n) of the Constitution, but the Act also fails to outline a process that needs to be followed

DJ Du Plessis Building West Campus Wits Braamfontein
Private Bag 3 Wits University 2050 South Africa
Tel + 27 11 717-8600 Fax + 27 11 717 1702
www.law.wits.ac.za/cals

to ensure how offenders who qualify for a parole will be identified and prepared for their consideration date according to different categories of sentences to avoid the administration confusion.

15. Failure by the Act to provide reasonable processes to determine the new regime parole has led to a violation of constitutional rights raised by the applicant in the Constitutional Court judgment. More clarity must be given in relation to the new parole regime.

16. This will require the Act to be more specific and it should determine reasonable measures on how the date of commission of an offence will be used as a definite factor between the categories of a parole. This can be achieved by outlining the process or policy to be used.

Understanding the non-eligibility for parole as a part of punishment

16.1. The Constitutional Court in *Phaahla* also importantly stated that the non-eligibility for parole is part of punishment. Particularly, the Court held that *"[c]orrectional supervision is a class of punishment, and so the rules prescribing correctional supervision prescribe a form of punishment. Parole is defined in substantively the same way, serves the same purpose, and is governed by the same rules as correctional supervision. In substance, therefore, the two are identical and parole, like correctional supervision, must surely be a type of punishment*."

17. It is vital for the Act as well as the Bill to recognise that non-eligibility for parole is part of punishment. A proper underpinning of this principle in the Act and the Bill will assist in ensuring that parole processes are fair, just and transparent. The proper legislation of this principle may also assist in ensuring parole decision makers are cognisant of, and adequately protect, inmates' right to a fair trial and the right to the least severe punishment if the prescribed

DJ Du Plessis Building West Campus Wits Braamfontein
Private Bag 3 Wits University 2050 South Africa
Tel + 27 11 717-8600 Fax + 27 11 717 1702
www.law.wits.ac.za/cals

punishment for the offence has changed between the time the offence was committed and the date of sentencing as encompassed in s35(3)(n) of the Constitution. We submit this has not been done in the Bill.

18. The Constitutional Court further noted that *S v Zuma* supports a broad interpretation of s35(3)(n) so that at the very least, the pre-conditions for parole would fall within 'prescribed punishment'. Therefore an increase in the length of time a person is not eligible for parole increases the severity of the punishment of the inmate.

19. This is again, an explicit recognition of this principle and its subsequent implications for parole in South Africa has not been dealt with adequately in the Bill.

Conclusion

20. The *Phaahla* judgment goes a long way in protecting the rights of inmates who would otherwise be subjected to unfair discrimination, prejudice and vague parole rules and procedures. It is important that parole procedures are demystified and that all the constitutional rights argued in the case are given effect to. We need a meaningful and clear Correctional Services Act with the necessary procedures and measures that consider qualifying offenders for possible placement on parole in line with the Constitution and this judgment.