

# **CHAPTER 9**

## **PAROLE**

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## CHAPTER 9

### PAROLE

#### 1. INTRODUCTION

The Commission consistently received complaints from prisoners and occasionally from members of Correctional Services about the Department's parole policy, the conversion of terms of imprisonment to correctional supervision, the remission of sentences and transfer of prisoners from one prison to another. This particular Chapter will deal with parole since the Commission has been able to establish that there are problematic areas because of mismanagement and/or corruption, which, in the Commission's view, the Department needs to attend to.

Department officials seem to be exercising unfettered discretion in respect of a number of issues, including parole and transfer, notwithstanding the fact that the Appellate Division has previously stipulated that a Government official may not exercise such discretion. The discretion allowed is to be exercised according to rules of reason and justice<sup>1</sup> and is limited to the extent of the provisions of the enabling statute. In this case, it would also include compliance with the provisions of the Constitution of the Republic of South Africa. Officials are clearly exercising

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<sup>1</sup> See *Ismail and Another v Durban City Council* 1973 (2) SA 362 (N) at 371 H – 372 B cited with approval in *Goldberg and Others v Minister of Prisons* 1979 (1) SA 14 (A.D.) at 18 C-F; *Park-Ross v Director: Office for Serious Economic Offences* 1995 (2) SA 148 (C) at 173 H-I; *Union of Teachers' Associations v Minister of Education & Culture* 1993 (2) SA 828 (C) at 836 A-C; *West.Bank v Laurie Fossati Plant Hire (Under Jud. Man.)* 1974 (4) 607 (E.C.D.) at 610 B-D and *Stanfield v Minister of Correctional Services and Others* 2004 (4) SA 43 (CPD) at para. [100].

this unfettered discretion because there are no checks and balances in place to ensure that in exercising their discretion, they act within the parameters of the Law and the Constitution.

This state of affairs encourages corruption because the affected prisoners, as a result of their unfortunate position, cannot challenge actions the members take. If prisoners seek to challenge such actions, they would have to part with substantial sums of money to move High Court applications, when a provision could instead be made in the Departmental Regulations or the Correctional Services Act to ensure that they do have some form of domestic remedy.

In some cases, the only way prisoners can ensure that they get what they are entitled to is to curry favour with Departmental officials or even to bribe them to ensure that they are allowed to enjoy the privileges or rights that they are entitled to. These are, however, the duties that members are supposed to perform without any financial gain. Prisoners in every prison we have investigated complained about this issue.

## **2. PAROLE BOARDS**

Parole Boards form one of the most important components in the Criminal Justice System chain. The chain involves the following processes: the police, who are part of the Department of Safety and Security, arrest an offender, who is tried and convicted by courts, which form part of the Department of Justice. The offender is incarcerated in a prison, which forms part of the Department of Correctional Services. Parole Boards, therefore, come into play after a Judge or a Magistrate has sentenced a person to imprisonment.

The task of the members of the Parole Board is to decide whether the person should be released before serving the full sentence that the judicial official who

presided over the matter imposed. Needless to say, that decision is one of the most important decisions that could be made in respect of any offender in the Department of Correctional Services. It is also a role that effectively gives the Executive power to interfere with an order of another arm of the Government; namely, the Judiciary, and such actions are permissible in terms of the Constitution.<sup>2</sup>

The risk factors involved in releasing a person on parole, or correctional supervision, are similar to the risk of releasing offenders on bail and our Courts have highlighted these in a number of judgments. The releasing of prisoners on parole is a very important decision if one considers the rate of recidivism,<sup>3</sup> which follows after the release of the offenders on parole,<sup>4</sup> and the seriousness of the crimes that people who have been released on parole or correctional supervision sometimes commit.<sup>5</sup>

To minimise these inherent risks, it is of vital importance that officials appointed to positions on Parole Boards have integrity and dedication towards their duties.

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<sup>2</sup> See *S v Mhlakaza and Another* 1997 (1) SACR 515 (SCA) at page 521: “The lack of control of courts over the minimum sentence to be served can lead to tension between the Judiciary and the Executive because the executive action may be interpreted as an infringement of the independence of the Judiciary cf Blom-Cooper and Morris, *The Penalty for Murder: A Myth Exploded* (1996) CRIM LR at 707, 716). There are also other tensions, such as between sentencing objectives and public resources ... courts should also refrain from attempts overtly or covertly to usurp the functions of the executive by imposing sentences that would otherwise have been inappropriate.” (own emphasis). Also see *S v Smith* 1996 (1) SACR 250 (E) and *S v Botha* unreported Case number 318.03 (SCA) delivered 28 May 2004 at para. 25.

<sup>3</sup> See A Dissel and S Ellis, Reform and Stasis: Transformation in SA Prisons. Critique Internationale No.16, July 2002 at page 5.

<sup>4</sup> According to Lukas Muntingh it is estimated that in South Africa, between 85% - 94% of released offenders will re-offend and go back to prison. (*Tackling Recidivism: Track Two* (2002); Vol. 11 No. 2 at page 2). Also the following articles by Amanda Dissel: “Track Two” (2002) Vol. 11 No 2 at pages 1-8; *Tracking Transformation in South African Prisons* and Lukas Muntingh (2001) “Imprisonment Issues in South Africa: After Prison the case of Offender reintegration”. Monograph 52: pages 1-6.

<sup>5</sup> See *Carmichael v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening)* 2001 (4) SA 938 (CC) (or 2001 (10) BCLR 995 (CC) and *Minister of Safety and Security and Another v Carmichael* 2004 (2) BCLR 133 (SCA) where a problem was encountered after a person had been released on bail.

They should also have the necessary insight to strike the balance between the competing interests of protecting the public on the one hand and on the other of ensuring that prisoners who qualify for parole are not to be detained for longer than is necessary.

In this section of the Chapter, the focus will first be on the Parole Boards and the problems the Commission observed with respect to them. At the time of the Commission's sitting, a number of matters brought before the Commission had already been before the Parole Boards and the prisoners had been released or were about to be released. In this regard, the Commission has selected two (2) exemplary cases to demonstrate a particular problem.

The cases involved are:

- Mr Mahopi's release<sup>6</sup> at Pretoria Management Area, and,
- Mr Daniel Hlongwane's application for parole.

In considering these matters, it will be appropriate to consider the legal provisions applicable at the time of the release of the prisoners concerned.

The release of prisoners on parole was governed by the provisions of the Correctional Services Act No. 8 of 1959 ("the 1959 Act"), the Departmental guidelines and the Regulations. Chapter 7 of the new Correctional Services Act No. 111 of 1998 ("the Act") introduced new provisions governing the release of prisoners on parole within the Department.

At the time of drafting this report, the new parole provisions in the Act had just come into operation. As a result, the Department was still using the old provisions (the 1959 Act) in deciding matters of parole brought before it, which was the

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<sup>6</sup> See the Commission's Tenth Interim Report dated 30 January 2003.

subject matter of the prisoners' complaints.<sup>7</sup> It needs to be stated however, that as far as the Commission is concerned, there was no cogent explanation as to why there was such a delay in bringing these new parole provisions into operation.<sup>8</sup>

The provisions of the Acts governing parole will also be dealt with in more detail later in this report.

## **2.1 Pretoria Central Prison: Mr Thabo Mohapi**

Mr Thabo Mohapi, Prisoner No. 93272451, was convicted and sentenced on four (4) counts of theft to an effective prison term of fourteen (14) years. The Randburg, Frankfort and Bethlehem Magistrates' Courts imposed the sentences in respect of all the abovementioned counts, which were committed during the periods April 1993 to March 1996. Mr Mohapi commenced serving his sentence on 13 December 1996. In addition, during 1996, whilst in prison, the Pretoria Magistrate's Court convicted and sentenced him for being in possession of dagga. He was sentenced to six (6) months' imprisonment, which was suspended for five (5) years. He was incarcerated at various prisons, amongst others, Kroonstad Prison, Leeuwkop Prison, Pretoria Central Prison and Harrismith Prison. It was a known fact at the Pretoria Central Prison that Mr Mohapi was the brother (or relative) of the then National Commissioner of Correctional Services, Dr Kulekani Sithole.

During one of the visits into the prison by the then Area Manager of the Pretoria Management Area, Mr Monama, Mr Mohapi raised the question of his parole with Mr Monama. At the time Mr Mohapi was incarcerated at Pretoria Central Prison. Mr Monama subsequently raised the issue of Mr Mohapi's parole with the Parole Board. During August 1999, the then Provincial Commissioner of Gauteng, Mr

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<sup>7</sup> The provisions of Chapter VII of the Act came into operation on 1 October 2004.

<sup>8</sup> See also the concerns expressed by the Supreme Court of Appeal in *S v Bull and Another; S v Chavulla and Others* 2001 (2) SACR 681 (SCA) at page 702.

Nxumalo, raised the issue of Mr Mohapi's parole with the Area Manager once again.

On the 6 September 1999, Mr Nxumalo visited the Pretoria Management Area to enquire about the parole hearing of the prisoner, Mr Mohapi. Mrs Mashele, the Chairperson of the Parole Board, at the request of the Provincial Commissioner, then completed the last page of the profile in which she made a recommendation for prisoner, Mr Mohapi, to be released on parole. The circumstances surrounding the writing of the recommendation were dealt with in the interim report. Mr Nxumalo then proceeded to approve the release of this prisoner on parole on the 3 December 1999. This effectively meant that the prisoner would be on parole for a period of five (5) years, ten (10) months and one (1) day. It was unusual, in terms of the Department's directives at the time, for a prisoner, except for prisoners serving life sentences, to be released on parole for such a long time.

The problems and irregularities surrounding this prisoner's release are another manifestation of the problems of granting parole in the Department.<sup>9</sup>

## **2.2 Atteridgeville Prison: Daniel Hlongwane**

The matter of Mr Daniel Hlongwane is one of those classical cases that show the problems with the parole system as the Department of Correctional Services has applied it.

The case is typical within the old parole system. It is imperative to deal with such issues even though they relate to the old parole system because most of the prisoners currently incarcerated will still be dealt with in terms of the old parole

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<sup>9</sup> For more details on this matter, refer to the Commission's Tenth Interim Report dated 30 January 2003.

system as applied by the Department. For the problems to be understood, it is appropriate to deal with the facts of the matter briefly.

Mr Daniel Hlongwane is an adult male born on 11 November 1976. As at the 5 July 2003, he was twenty six (26) years old. On 4 June 2003, the Pretoria Magistrate's Court sentenced him to twelve (12) months imprisonment for common assault. According to Mr Hlongwane's prison record, the warrant type was in terms on Section 276(A)(3) of the Criminal Procedure Act and at the time he appeared before the Commission in Pretoria, he was an "A" group prisoner.<sup>10</sup>

Notwithstanding the fact that the nature of the common assault is not described anywhere in the file, the offence was referred to in the prison records as "aggressive". Furthermore, it was apparent that according to the prison record it was classified as "assault B/B". This particular classification will be referred to later in this report.

According to his record, the various dates for his release were reflected as follows:

Maximum	2004/06/03
Sentence Exp. Date	2004/06/03
½ Sentence Time	2003/12/03
⅓ Sentence Time	2003/10/03
⅔ Sentence Time	2004/02/03
¾ Sentence Time	2004/03/03
Conversion	2003/09/03 ¼
Consideration Date	2003/12/03
Prof Submission Date	2003/10/03
Final Consideration	2004/06/03.

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<sup>10</sup> An "A group" status is given to, amongst others, well behaved prisoners.

On 3 September 2002, Mr M.M. Masiela of Community Corrections prepared a report that supported Mr Hlongwane being placed under correctional supervision.

On 24 November 2003, Mr Hlongwane appeared before the Parole Board and the following comments are reflected on his file:

*“Further profile recommended for 2004/03/03. Behaviour and adaptation is positive. He is currently allocated as a vegetable producer. Address is monitorable. No complaint.*

*Signed – 03/11/24.”*

Furthermore, on 24 November 2003 it was recommended that a further profile be submitted on 3 March 2004.

According to the evidence before the Commission, this effectively meant that he was to appear before the Parole Board once again on 3 March 2004.

However, for an inexplicable reason, notwithstanding that he was to appear before the Parole Board on 3 March 2004, he appeared before the Parole Board on 12 February 2004. At the said hearing, the following comments were recorded in his file:

*“He is serving one year for aggressive crime. His behaviour and adaptation is stable and co-operative. His address is monitorable. He is further encouraged to attend programmes at Community Corrections. Recommended for placement on parole 2004-03-03. No complaint.*

*Signed 04/02/12.”*

Mr Hlongwane was charged with, amongst other things, intimidation in contravention of section 1(1)(a) of Act 72 of 1982, alternatively, in contravention of section 1(1)(b) of Act 72 of 1982, assault alternatively, pointing a firearm.

Notwithstanding these charges, he was eventually found guilty of a competent verdict of assault and was sentenced as follows:

*“Three (3) years’ imprisonment of which two (2) years be suspended for a period of five (5) years on condition that he was not convicted of an offence of which assault forms an ingredient during the period of suspension.”*

This effectively meant that he was serving an effective sentence of one (1) year’s imprisonment.

The Commission heard the matter of Mr Hlongwane in March 2004 at which time he had served about 75% of his sentence. Because of the problems with the parole system at Atteridgeville, Mr Hlongwane, who had been arrested for nothing more than a common assault, served a great portion of his sentence and was only released when the members of the Atteridgeville Management area realized that the Commission was interested in the Hlongwane matter. As a result, he was released on 3 March 2004.

It is also apparent from his records that Mr Hlongwane had no previous convictions nor did he have any pending charges against him. In actual fact, he had reported a matter as a complainant against another prisoner. Instead of him being regarded as a complainant, it was reflected in his records that there was a pending case, which, according to the officials at the prison, led to the decision not to release him. They treated him in the same manner as an accused or suspect with a pending further charge instead of protecting him as a witness in the criminal justice system.

Furthermore, it was also apparent that even though the nature of the assault was not clarified in the prison file, according to Departmental policy assault is regarded as an “aggressive crime” regardless of the real conduct of the

perpetrator. Thus he was immediately classified as a prisoner who had committed one of the serious crimes and who should be treated stringently when parole applications are considered. This was done notwithstanding that assault, in the legal sense, may not necessarily involve physical violence.

According to Burchell<sup>11</sup> assault is defined as:-

*“Assault consists in unlawfully and intentionally:*

- (1) applying force to the person of another, or*
- (2) inspiring a belief in that other person that force is immediately to be applied to him or her.”*

Snyman<sup>12</sup> defines assault as:

*“The unlawfully and intentionally:*

- (a) applying force directly or indirectly, to the person of another, or*
- (b) threatening another with immediate personal violence in circumstances which lead the threatened person to believe that the other intends and has the power to carry out the threat.”*

When the fact that assault does not necessarily imply physical violence was raised with the official at Atteridgeville Prison, he conceded that the definition of assault as an aggressive crime might not be appropriate. It would seem that the Department misdirected officials during the classification of crimes. Alternatively, if that is not the case, then the officials failed to appreciate the finer legal points that need to be considered in the classification of crimes when they applied their discretion. In other words, before the prisoner is subjected to stringent parole conditions, the Parole Board needs to know the nature of the crime or the facts of the assault.

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<sup>11</sup> See *Principles of Criminal Law* 3<sup>rd</sup> Edition (2005) at page 680.

<sup>12</sup> *Criminal Law* 4<sup>th</sup> Edition (2002) at page 430.

It is clear from perusing the file that Mr Hlongwane was a candidate to be released on parole as soon as possible. According to the record, he was gainfully employed at the prison as a “vegetable producer”. Furthermore, he had an address outside prison, which was that of his next-of-kin being his mother, Mrs Sara Hlongwane, who lived at Soshanguve. Accordingly, except for Departmental maladministration, there was no reason why he could not be released on parole sooner.

According to the records, he was a medium security prisoner, or “B” group prisoner, with effect from 4 June 2003. With effect from 4 September 2003, he was classified as a group “A” prisoner.

In terms of the calculations referred to above, as at 3 February 2004, he would have served two-thirds of his sentence and as at the 3 March 2004, he would have served three-quarters of his sentence. Notwithstanding the positive report prepared by Mr Maisela of Community Corrections on 3 September 2002, on 24 November 2003, Ms N.N. Kula, the Chairperson of the Parole Board, did not grant Mr Hlongwane parole or place him under correctional supervision but recommended that a further profile be submitted. There was no explanation as to why Mr Hlongwane could not be considered for parole immediately and be released and why state resources were wasted with a further parole hearing, when in fact he was a clear candidate for parole and qualified to be released.

It is clear that on 12 February 2004, the Parole Board recommended him for placement on parole on 3 March 2004, after he had served three-quarters of his sentence and after the Commission had shown an interest in his case.

The case of Mr Hlongwane is not unique but one of many that have become common within the Department and that to a large extent contribute to the

problem of overcrowding. The contribution to overcrowding is made in the sense that people are kept in prison for longer periods than is necessary.

According to Mr Wilkins, who appeared before the Commission, given the length of his sentence and the date when he was incarcerated, Mr Hlongwane should have appeared before the Parole Board on 3 October 2003. Instead, he only saw the Parole Board for the first time on 24 November 2003. Mr G. Sithole, who was the Secretary of the Parole Board at the time, could not prepare Mr Hlongwane's profile timeously because there was no Chairman of the Parole Board. However, on being closely questioned by the Commission, he conceded that the absence of a chairman has nothing to do with the preparation of profiles since he could have prepared the profiles timeously and then waited for the Chairman of the Board to be appointed. According to the evidence before the Commission, this profile was only completed on or about 17 November 2003 in preparation for the Parole Board sitting on 24 November 2003. He also conceded that he did not prepare any profile for the sitting, which was supposed to take place on 3 October 2003. Even if there was no Chairman of the Parole Board prior to 3 October 2003, as Ms Kula was only appointed on 3 October 2003, this profile could have been prepared and filed until such time as an appointment was made and then the matter could have been considered timeously. Accordingly, there was clearly negligence or incompetence on the part of Mr Sithole in dealing with this matter.

According to Mr Hlongwane, when he appeared before the Parole Board on 24 November 2003 he spent only three (3) minutes at the hearing. He was then asked whether he had other charges against him and when he indicated that he had no charges but was in fact a complainant, he was told to go and get the information that he was a complainant from the court. This then delayed his further consideration until January 2004, when he obtained a copy of the letter from the court, which was submitted to the Commission. On being further questioned by the Commission, Mr Sithole conceded that he should have

obtained this information himself as an official of the Department of Correctional Services and that he could have done so with very little effort. As it transpired, it took Mr Hlongwane, a mere prisoner without official authority, a number of trips to the court before he could obtain this information. Clearly, there was sheer incompetence in the manner in which officials dealt with this prisoner and a general disregard of the rights of prisoners when they apply for parole. It is a problem that is encountered all over the country where prisoners are simply shunted from pillar to post by Departmental officials instead of receiving assistance from these officials with the processes for obtaining parole.

Ms M.M. Kula, who was the then acting Chairperson of the Parole Board, testified and also indicated that she had believed that Mr Hlongwane had a further charge when in fact this was not the case. This once again indicates the manner with which officials deal with information that is before them when considering a prisoner for parole.

According to Mr Wilkins, when a prisoner is considered for placement on parole, the following factors should, amongst others, be taken into account if he/she is a suitable candidate for such placement:

- (a) the rehabilitational level of the inmate;
- (b) whether he/she has atoned for the transgressions committed;
- (c) whether the objectives of the retributory element of punishment have been reached; and
- (d) whether the inmate is a suitable candidate for placement on parole. This refers to the supportive systems and structures to ensure the smooth integration back into society.

He went on to testify in the case under discussion but said nothing positive or negative pertaining to the level of rehabilitation. In fact, the evidence was that Hlongwane was not referred to any programmes at Atteridgeville Prison at the

time. Accordingly, this particular aspect could not have been considered. Furthermore, it is clear that the prognosis of the inmate who has come as a first offender should have been regarded as good and he should have been given all the support possible to correct his mistake in society. The lenient sentence by the High Court should also have been seen as an indication that the inmate is not a threat to society and that by serving half of his sentence he would have demonstrated enough of the required objective of retribution. Furthermore, his support system is strong and consequently he could have been released earlier from prison.

Whilst one should be alive to the concerns of the community about people being given parole who have not been rehabilitated, it is clear that some members of the Parole Boards, either through incompetence, malice or prejudice, are not giving parole to deserving prisoners. There is absolutely no reason why, in the Commission's view, Mr Hlongwane should have served the full twelve (12) month period for the offence for which he was convicted. There was no evidence to show that he was a danger to society nor were there any sentencing comments by the Judge in the file indicating he was such a danger. Despite this, the officials at Atteridgeville Prison considered all of the above to be unimportant and indicated that they were basing their decision on the fact that he had committed "an aggressive crime" as they understood the policy. The fallacy of this argument has already been dealt with in the sense that it ignores the fact that not every assault includes force but could include a threat of violence, which impacts on a victim's mental tranquillity rather than physical safety.

Accordingly, this case underscores the Commission's view that, because of the discretionary nature of parole decisions, such decisions should be left with people who are properly trained to exercise discretion "judiciously" and not "arbitrarily and capriciously".

Whilst it is appreciated that a prisoner does not have a right to parole, it is clear that the decision to refuse or grant parole should meet the requirements of fairness as enshrined in our Constitution.

After taking into consideration all of the abovementioned factors, it is the Commission's view, which Mr Wilkins shares, that the prisoner Mr Hlongwane should have been released on parole after serving half of his sentence, namely, on 3 December 2003. There is evidence to support such an opinion, namely:

- (a) he was a first offender,
- (b) he had a good support system,
- (c) there were no rehabilitation programme reports; and
- (d) he had adapted to prison properly.

All of these factors support his release on parole.

Although there are Department of Correctional Services guidelines as to when people should be released, the Act does not specify the minimum period that must be served by such a prisoner. In the circumstances, there is no basis for not applying discretion as a Parole Board and therefore not releasing a person after they have served half their sentence, as long as it is applied judiciously. The Departmental regulations are merely guidelines and the Act would be supreme to the manner in which one applies oneself in giving parole. This is one aspect that is missed by Departmental officials in their consideration of parole. Even deserving cases like that of Mr Hlongwane are treated in the manner the Department recommends in its guidelines and the Act is ignored.<sup>13</sup>

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<sup>13</sup> The guidelines of policy pertaining to release of sentenced offenders 1/8/B – Penalization factors: applicable in Parole Board and delegated officials signed by Director Offender Policy, F.J. Venter dated 23 April 1998. (Annexure 'C' to Pretoria Exhibit "CCC").

### 3. LEGAL POSITION

The release of prisoners on parole, at the material or relevant time, was governed by the provisions of the Correctional Services Act No. 8 of 1959 (“the 1959 Act”), the various Departmental guidelines and the Prison Regulations. Some of the Regulations are commonly referred to as the “B-Orders”.

Section 31 of the 1959 Act provides that every correctional official the Department employs and who is in charge of a prisoner shall cause every prisoner who has been sentenced by any court to undergo that sentence in the manner directed in the warrant by the court; or if the sentence has been commuted by the State President as set out in the order of the Minister of Correctional Services, which records the State President’s commutal in the manner the State President directs.

Having said that, however, the 1959 Act, in terms of section 65, provides for an exception on how prisoners are to be released on parole before they serve their full sentences as directed in the warrant or the order of the State President referred to above.

Section 65 provides as follows:

- “(1) A prisoner shall be released upon the expiry of the term of imprisonment imposed upon him;*
- (2) A prisoner may, in accordance with the provision of this section after the report submitted by the Parole Board in terms of section 63 has been studied, be placed on parole before the expiration of his term of imprisonment if he accepts the conditions of such placement ...*

- (4) a) *A prisoner serving a determinate sentence or any of the sentences contemplated in sub-paragraphs (ii) and (iii) of paragraph (b) shall not be considered for placement on parole until he has served half of his term of imprisonment; Provided that the date on which consideration may be given to whether a prisoner may be placed on parole, may be brought forward by the number of credits earned by the prisoner.” (Own emphasis)*

Section 63, which is referred to in section 65(2), sets out the powers, functions and duties of the Parole Board. Section 63 provides:

- “(1) *A parole board shall, in respect of each prisoner under its jurisdiction serving an indeterminate sentence or a sentence of imprisonment in excess of six months or in respect of whom a special report is required by the Minister or the Commissioner having regard to the nature of the offence and any remarks made by the court in question at the time of the imposition of sentence if made available to the Department, and at the times and under the circumstances determined by the Commissioner or when otherwise required by the Minister or the Commissioner-*
- (a) *submit a report to the Commissioner or to the Minister, as the case may be, with regard, inter alia, to the conduct, adaptation, training, aptitude, industry and physical and mental state of such prisoner and the possibility of his relapse into crime;*
- (b) *together with the report on each prisoner submitted in terms of paragraph (a), make recommendations to the Commissioner regarding-*

- (i) *the placement of such prisoner under correctional supervision by virtue of a sentence contemplated in section 276(1)(i) or 287(4)(a) of the Criminal Procedure Act, 1977 (Act 51 of 1977), or by virtue of the conversion of such prisoner's sentence into correctional supervision under section 276A(3)(e)(ii) or 287(4)(b) of the said Act and the period for which and the conditions on which such prisoner may be so subjected to correctional supervision; Provided that for the purposes of such recommendations a prisoner's date of release contemplated in section 276A(3)(a)(ii) of the Criminal Procedure Act, 1977, shall be deemed to be the earliest date on which a prisoner may, in terms of this Act, be considered for placement on parole or the date on which the prisoner may be released upon the expiration of his sentence, whichever occurs first; or*
    - (ii) *the placement of such prisoner on parole in terms of section 65 or on daily parole in terms of section 92A and the period for which, the supervision under which and the conditions on which such prisoners should be so placed; and*
  - (c) *exercise such other powers and perform such other functions and duties as may be prescribed by regulation.*
- (2) *A parole board shall in terms of section 286B of the Criminal Procedure Act, 1977, in respect of each prisoner serving an*

*indeterminate sentence after having been declared a dangerous person, having regard to the nature of the offence and any remarks made by the court in question at the time of the imposition of sentence if made available to the Department, submit a report to the court, on the date determined by the court, with regard, inter alia, to the conduct, adaptation, training, aptitude, industry and physical and mental state of such prisoner and the possibility of his relapse into crime.”*

Section 22A of the 1959 Act prescribes that a prisoner may earn credits to be awarded by the Institutional Committee by observing the rules, which apply in the prison and by actively taking part in the programmes which are aimed at his or her treatment, training and rehabilitation. The one proviso is that a prisoner may not earn credits amounting to more than half of the period of imprisonment which he has served.<sup>14</sup>

#### **4. THE PAROLE GUIDELINES**

In 1998, the Department compiled guidelines, which were utilized in the Department for the purpose of assisting Parole Boards to ensure that some uniformity existed in deciding on the placement of prisoners on parole. These guidelines are known as the “Penalising factors”, which are contained in the Department’s Minute 1-8-B, dated 23 April 1998. These guidelines set out the “negative” and “positive” factors that need to be taken into account by the Parole

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<sup>14</sup> In terms of the ‘credits system’, then, a prisoner, subject to good behaviour, earns credits up to a maximum of 1 day for every 2 days’ imprisonment served by him. The practical effect hereof is that a prisoner becomes eligible for consideration for placement on parole after servicing 1/3 of his sentence. This is the case irrespective of the crime for which a prisoner has been sentenced.

Boards in deciding how to calculate the term of release of a prisoner on parole.<sup>15</sup> Furthermore, the policy directive provided that prisoners who had been sentenced for certain violent crimes (such as murder, or robbery with aggravating circumstances) should serve ¾ of their sentences before being placed on parole.

The directive also provided that prisoners who had escaped should serve eighty per cent (80%) of their sentences before being placed on parole.

In light of the foregoing, one could say the guidelines referred to above, rightly or wrongly expanded the Correctional Services Act No. 8 of 1959 by introducing a system of credits for good behaviour. However, it is clear from the facts of the case mentioned above and other cases that have been before the Commission that the system of credits for good behaviour is not a simple system that is understood well by the members. The members of the Department of Correctional Services seem to be having ongoing problems in interpreting and applying it. This leaves room for poor understanding and misinterpretation of the policy to the detriment of the prisoners who are eligible for parole.

Accordingly, there is the potential for the Department to be embroiled in a number of legal disputes before courts of law regarding the issue of parole as set out in the above policies. This has already happened in that a number of cases have been taken to court.<sup>16</sup>

Furthermore the different interpretations given by the Natal High Court<sup>17</sup> and the Cape Provincial Division<sup>18</sup> with regard to these guidelines led to Department

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<sup>15</sup> See Leeuwkop Exhibit 'Z7' at pages 121 – 128.

<sup>16</sup> See *S v Segole* (1999) JOL 5349 (W) *Winckler and Others v Minister of Correctional Services* 2001 (1) SACR 532 (c) (per Moosa J); *Combrink and Another v Minister of Correctional Services and Another*, 2001 (3) SA 338 (D) (per Levinshon J) and *Stanfield v Minister of Correctional Services and Others* 2004 (4) SA 43(C) (per van Zyl J).

<sup>17</sup> See *Combrink and Another v Minister of Correctional Services and Another*, 2001 (3) SA 338 (D) (per Levinshon J).

<sup>18</sup> See *Winckler and Others v Minister of Correctional Services* 2001 (1) SACR 532 (C) (per Moosa J);

officials abdicating their responsibilities even further. It might be argued, as Mr. S.J. Wilkins testified, that the judgments created confusion. If they did, then officials used this confusion as a justification for not interpreting the guidelines in favour of the prisoners.

The Commission says it was a justification because it is clear that the legal system operates on the basis that the KwaZulu-Natal judgment is binding in KwaZulu-Natal while the Western Cape judgment is binding in the Western Cape. If the Department wanted to clarify any so-called confusion, the Department should have taken the matter on appeal to obtain a judgement from the Supreme Court of Appeal, which would have given direction on the matter nationally.<sup>19</sup> The Department did not do this.

In any event, the Department should have given a more liberal interpretation of the guidelines or reverted to the old parole rules and the Act to give some direction or leadership on the matter.<sup>20</sup> The guidelines were established to regulate parole and not to deny it. In addition, there is an established principle of statutory interpretation, which holds that, where a provision is open to two interpretations, the one which encroaches least on existing rights is to be preferred.<sup>21</sup>

Be that as it may, the Department, in all likelihood, would still be embroiled in a lot of litigation with regard to parole, especially with those prisoners who were sentenced before 1<sup>st</sup> October 2004 (when the Parole Provisions of Act 111 of 1998 came into operation).

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<sup>19</sup> Moreover the Winckler Judgement had been criticised and was not followed in the Eastern Cape, which should have provided even more reason for the Department to follow the Combrinck Judgement (See *Mohammed v Minister of Correctional Services and Others* 2003 (6) S.A. 169 (SE).

<sup>20</sup> See Sections 65(4) and 22A of the 1959 Act above.

<sup>21</sup> See *Avex Air (Pty) Ltd. v Borough of Vryheid* 1973 (1) SA 617 (A) 621 F-G.

It is clear that the courts have taken a view that these parole provisions are not applicable to those prisoners.<sup>22</sup> In terms of Section 65 (4) of the 1959 Act, a prisoner would have to serve at least half of the term of imprisonment before being considered for parole. In other words, the Department increased the period which was applicable before prisoners could be considered for parole.

The Department effectively sought to change the provisions of the statute by passing regulations, which were rough-shodding on the rights of prisoners to be considered for parole at an earlier stage.

The procedure for the giving of notice, quorum and sitting of the Parole Board is set out in the Department's B-Orders.<sup>23</sup> The Regulations governing the sitting of the Parole Board stipulates, amongst other things, that the prisoner must receive notice of the sitting of the Parole Board at least seven (7) days before the hearing. The prisoner must be present at all times unless he indicates in writing that he does not intend being present. The quorum of the Parole Board sitting is two (2) members, namely, the Chairperson of the Parole Board and a member of the Institutional Committee. These two members must always be present for the decisions of the Parole Board to be valid. There are other additional members who are members of the Parole Board, namely, a member representing the prison section in which the prisoner is incarcerated and any other interested party. The proceedings of the Parole Board should be minuted and the minutes filed.<sup>24</sup>

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<sup>22</sup> See *Combrink and Another v Minister of Correctional Services and Another* 2001 (3) SA 338 (D) and also the case of *Mothibedi Floyd and 4 Others v Minister of Correctional Services and Others* (Witwatersrand Local Division)– Case No. 2004/26166/2004 – Judgment delivered on the 19<sup>th</sup> November 2004, unreported (per Schwartzman J); See also *Mohammed v Minister of Correctional Services and Others* 2003 (6) SA 169 (SE).

<sup>23</sup> See PSOB (vi)(1) (c)(i)(8) and (9) as well as (ii)(e) and also PSOB vi (1)(b)(ii)(aa). Also PSOB vi(1)(c)(ii)(b).

<sup>24</sup> See PSOB vi (1).

According to the evidence before the Commission, the Parole Board failed to give Mr Hlongwane timely notice or to record the proceedings as anticipated in the B-Orders. This is an ongoing problem in the Department.

The parole provisions of the Correctional Services Act No. 111 of 1998 were not promulgated at the time the Hlongwane matter was heard. The provisions of the Parole and Correctional Services Amendment Act No. 87 of 1997 were consented to on the 26 November 1997, with the date of commencement to be proclaimed. However, the State President proclaimed 1 October 2004 as the date of commencement of the Parole Provisions in the 1998 Act.<sup>25</sup> Notwithstanding this, the officials seemed to be confused about the applicable provisions as well.

In *S v Segole and Another*<sup>26</sup>, the Department sought to rely on the 1997 and 1998 provisions of parole, even though they had not yet been promulgated. This is a clear indication of the confusion within the Department as to what parole system should be applied. Although this matter emanated from Gauteng, this confusion permeated the entire Department and led to a lot of uncertainty and ill-advised refusal of parole to deserving prisoners.

The same can be said about the manner in which the Department applies the provisions of medical parole to those deserving it. In this regard see the argument of the Department in the matter of *Stanfield v Department of Correctional Services*.<sup>27</sup> The Department in that case sought to rely on the provisions of the 1998 Act to defend the case of medical parole for Mr Stanfield, even though those provisions had not been promulgated. This was a Western Cape matter, which shows that the problem was not confined to one province or Management Area.

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<sup>25</sup> See *Government Gazette* No. 26808 dated 1 October 2004 – Proclamation No. 45 of 2004.

<sup>26</sup> (1999) JOL 5349 (W).

<sup>27</sup> 2004 (4) SA 43 (CPD).

## **5. HLONGWANE'S PAROLE: FINDINGS**

Accordingly the finding made was that Mr Sithole was negligent in the manner in which he conducted his duties and in that he failed to pay any regard to the rights of the prisoner or to his duties as a correctional official, in that:

- (a) He failed to set the matter down in October 2003 when he ought to have done so.
- (b) When he received a complaint from the Independent Prison Visitors regarding the incorrect information, he paid no regard to the complaint and there was a clear dereliction of duty.
- (c) He sent Mr Hlongwane away and told him to come back after the matter had been finalised.
- (d) He abdicated his responsibility when he asked Mr Hlongwane to pursue the investigation when he should have done it himself.
- (e) He failed to comply with the Departmental regulations in that he did not notify Mr Hlongwane timeously of the Parole Board hearing nor did he keep minutes of the Board's hearings.

## **6. PAROLE STATISTICS**

The Commission also obtained statistics from the various Management Areas regarding parole. The statistics provided by the different Management Areas suggest that there is confusion around the parole system or, alternatively, inadequate statistics are being compiled with regard to parole. There certainly

are inconsistencies in the information given and huge discrepancies in the percentage of prisoners who are granted parole in the different areas.

In several of the Management Areas one finds that the number of people granted parole is significantly higher than in others, as reflected in the table below.

**Percentage of People Considered for and Granted Parole**

<b>Area</b>	<b>1999</b>	<b>2000</b>	<b>2001</b>	<b>2002</b>	<b>2003</b>
Durban	83%	94%	96%	96%	99%
Pietermaritzburg	69%	67%	68%	59%	56%
St Albans	52%	53%	47%	50%	48%
Pollsmoor	Pollsmoor was not able to provide statistics of the number of offenders the Parole Board considered.				
Grootvlei	Grootvlei indicated that it did not have statistics to work from but estimated that about 99% of offenders were granted parole.				
Leeuwkop	62%	60%	59%	55%	53%
Pretoria	42%	42%	41%	39%	43%
Ncome	100%	100%	100%	97%	86%
Johannesburg	46%	54%	46%	60%	47%

With regard to Durban, one finds that a very low number of people are rejected. In fact, the information provided to us stated that most of the people rejected are

those with incomplete documents, such as support system or social worker's reports.

The information from Pollsmoor casts some doubt on the statistics because it states that the vast majority of offenders are considered more than once for possible placement during their sentence period. As an example, the information indicates that a prisoner sentenced to eight (8) years for rape or murder must serve three quarters of his sentence but must appear before the Parole Board after a third of his sentence. Thus, according to this information, it is not uncommon for one offender to appear before the Parole Board four (4) or five (5) times before a positive recommendation for placement is made.

Some Management Areas, such as Grootvlei, Pollsmoor, Pretoria and Johannesburg, state that prisoners do not generally apply for parole. Other Management Areas provide statistics for this category, while others offer fairly low figures. In those Management Areas where statistics were not provided for in this category, it was said that no-one applied. This is perhaps explained in the information provided by the Johannesburg Management Area, which states that people do not generally apply for parole because inmates are automatically considered for parole after having completed a certain portion of their sentences. However, the information states that there are a "very small minority" of cases where inmates, their families or legal representatives approach the Parole Board and ask for an "early" parole. Durban also stated that attorneys make most of the applications.

Furthermore, the response to the Commission's request for statistics from Grootvlei states that according to policy all offenders must appear before the Parole Board and that if an offender indicates that he does not want to appear, the Parole Board will handle the profile in his absence. The information from Pietermaritzburg contains a fairly significant number of people – ranging from 100 to 120 in the 1999 to 2003 period – who did not appear before the Parole Board.

In light of the above, there is a need for a consistent Parole Policy within the Department.

## **7. THE NEW PAROLE PROVISIONS**

The Commission feels that it might be appropriate in this report to deal with the new parole provisions so that recommendations made with regard to Parole Boards will also take into consideration the new provisions. At the time of writing of this report, the new provisions had just come into operation. However, the Commission was informed that the Department was busy making preparations to set up the Parole Boards.

The parole provisions in the 1959 Act have since been amended by the provisions of the Correctional Services Act No. 111 of 1998 (the Act), as mentioned earlier in this report. Prior to the promulgation of the Act, the Department also published the Correctional Services Amendment Act No. 87 of 1997.

### **7.1 Correctional Supervision and Parole Boards**

Section 74 of the Act empowers the Minister of Correctional Services to appoint the Correctional Supervision Board and the Parole Board and also to specify the seat for each Board. Furthermore, he is granted the power to determine and amend the areas of jurisdiction of both Boards.

Section 74 stipulates that:

*“(1) The Minister may-*

- (a) *name each Correctional Supervision and Parole Board;*
  - (b) *specify the seat for each Board;*
  - (c) *determine and amend the area of jurisdiction of each Board.*
- (2) *The Minister must appoint one or more Correctional Supervision and Parole Boards consisting of -*
- (a) *a chairperson;*
  - (b) *a vice-chairperson;*
  - (c) *and (d) – ( Paras. (c) and (d) deleted by Section 28(a) of Act No. 32 of 2001);*
  - (e) *one official of the Department nominated by the Commissioner;*  
*and*
  - (f) *two members of the community.*
- (3) *The Commissioner must designate one of the correctional officials referred to in subsection (2) (e) to act as a secretary for a Board.*
- (4) *If the chairperson is absent from a meeting of the Board, the vice-chairperson must preside at that meeting.*
- (5) *Three members constitute a quorum for a meeting of a Board and must include the chairperson or vice-chairperson; and*
- (6) *Any decision of a Board must be taken by resolution of the majority of the members present at any meeting of that Board and, in the event of equality of votes, the person presiding shall have the casting vote as well as a deliberative vote.*
- (7) (a) *A member of a Board-*
- (i) *holds office for such period and on such conditions as the Minister may determine; and*
  - (ii) *may at any time resign by tendering written notification to the Minister*

- (b) *The Minister may remove a member from office on grounds of misbehaviour, incapacity or incompetence but such action by the Minister does not preclude disciplinary action against officials in the full-time service of the State as provided for in their conditions of service.*
  - (c) *If any member resigns, is removed from office or dies, the Minister may fill the vacancy by appointing a person in accordance with subsection (1) for the unexpired portion of the term of office of the predecessor.*
- 7(A)
- (a) *A Board may co-opt an official nominated by the National Commissioner of the South African Police Service or an official nominated by the Director-General of the Department of Justice, or both such officials, for a meeting of the Board.*
  - (b) *Any such co-opted official may vote at the meeting of the Board.*
- (8) *A member of a Board who is not in the full-time service of the State may receive such remuneration and allowances as the Commissioner may, on the recommendation of the Commission for Administration, determine with the concurrence of the Minister of Finance.”*

Section 74(2) stipulates that the Minister must appoint one or more Correctional Supervision and Parole Boards. The total number of such appointees amounts to five (5).

According to Section 74(3), the correctional official referred to in Section 74(2)(e) is to act as secretary to either the Parole Board or the Correctional Supervision

Board. On reading this provision, Section 74 goes on further to set out the quorum, the manner in which decisions will be taken and the fact that the Minister will appoint members of the Board.

It is also apparent from reading this particular provision that the Parole Board is appointed and thus responsible to the Minister and not to the Commissioner. Whilst this is apparent from the interpretation of the Act, it is the Commission's view that this point needs to be emphasised to the employees of the Department so that they will not interfere with the Boards. In drafting the regulations or the Act to deal with this, it should also be expressly stated to avoid any future misinterpretation of the provisions. There might be a misinterpretation of this aspect because of the provisions of section 74(8). It is apparent, if one considers the problems that have been encountered with the Parole Boards as set out above in this Chapter, that the Parole Boards and Correctional Supervision Boards have been the victims of the abuse of power by members of the Department of Correctional Services.

Accordingly, to restore credibility and respect to these Boards, it would be imperative that their independence be expressly stipulated. To ensure that their independence is not only stipulated on paper but that it is seen to be so, the Minister might even consider delegating the power of overseeing the functions with regard to these Boards to another body like the National Council of Correctional Services or a newly formed Board or Council, or alternatively, to the Office of the Inspecting Judge, who might act as his delegate.

The Office of the Parole Board should preferably be managed and supervised by outside people and should be placed outside the prison system and that particular Management Area. In this regard, consideration should be given to the Parole Boards falling under the jurisdiction of an independent body or the National Council of Correctional Services or the Office of the Inspecting Judge.

In the case of the Office of the Inspecting Judge, a new directorate could be set up with an assistant appointed in terms of section 87(2) of the 1998 Act, who would deal with supervising Parole Boards and ensuring that the Parole Boards work as they are supposed to work in terms of the Act. This will ensure that there are checks and balances in place, as parole seems to be an area prone to corruption and abuse. Accordingly, it is also an area that is likely to bring the Department into disrepute, if it has not already done so.

In the appointment of the members of the Parole Boards, the Office of the Inspecting Judge, or National Council or the new Independent Body will obviously consider those people who are beyond reproach, bias and prejudice and who will do their work without fear, favour or bias.

Having mentioned the fact that the Boards fall within the jurisdiction of the Minister, the Commission is of the view that the payment of the members of the Board should also be left to the Minister to decide rather than the Commissioner. Certain government officials might use the salaries of the members of the Boards to penalise those who might have done something or who have refused to toe the line. Given this, the Commission is of the view that the word "Commissioner" in Section 74(8) should be deleted and replaced with the word "Minister". This will ensure that it is the Minister who decides the salaries paid to the members of these Boards without any Departmental or other interference.

The Act does not specify the qualifications required for the Chairperson of the Correctional Supervision and Parole Boards as referred to in Section 74(2)(a). The only reference to a legally qualified person was in respect of the official of the Department of Justice in Section 74(2)(d), which has since been amended. This section stated that the official must have a legal background. However, there is now no such a requirement.

The notion of “fairness” is embedded in our Constitution, which has consequently been adopted in all judicial and constitutional bodies that have to consider and decide on the rights of individuals.<sup>28</sup> The notion of fairness also invites equity. Occasionally, the Board(s) has to exercise discretion in deciding whether to grant parole or not. The Board might even have to exercise discretion with regard to who needs to be called and what type of evidence needs to be put before it for purposes of making a decision. Thus the decisions will have to be carefully considered and not be unfair or arbitrary or capricious or *mala fide*, as it has become apparent with some of the decisions the current Parole Boards have taken. Having said that, it is clear that to do so, one will need an experienced and legally qualified person to preside over these Parole and Correctional Supervision Boards.

Whenever a prisoner is to appear before the Correctional Supervision or Parole Boards because of cancellation of correctional supervision or parole,<sup>29</sup> or because a prisoner was sentenced to life imprisonment and the cancellation of parole as set out above must be considered,<sup>30</sup> the prisoner is given an opportunity to file written representations to the Board or to be represented by anybody to appear before the Board.<sup>31</sup> The only restriction set out as to who can represent the prisoner before the Board is that it should not be a fellow prisoner, a correctional official or an official of the South African Police Service or the Department of Justice and Constitutional Development. Given this, one could say that legal representation may also be allowed in terms of the Act.

It might be appropriate for the Act or the Regulations to specify that the Chairperson should be a legally qualified person. To avoid any future problems, it is the Commission’s view that the Act should be amended to stipulate specifically that the Chairperson should have legal qualifications. If it cannot be done in the

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<sup>28</sup> See *State vs Zuma and Others* 1995 (4) BCLR 401(CC).

<sup>29</sup> See Section 75(2)(a).

<sup>30</sup> See Section 75(2)(c).

<sup>31</sup> See Section 75(3)(a) and (c).

Act or the Regulations, then the guidelines for the Minister need to specify this. However, if it is in the guidelines, the problem is that it will not be binding on whoever is responsible for constituting the Boards.

Given that certain officials in the Department manipulate these systems, as outlined in this report, it is the Commission's view that officials of the Department should not be allowed to hold the office of Chairperson and Vice-Chairperson in the Correctional Supervision and Parole Boards. Although the Act does not clearly prohibit such officials being appointed as Chairperson and Vice-Chairperson, it is the Commission's view that the Act should clearly stipulate that the Chairperson and the Vice-Chairperson should not be appointed from the officials of the Department of Correctional Services.

The issue of cost will, of course, come into consideration as to whether the Department can afford to appoint legally qualified people to chair the Boards set up in the various provinces. However, the costs should not bar consideration of appointing qualified legal practitioners on an ad hoc basis to preside over these boards. It is the view of the Commission that the issue of costs could be taken care of by the appointment of retired Magistrates or even retired Judges to chair the various Parole Boards.<sup>32</sup> If costs are an issue, the preference should be given to the former rather than to the latter because the latter might be used in other capacities that will be clearly be set out later in this Chapter.<sup>33</sup>

The fact that legal representation may be allowed is an additional reason why the Chairperson should be legally qualified. Inevitably, the legal representatives will raise technical and legal points and it needs a Chairperson who is familiar with legal proceedings to deal with this.

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<sup>32</sup> The one fact that may deter retired magistrates and judges from being appointed is that there are very few retired black magistrates let alone retired black judges. It is therefore the Commission's view that despite the issue of cost, which may be minimal if such persons are appointed from legally qualified practitioners on an ad hoc basis, practising lawyers should also be included to chair the various boards.

<sup>33</sup> See the section dealing with Review Boards (*infra*).

The problem of not having properly qualified Chairpersons of the Parole Boards was best demonstrated in the problems the Commission encountered at the Durban/Westville Management Area regarding Mr Magubane, which is dealt with later in this report.

## 7.2 United Kingdom Parole Boards

Chapter 53 of the United Kingdom Criminal Justice Act of 1991 establishes the Parole Board. It is interesting to note that in terms of this Statute, the Parole Board “shall not be regarded as the servant or agent of the Crown” and furthermore that the assets it holds, it holds “on behalf of” the Crown.<sup>34</sup>

This obviously gives the Parole Board the independence it deserves from the Government of the day. According to the Act, the Board consists of a Chairman and not less than four (4) other members the Secretary of State appoints. The members include, amongst others,

- “(a) a person who holds or has held judicial office;*
- (b) a registered medical practitioner who is a psychiatrist;*
- (c) a person appearing to the Secretary of State to have knowledge and experience of the supervision or after care of discharged prisoners; and*
- (d) a person appearing to the Secretary of State to have made a study of the causes of delinquency or the treatment of offenders.”<sup>35</sup>*

Whilst there are some similarities between the constitution of the United Kingdom Parole Board and the constitution of the South African Parole Board, it is clear that the shortcomings in the South African Act are that it does not have “a judicial

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<sup>34</sup> Section 1 (1) of the Act.

<sup>35</sup> Section 2 (1) and (2) of the Act.

officer” and “a medical practitioner who is a psychiatrist” as members of the Board.

The Commission views these two aspects as very important, as there is a need to ensure that whilst the Board is independent, appointees are people who can be of assistance because of their expertise. Loading the Board with appointees who may not bring any expertise to the Board may not be helpful or appropriate.<sup>36</sup>

The Commission appreciates that there is a shortage of medical practitioners, psychiatrists and psychologists in the country and thus we cannot be in a position to staff all Boards with medical or health professionals. However, provision could be made for people who have some relevant medical qualification to be part of the Parole Board or to be appointed on an ad hoc basis.

Having said that, the Commission’s view is that there should be no compromise in getting people who hold judicial office or who have held judicial office to assist in this regard. There are sufficient retired Magistrates who could be part of these Boards.

### **7.3 Review Boards**

Section 76 of the Act stipulates that-

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<sup>36</sup> For example, Ms Joan van Niekerk, the Director of Childline, KwaZulu-Natal, brought to the notice of the Commission that more information is required in dealing with the assessment of dangerousness and risk when considering the parole of a sentenced sexual offender. Ms van Niekerk is of the view that sexual offenders often present as model prisoners in the prison system and, because of good behaviour, often move rapidly into positions of trust and privilege, which means that Parole Boards receive very positive reports on the behaviour of the offender. In light of what Ms van Niekerk had said, it would be especially prudent and necessary to have a psychologist’s report from someone who specialises in the field of deviant sexual behaviour when the Parole Board forms an opinion on whether the offender still poses a risk to the community.

- (1) *The National Council consists of-*
  - (a) *a judge as chairperson;*
  - (b) *a director or a deputy director of Public Prosecutions;*
  - (c) *a member of the Department;*
  - (d) *a person with special knowledge of the correctional system; and*
  - (e) *two representatives of the public.*
  
- (2) *The National Council must appoint the members for each meeting of the Correctional Supervision and Parole Review Board.*
- (3) *The majority of the members of the Correctional Supervision and Parole Review Board constitute a quorum for a meeting of the Board.*
- (4) *A decision of a majority of the members of the Correctional Supervision and Parole Review Board present is a decision of the Board and in the event of an equality of votes on any matter, the member presiding at the meeting has both a deliberative and a casting vote.”*

It is apparent from this section that the Review Board will be appointed from the members of the National Council. It is the view of the Commission that the members of the National Council may be inundated with work and may not be in a position to deal with all the matters that might end up reaching them. Given this, consideration should be given to wider delegations and allowing people who are outside the National Council to participate, like retired Judges and/or Directors of Public Prosecutions in respect of the members referred to in Section 76 (1)(a) and (b).

Section 75(8) stipulates that a decision of the Parole Board is final except that the Minister of Correctional Services and the Commissioner may refer the matter to the Correctional Supervision Board and the Parole Review Board for reconsideration, in which case the record of the proceedings before the Parole

Board must be submitted to the Correctional Supervision Board and the Parole Review Board.

Once again, the Commission has difficulty with provisions of Section 75(8) in that the right of review is only given to the Minister and the Commissioner of Correctional Services for the reasons set out below.

Section 33 of the Constitution of the Republic of South Africa (Act No. 108 of 1996) gives everyone the right to administrative action that is “lawful, reasonable and procedurally fair”. It goes further to demand that anyone whose rights have been adversely affected by administrative action has the right to be given “written reasons”.

Prisoners have the common law right of review to take any decision of an organ of State on review.<sup>37</sup> Prisoners, like any other person in the Republic of South Africa, also have a constitutional or statutory review right in terms of Promotion of Administrative Justice Act No. 3 of 2000 (PAJA).

In order to bring the provisions of PAJA into the equation and invoke them, a prisoner will have to merely prove that the Parole Board is “an organ of State” as contemplated in Section 239 of the Constitution and Section 1 of PAJA. Section 1 of PAJA simply defines “an organ of State” as that contemplated in Section 239 of the Constitution. The Constitution defines “the organ of State” in Section 239 as follows:

- “(a) *Any Department of State or administration in the national, provincial or local sphere of government; or*
- (b) Any other functionary or institution –*

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<sup>37</sup> *Johannesburg Stock Exchange and Another v Witwatersrand Nigel Limited and Another* 1988 (3) SA 132 (A) at 152 A-D.

- (i) *exercising a power or performing a function in terms of the Constitution or Provincial Constitution; or*
- (ii) *exercising a power or performing a public function in terms of any legislation, but does not include a court or judicial officer.”*

The Correctional Services Act obviously created the Boards, their powers are manifestly public powers and they perform public functions. The Boards are part of the Department of Correctional Services or it might be argued that they are part of the State, in the sense that they are under the State's direct control. They also serve a function for the State in considering parole and correctional supervision applications by prisoners.

Whichever way one views it, the Parole Board is performing an administrative action, which is subject to review by a High Court in terms of both the common law and PAJA.<sup>38</sup>

Whilst it might be argued that the intention of the legislature in promulgating the Act was to exclude the prisoners from having the right of review on the refusal of the Parole Board or the Correctional Supervision Board to grant the parole or correctional supervision, the legislature may not have succeeded in achieving that goal because of the provisions of PAJA and the South African Constitution. PAJA and the South African Constitution give any person who is aggrieved by an administrative action the right to take the matter on review. This includes prisoners.

Given this, it might be easier if the same right is recognised in terms of the Correctional Services Act to prevent the possibility of a number of technical points being argued before the Board or court as to whether the prisoner has a

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<sup>38</sup> See *Directory Advertising Cost Cutters v Minister of Post, Telecommunications and Broadcasting* 1996(3) SA 800 (T) at 807 H-811 B, *Korf v Health Professionals Council of South Africa* 2000 (1) SA 1171 (T) at 1177 E – 1178 D, *Inkatha Freedom Party v Truth and Reconciliation Commission* 2000 (3) SA 119 (C) at 132 E – 133 D and *Nextcom v Funde N O* 2000 (4) SA 491 (D) at 503 E – 504 B.

right or not, and in terms of which statute, to review the Board's decision. That might on its own delay the proceedings of the Review Boards or court.

The advantage of incorporating the review procedure in the Correctional Services Act will be that the procedure can be tailored to suit the prisoners given the limited resources they have and the nature of the Department's obligations in terms of the Act. That would be acceptable as long as it is not contrary to the intention and spirit of the Constitution. In other words, it must be acceptable to both the Department and the prisoners who may be aggrieved. In the circumstances, it might be in the Department's interest to give prisoners the right of review and also to set out its own review procedure to the advantage of all the parties, otherwise the review procedure will be in terms of the Supreme Court Act.

In the cases of *Staniland v Minister of Correctional Services* (above) and *Du Plooy v Minister of Correctional Services and 4 Others* (2004) 3 All SA 613 (T), where the prisoners had taken the Department on review for refusing them Medical Parole, the courts, in fact, found that the official had acted not only unreasonably but also unlawfully.<sup>39</sup> Given these possibilities, the Department may save time and costs by avoiding being taken on review before the High Court by prisoners aggrieved at the Board's refusal of parole and could ensure that there are checks and balances in place to protect the rights of prisoners. In addition, it could be designed so that it is a cost effective procedure.

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<sup>39</sup> In *Du Plooy v Minister of Correctional Services and 4 Others* (2004) 3 All SA 613 (T) at page 621 a-b where the Judge also found:

*“There is no mention of the provisional commissioner of correctional services, namely the third respondent in the decision-making process. In terms of the delegation within the hierarchy of decision-makers, I find that it was the wrong person who took the decision. The decision was taken by the fourth respondent, the area Commissioner and not the provincial Commissioner, the third respondent, not to release the applicant in terms of section 69(b).”*

The issue of prisoners taking the Department to the High Court where there is uncertainty about the provisions of the law, is not a far-fetched idea. Lately, it has been the trend. In a number of management areas the department has been taken to court for failing to give guidance on matters of parole. This tendency has arisen because of, amongst others, the problems, which have been highlighted in this report regarding the department's interpretation of the parole provisions.

Accordingly, it might be appropriate at this stage to turn to look into the situation with regard to the various High Court applications in this country, which have been moved by prisoners.

## **8. HIGH COURT APPLICATIONS**

The flood of applications prisoners have made to our courts is evidence of the lack of adequate remedies or procedures in the Regulations or the Act for prisoners to protect their rights to parole and the other rights they are entitled to.

There is a great deal of confusion among correctional officials about parole because the Department has consistently chopped and changed its directives.

Members of the various parole boards are therefore sometimes not exactly sure of the applicable directives. Similarly, a number of prisoners are also uncertain about the criteria used to grant parole.

As a result of this confusion, various prisoners have instituted a number of court cases against the Department regarding parole. This sudden surge in applications for parole to the High Court is not only affecting the Department of Correctional Services but also clogging the Motion Court rolls in the different divisions of the High Court in South Africa.

The said clogging of the rolls has, amongst other things, led to the Johannesburg High Court creating an additional Motion Court, which sits on a daily basis to deal with matters of parole and other matters which emanate from the Department of Correctional Services. During the period July 2004 to January 2005, the Motion Court applications increased to forty seven (47) matters. In this regard, refer to annexure “A” to this Chapter, wherein the State Attorney for Johannesburg has explained the problems they are encountering with regard to the various applications emanating from the Department of Correctional Services.

The Commission has noted from the information received from the State Attorney that there has been a downward trend lately with these applications in the Johannesburg High Court. On making inquiries, the Commission was informed that during or about 15<sup>th</sup> October 2005, a meeting to try and resolve the problem of the sudden influx of applications for parole in the Johannesburg High Court was held between Judge K. Satchwell and the senior officials of the department stationed at Johannesburg, Leeuwkop, Boksburg and Krugersdorp Management Areas. This meeting may have contributed to the downward trend in the Parole or Review Applications

Although there is a downward trend in Parole Applications at the Johannesburg High Court, the new applications are now to review the decisions or lack thereof of the Parole Boards. Furthermore, this problem of applications has not only been confined to the Johannesburg High Court. The Pretoria and Durban High Courts have also observed an upsurge in applicants, who are, inter alia, seeking to have the decisions of the parole boards reviewed and set aside because of the confusion in the Department with regard to parole.

At the Pretoria High Court, the situation became so chaotic that the Registrar issued a directive or letter<sup>40</sup> to the Department setting out interim procedures

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<sup>40</sup> A copy of the letter is annexed to this Chapter, marked “A”

relating to the applications being received from prisoners in the Pretoria Management Area. A prisoner<sup>41</sup> subsequently challenged the validity of this letter in an urgent *ex parte* application. The seriousness with which the High Court viewed this application can be seen from the fact that a full bench was assembled to deal with the matter.<sup>42</sup>

This stream of applications has also resulted in a potentially serious security risk at the country's High Courts, as numerous prisoners have to be transported on a daily basis to court when the applications are heard. This also causes further staffing problems, as numerous warders are now required to accompany the prisoners to court. The full impact of these applications is fully discussed in the Full Bench decision and the following extreme example is referred to in the judgement delivered by Hartzenberg ADJP, where he points out

*"During April this year there was an instance where in one abortive application 41 prisoners were transported from Kutuma Sinthumule prison, more than 400 kilometres from court in five vehicles guarded by 25 warders. The entourage left the prison at 4:00 am and must have arrived back very late in the evening. The matter was not on the roll and there was no service on the State."<sup>43</sup>*

Given this, the Department's failure to act in accordance with the law has clearly created a crisis. As a result, there is an urgent need for the authorities to intervene to ensure that the parole provisions of the Act are implemented correctly and legally and that the Department puts in place orderly and streamlined procedures for prisoners to have access to the courts without affecting their smooth functioning.

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<sup>41</sup> Thamsanqa Fortune Thukwane.

<sup>42</sup> The Judges who sat as a Full Bench were, Hartzenberg ADJP, De Villiers J and Van Oosten J.

<sup>43</sup> See *ex parte* application T.F. Thukwane vs Minister of Correctional Services, Pretoria High Court, Case No. 15301/05 (Unreported).

## 9. CONCLUDING REMARKS

The abovementioned case of Hlongwane is a classical case, which shows how the Department has failed to implement the parole provisions correctly. Similarly, the case of Mr Mohapi indicates how favouritism works when it comes to applications for parole within the Department.

However, the abovementioned problems and the ongoing confusion with regard to the Department's directives, has led to a situation where prisoners have resorted to seeking remedies from the High Court as they are not getting much help from the Parole Boards.

There was also evidence before the Commission that in some of the management areas, the grinding of the wheels of the Parole Boards had come to a virtual standstill because of the uncertainty regarding the applicable parole legal framework. These are situations which should be avoided in any correctional environment.

The directive which was the guideline of policy pertaining to the release of certain offenders No. 1/8/B-“Penalisation Factors: Applicable in Parole Board and delegated officials” was signed by the Director of Offender Policy, F J Venter.<sup>44</sup> The aforesaid directive came into operation on the 23<sup>rd</sup> April 1998.

Since 23<sup>rd</sup> April 1998, the various Parole Boards have been using the aforesaid directive as though it was ‘cast in stone’, rather than using same as a guideline, which was to assist them in interpreting, rightly or wrongly, the 1959 Act.

It is clear from all of the abovementioned cases that the departmental officials were no longer using this as a guideline but they were using it as a replacement of the Act. This created a situation, which could never have been anticipated by

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<sup>44</sup> See Annexure ‘C’ to Pretoria Exhibit ‘CCC’.

the legislature when it enacted the 1959 Act. Secondly, the Departmental guidelines or regulations can never override the provisions of the Act.

The aforesaid directive was only repealed by the Department on the 27<sup>th</sup> June 2005, by an order of the Department bearing ref. No. 1/8/1 given under the signature of E. J. Kriek, Director: Pre-release Resettlement of the Department.<sup>45</sup> The Department has got to be commended for the aforesaid directive as it relieved the congestion and problems which had engulfed the various management areas because of the abovementioned 1998 directive.

Having said that, the Commission will have to mention that it was surprised by the fact that it took the Department approximately five (5) years to attend to a simple issue of resolving the parole guidelines, which were imposed by its officials and ensuring that prisoners are released timeously.

One of the first cases, which challenged the aforesaid directives besides the different complaints, which were raised by the various prisoners, both to the Department and to other bodies, which deal with issues of parole, including the Office of the Inspecting Judge, regarding the unfairness thereof, was heard by the High Court on 15<sup>th</sup> August 2000. Judgment was delivered on 25<sup>th</sup> August 2000.<sup>46</sup>

The aforesaid Judgment was followed by the various complaints from different prisoners to the Department, the Office of the Inspecting Judge, South African Prisoners' Organisation for Human Rights<sup>47</sup> and this particular Commission about the manner in which their applications for parole had been affected by the

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<sup>45</sup> See Head Office Exhibit 'U'.

<sup>46</sup> See *Combrink and Another v Minister of Correctional Services and Another* 2001 (3) SA 338 (D). On 27 March 2002 another Judgement, in *Mohammed v Minister of Correctional Services* (above) confirmed the views espoused in the Combrinck judgement regarding the Policy Directive.

<sup>47</sup> See the evidence of Mr Golden Miles Bhudu, Johannesburg Transcript, Volumes 39, pages 3 219-3 221.

Department's guidelines, which had already been declared unfair by abovementioned court. A number of challenges were also instituted by the prisoners in the High Courts around the country to no avail.

It is this approach to the issue of parole, which the Commission found to be an indication of the Department's clear disregard of prisoners' rights and the general state of the management of the Department being re-active instead of being pro-active. This also points to a level of incompetence, in that, the issue, which contributed to, amongst others, overcrowding in prisons and the clogging of the different Motion Court rolls could have been attended to at a very early stage.

Accordingly, it is the Commission's view that even the High Court applications referred to in this chapter, are of the Department's own making in that it failed to act in accordance with the law as already discussed above.

Whilst it might be argued that there are new parole provisions in the 1998 Act, it is important to ensure that the Department acts with regard to the law in respect of all those prisoners who were sentenced prior to the new parole provisions coming into operation. Accordingly, it is the last letter of the law in respect of those prisoners, which should be guiding the Department, namely section 65 of the 1959 Correctional Services Act, as amended.

## **10. MEDICAL PAROLE**

While the Commission was dealing with the issue of parole, it also became apparent that a second issue, namely medical parole, is also problematic for the Department.

In dealing with this particular aspect, it might be appropriate to refer to the provisions of the Constitution with regard to the rights of arrested and detained persons. Section 35 (2)(e) of the Constitution, states that:

- “(2) Everyone who is detained, including every sentenced prisoner, has the right-*
- (e) to conditions of detention that are consistent with human dignity, including at least exercise and provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment.” (Own emphasis)*

In addition to stating these rights of a detained and accused person, it is appropriate to also consider what the Constitution says with regard to rights to health care, food, water and social security. Section 27 of the Constitution states that:

- “(1) Everyone has the right to have access to:*
- (a) Health care services, including reproductive health care;*
- (b) Sufficient food and water; and*
- (c) Social Security, including if they are unable to support themselves and their dependants, appropriate social assistance;*
- (2) The State must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights;*
- (3) No one may be refused emergency medical treatment.”*

Section 69 of the Correctional Services Act No. 8 of 1959 deals with medical parole and provides as follows:

***“Placement on parole on medical grounds***

*A prisoner serving any sentence in a prison-*

- (a) who suffers from a dangerous, infectious or contagious disease; or*
- (b) whose placement on parole is expedient on the grounds of his physical condition or, in the case of a woman, her advanced pregnancy, may at any time, on the recommendation of the medical officer, be placed on parole by the Commissioner: provided that a prisoner sentenced to imprisonment for life shall not be placed on parole without the consent of the Minister.”*

The corresponding provision in the Correctional Services Act No. 111 of 1998 is section 79. In this section, the following is provided for parole on medical grounds:

*“Any person serving any sentence in a prison and who, based on the written evidence of the medical practitioner treating that person, is diagnosed as being in the final phase of any terminal disease or condition may be considered for placement under correctional supervision or on parole, by the Commissioner, Correctional Supervision and Parole Board or the court, as the case may be, to die a consolatory and dignified death.”*  
(Own emphasis)

The context within which the failure to release people on medical parole is assessed is in terms of the rights and obligations of the State in respect of people who are detained and, in particular, their right to medical care. If the State cannot provide adequate medical care, the best thing it can do under the circumstances

is to consider releasing terminally ill prisoners on medical parole so that the family can look after them.

Section 10 of the Constitution recognises that “everyone has inherent dignity and the right to have their dignity respected and protected”. Accordingly, in considering the release of an inmate on medical parole, it is imperative that the right of an individual to die in a “dignified and humane way” should take precedence when the Department’s officials consider such applications.<sup>48</sup> However, it seems that this is not the main consideration of the Department’s officials in dealing with the issue of medical parole.

At the Commission’s hearings on the Bloemfontein and Johannesburg Management Areas, the problem of medical parole became even more profound. The impression that the Commission was given is that either the Department does not have a clear policy on medical parole or, if there is a clear policy, the members of the Department who are supposed to implement the policy do not have proper guidelines as to how the policy is to be implemented. If there are clear guidelines as to how the policy is to be implemented, officials are simply disregarding these policies and guidelines, or alternatively, they seem to think that even though a person may be at a stage where he or she should be given medical parole, he or she should continue to be punished by refusing to give him or her medical parole.

In respect of the Johannesburg Management Area, there was evidence that some of the prisoners already on their deathbed with chronic diseases have never been given an opportunity to die a decent death. They are refused parole and some of the deaths were most undignified and humiliating for those who had to observe what was happening. They died without dignity and with clear disregard of their basic human rights by the members of the Department of Correctional Services.

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<sup>48</sup> See *Stanfield’s case supra* (note 17) – paragraph 15.

A terminally ill man who could not even walk to the visitation room, died in front of his family in a wheelchair.<sup>49</sup> Obviously, everybody could see that the prisoner could not even walk and that he had a terminal disease. To the Department officials in charge of parole, that should have been the very reason seriously to consider the medical evidence presented and place the matter before the Parole Board for consideration.

The Department's argument, which was presented before the Commission at the hearings, is of course that sometimes it happens that people who are on their deathbeds do not have family or if they do have families, the members of their families are not prepared to take them at that advanced stage of their illness. This cannot be correct with regard to all the prisoners who have died natural deaths in prison.<sup>50</sup> Furthermore, consideration could be given to the sick prisoner being transferred to a Hospice for him or her to die a dignified death.

It might be appropriate, at this stage, to consider the Department's approach to the issue of Medical Parole.

## **10.1 Department's Approach**

### **10.1.1 The Stanfield Case**

The attitude of the Department with regard to medical parole was clearly expressed in the matter of *Stanfield v Minister of Correctional Services*.<sup>51</sup>

In that case, notwithstanding the fact that various medical practitioners had recommended that Stanfield should be released on medical parole, the Departmental officials opposed the release of Mr Stanfield on flimsy grounds,

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<sup>49</sup> See the evidence of Mr Cloete at Johannesburg.

<sup>50</sup> See section dealing with General Parole above.

<sup>51</sup> See (note 17) *supra*.

which the court found to have no basis. They even took the matter on appeal after the court had made the order. There could be no better illustration of the disregard of Departmental policies as was shown in the Stanfield matter.

Secondly, it was clear in the Stanfield matter that the Department sought to rely on regulations that were not in operation. The fact that the 1998 Act had not yet come into operation caused this confusion because the B-Orders had been drafted as if the 1998 Act were operative. Thus, Department officials used certain requirements that were not part of the 1959 Act to deny people medical parole when in fact those provisions had not come into operation.<sup>52</sup> The question is how many people, who should have been released on parole, have died in South African prisons when they should have been granted parole on the basis of the 1959 Act?

Thirdly, even if the requirements set out in the 1998 Act were the applicable ones, it was apparent in the Stanfield matter that the application thereof was not done judiciously or with the compassion that ought to be shown to people with chronic illnesses. It is evident that Department officials misconstrued the nature of the discretion conferred upon them in terms of section 69 of the 1959 Correctional Services Act or even, for that matter, section 79 of the 1998 Act. In doing so, they also applied their discretion arbitrarily and capriciously, took irrelevant considerations into account and failed to take into account relevant considerations.

It was clear in the Stanfield case that the Department wanted the person to be “in the final phase of a terminal illness” before he could be released on medical parole. The requirement of terminal illness was in the B-Orders of the Department even though the applicable Act did not have such a requirement. As to why the Department incorporated this requirement, which is in terms of the

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<sup>52</sup> This confusion even found its way into the Annual Report of the Inspecting Judge for the 2002/2003 year. At page 20, there is reference to the provisions of section 79 of Act No.111 of 1998 as the applicable Act.

1998 Act, before this Act came into operation is still a mystery to this Commission.

In the Stanfield case, the Department (amongst others) gave as considerations for refusing parole the fact that the applicant had committed a serious crime and his earlier release would evidently have deleterious effect on the objectives of punishment and on the interests of administration of justice and of the community at large. Furthermore, this would “certainly not be expedient but would rather frustrate the objectives of section 59 of the Act”.

Once again, in considering the views expressed with regard to why the Department refused to give Mr Stanfield parole, the Commission gets the impression that departmental officials have too much or too wide a discretion in deciding what is good for the administration of justice. The Commission is unsure whether this falls within their jurisdiction or whether the officials of the Department are qualified to deal with it.

Section 63(2) of the 1959 Act merely requires the Parole Board to submit a report on, amongst other things, the possibility of the prisoner’s “relapse into crime”. This requirement is applicable to a prisoner with an indeterminate sentence in terms of this section. The Commission is saying this because it is of the view that people are in prison as punishment and not to be punished. Given this, the Department should have nothing to do with the manner in which they should be punished. It is the court that decides upon punishment by either taking away a convicted person’s liberty, imposing a fine or house arrest, directing that they should perform community service or that they should be placed under correctional supervision. The only role the Department has is to say these are the facts. The Commissioner has to decide and if the Commissioner decides not to release the person, then the Department has every resource and power to refer the matter back to court for a decision on whether, at this stage, it would be appropriate to release the person.

It is exactly because of this view that the Commission feels the issue of parole should fall under the chairmanship of legally qualified persons who would, even though the task would be the performance of an executive function, still be applying the law and could make the sorts of decisions expected of lawyers.

Furthermore, in the opinion of the Commission, neither section 79 of the 1998 Act nor section 69 of the 1959 Act requires that a person should be “unable to commit any crime should he be released on parole for medical reasons.” However, this requirement, coupled with punishment and the administration of justice, seems to feature strongly in the manner in which the Department considers parole. The Commission is of the view that the Department should place less emphasis on this and focus more on whether a prisoner is in his final phase of a terminal disease and in doing so, be guided by medical opinion instead of usurping the functions of the medical practitioners.

### **10.1.2 Stanley Ndlovu Application**

Mr Stanley Ndlovu is a prisoner serving a term of imprisonment of fifteen (15) years for robbery at Leeuwkop Prison. He was transferred to Johannesburg Medium B on 29 July 2003.

The Administrative Secretary of the Department of Correctional Services, Johannesburg Medium B, Mr J.C. Messias,<sup>53</sup> provided the following information with regard to Mr S. Ndlovu:

- His effective sentence is fifteen (15) years and he was sentenced on 2 June 1997.
- His sentence expiry date is 1 November 2011.
- His date for half of his sentence is 17 August 2004.

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<sup>53</sup> See letter dated 26 April 2005, Leeukop Exhibit “HH1”.

- He will be placed before the parole board again on 31 October 2005 for further consideration of parole.

On 17 October 2000, whilst at Leeuwkop Prison, he was stabbed and taken to the prison hospital. As a result of being stabbed, Mr Ndlovu was paralysed and suffered the loss of the use of his lower back muscles and lower limbs. Furthermore, he suffered from a problem “urogenic bladder” and could not pass urine normally.

During October 2001, Mr Ndlovu applied for medical parole. Dr P.G. Blaxter prepared a medical report dated 19 October 2002, where he stated that:

*“STANLEY NDLOVU*

*The above was stabbed one year ago and has lower backache, bowel problems and paraesthesias. He can barely stand and has to move his legs with his arms. His disability is permanent and I recommend medical parole.*

*(sgd.) DR P.G BLAXTER”*

It is clear that Dr Blaxter supported the application for medical parole.

There is also a medical report compiled by Dr J.T. Chuene who stated the following:

*“He is currently using catheters to relieve himself (urine). There is less chance that he will recover i.e he may not be able to pass urine normally in future.*

*Faithfully yours*

*(sgd.) DR J.T CHUENE.*

It is clear from Dr Chuene's report that the prisoner was never going to be in a position to pass urine normally in the future. Furthermore, there is also another medical report on the prisoner (Z1258) dated 8 October 2001 in which it is recommended that Mr Ndlovu be released on medical parole. The report states that he has multiple complications and needs treatment.

Mr Ndlovu's application was accompanied by medical reports from the District Surgeon, Dr N. Kabane as well as Dr Blaxter's report. The application for release on medical grounds contained the following information:

***"APPLICATION FOR RELEASE ON MEDICAL GROUNDS:***

***PRISONER STANLEY NDLOVU***

***REGISTRATION NUMBER 97320413***

***LEEUEWKOP MEDIUM A PRISON.***

***HEAD OF PRISON: (sgd) Signature illegible***

***CHAIRMAN: PAROLE BOARD: R.N Zondani.***

***AREA MANAGER: CORRECTIONAL SERVICES:***

***LEEUEWKOP.***

1. ....

3. *Prisoner STANLEY NDLOVU is sentenced as follows:*

*Date of Sentence/sentences:*

(1) 1997.06.02.

(2) 1998.06.23.

*Sentence expiry date:* 200.12.01. (sic)

*Correctional Supervision Date:* --

*(Act 276 (1)(i))*

*Correctional Supervision Date:* 2000.03.01.

*½ of Sentence:* 2000.09.01.

*Number of credits earned:* 2648  
*(until)*

*½ of sentence minus credits: 1997.06.02.*

*Sentence expiry date minus credits: 2000.08.31.*

*4. Medical condition of the prisoner:*

*1.1 Diagnosis: Stabbed at the fourth thoracic spine in September 2002 with resultant paresis and parasthesia of the lower back muscle and lower limbs.*

*1.2 Prognosis: Very poor prognosis to regain power and sensation over both lower limbs and has multiple complications like hemorrhoids, backache that is intractable and pre-existing asthma and sinusitis.*

*4.4. Recommended accommodation: Patient to be discharged to the care of his family and possible sheltered employment (secured) on medical parole.*

*5. Recommendation:*

*It is recommended that prisoner Stanley Ndlovu be released on medical grounds in accordance with the provision of Article 69 of the Correctional Services Act No. 8 of 1959 and DOB III (3)(d)(xvii) and DOB VI (5)(v) in the care of his family because of the following reasons.*

*5.1. Patient has multiple problems relating to his health and needs extensive medical care. (Kindly peruse medical file).*

*6. For your further attention.*

*(sgd.): DR N KABANE*

*Date : 2001/10/08...*

*7. Recommendation/Comments: Head of Prison.*

*I also concur with the abovementioned recommendations that he may be considered for medical parole.*

*(sgd.) HEAD OF THE PRISON*

*Date : 25.10.2001.*

*8. Recommendation/Comments: Chairman of the Parole Board:*

*Prisoner's state of health is not good. He is permanently disabled and confined to a wheelchair after being stabbed by*

*a prisoner (at Maximum). He urinates by means of tubes, he cannot walk or even stand up for that matter. As chairperson of Parole Board I strongly recommend that he be released on medical grounds and that he be monitored by Community Corrections throughout.*

*(sgd.) CHAIRMAN OF THE PAROLE BOARD*

*R N ZONDANI - Deputy Director. Date : 14.11.2001.*

7. *Recommendation/Comments: Area Manager.*

*Not recommended.*

*(sgd.) AREA MANAGER Date 16.11.01.<sup>54</sup>*

It is clear from this report that the Doctor recommended that Mr Ndlovu be released on medical parole. The Head of Prison, as well as the Chairman of the Parole Board, supported the recommendation.

However, Mr Ndlovu was never released because the then Provincial Control Officer in the Provincial Commissioner's Office, Mrs Sharon J. Kunene did not support the recommendation that he be released. Mrs Kunene does not give reasons in the application for why she refused the release of Mr Ndlovu.

In the Commission's view, this shows that the officials of the Department, who are in control of the prisoners' lives, abuse their power in that they ignore the recommendations of medical practitioners and expert opinion without any basis. Officials adopted a similar approach in the Stanfield matter reported on above. Reasons should be given in order to comply with the provisions of section 32 of the Constitution and the Access to Information Act No. 2 of 2000.

The Commission approached Mrs Kunene for an explanation as to why the Stanley Ndlovu application was refused. In her affidavit, she stated that:

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<sup>54</sup> See Application in Leeuwkop file 1/8/3, Exhibit "HH".

“6. Both the doctor and parole board recommended that the inmate should be released on medical grounds, however upon perusal of the doctor’s note and board’s recommendations I realized that their recommendations were solely based on the fact that the inmate was confined to a wheelchair, nothing suggested that the inmate was in the final phase of any terminal disease or condition.”<sup>55</sup>

In her affidavit she also went on to state that she relied on section 79 of the Correctional Services Act of 1998 and she declined the application “based on the abovementioned provisions of the Act.”

Mrs Kunene relied on an incorrect provision of the Act because at the time the said provision had not come into operation. This was the same situation as it was the case in the Staniland matter.

### **10.1.3 The Du Plooy Application**

In *Du Plooy v Minister of Correctional Services and 4 Others* (above), Mr du Plooy, a prisoner, who was terminally ill and serving a sentence of fifteen (15) years at the Pretoria Local Prison for armed robbery, had to apply to the High Court for release on medical parole. Mr du Plooy had been admitted to the prison hospital from the first day of his sentence because of ill-health. According to his doctors, his life expectancy had been reduced to a few months. Four (4) medical practitioners, including a physician who specialised in oncology and the District Surgeon, who worked at the prison hospital, supported his application for parole. Despite this, the Parole Board supported by the Area Manager, refused to release him on parole stating:

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See Sharon Jabulile Kunene’s affidavit – Leeuwkop Exhibit “HH2”.

*“Our medical staff will evaluate the prisoner’s condition from time to time and immediately it deteriorates he will be placed before the Parole Board for another consideration. [sic] Presently he does not meet the criteria. Not recommended for placement on medical parole.”*

When his lawyers requested to know “the criteria” and the reasons for the refusal, they were neither told the criteria nor given the reasons. It was only in court papers that the Department gave the reasons as:

*“... the applicant may be terminally ill, but he is still in a position to walk around unassisted, climb stairs as there are no lifts at the hospital and generally walk around the hospital”.*

This was notwithstanding that one of the doctors had furnished an affidavit stating that in his professional opinion Mr du Plooy was “in the last stage of the final stage of the disease and the disease could result in his imminent death at any stage from now to the following two to three months”. He went on to state:

*“The applicant is currently dying a painful and protracted death and currently needs to be cared for either in a hospice or at home with regular hospice intervention.”*

The court found that Mr du Plooy’s health was deteriorating rapidly and he was in need of humanness, empathy and compassion.

Accordingly the court ordered that:

*“The applicant be placed forthwith on parole subject to:*

- (a) *him being monitored by the respondents' Department Community Corrections in accordance with the statutes and regulations pertaining to Correctional Services;*
- (b) *his continuing to remain and be under the supervision of Dr J.N Lombard at the Pretoria Academic Hospital;*
- (c) *in the event of him being discharged from hospital then he shall be placed under the care of his wife Mrs Susan du Plooy at their common home at 407 Ruben Flats, 517 Jasmin Street, Silverton, Pretoria."*

There is a dire need for the Department to have a proper and consistent Medical Parole Policy. Prisoners like Messrs Stanfield, Ndlovu and du Plooy, who should have been released on Medical Parole, are kept in prison for no apparent reason. It is clear that Medical Parole is left to the sole discretion of officials who are not medically qualified to make the necessary assessments. Furthermore, they do not accept the advice of medical personnel.

## **10.2 Judicial Inspectorate**

In his report for the year ending on 31 March 2003, the Inspecting Judge, the Honourable Mr Justice J.J. Fagan, indicated that there is a need for the Department to consider making use of the provisions relating to release of terminally ill patients on medical grounds.<sup>56</sup>

In his report for the period ending 31 March 2004, the Inspecting Judge reports that they received nineteen thousand three hundred and twenty nine (19 329) complaints regarding health care problems. Four hundred and ninety five (495)

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<sup>56</sup> The records indicate that eighty eight (88) out of an average of 179 398 prisoners were released on medical grounds. (Page 19 of the Report).

prisoners requested to be released on medical grounds. One hundred and seventeen (117) terminally ill prisoners were released in 2003 on medical grounds nationwide. 1 683 are said to have died of natural causes and three hundred and eighty nine (389) of those were awaiting trial.<sup>57</sup>

It is clear that a very small number of prisoners were released on medical grounds in this two-year period notwithstanding the fact that it has been stated in numerous publications and research papers that there are a number of prisoners who are terminally ill because of the scourge of HIV/Aids in our country. The question then is, if on average only eighty eight (88) up to one hundred and seventeen (117) prisoners are released in one year, where are all the other terminally ill patients? Why are all the other terminally ill patients not being released on medical parole?

Similarly, according to the same report of the Inspecting Judge, the mortality rate amongst the prisoners has increased by 600% over the past seven years. This again clearly points to the fact that the Department is not using medical parole.

### **10.3 Concluding Remarks**

The Commission is in full agreement with the sentiments of Van Zyl J in the Stanfield case<sup>58</sup> when he stated that:

*“It is hence irrelevant what the nature of his conviction and length of his sentence of imprisonment might be. It is equally irrelevant what period of imprisonment he has actually served. The only requirements for release on parole on medical grounds are that the medical officer should*

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<sup>57</sup> See pages 15 – 17 of Annual Report 2003/2004. Prisoners and Prisons.

<sup>58</sup> Supra (note 17).

*recommend it and that issue should be “expedient” having regard to his “physical condition”.*<sup>59</sup>

About the requirement on life expectancy, he said:

*“There is no indication of what a “short”, as opposed to a “not so short”, life expectancy may be. Nor can it be determined when a prisoner is so ill that it would be physically impossible for him to commit a crime. I should imagine that the commission of further crimes would be the last thing on the mind of any prisoner released on parole for medical reasons, particularly when he knows that he has only a few months to live.”*<sup>60</sup>

Accordingly, the Department has misdirected itself in imposing the requirement of whether a prisoner would be able to commit a crime or not in the assessment of medical parole.

In paragraphs 124 to 128 of the judgment, Van Zyl J deals with the right to dignity of sick prisoners in the most compassionate way and this Commission agrees with his views, which can best be summed up in this statement:

*“Even the worst of convicted criminals should be entitled to a humane and dignified death.”*<sup>61</sup>

The requirements of section 35 (2)(e) of the Constitution should be paramount. The Department should respect the right to dignity at all times, especially in respect of those prisoners who are terminally ill.

The requirement in section 79 of the 1998 Act that a prisoner be “in the final phase of any terminal disease or condition” before he is released on medical

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<sup>59</sup> *Op cit* at para. 82.

<sup>60</sup> *Op cit* at para. 110.

<sup>61</sup> See paragraph 127 of the *Stanfield v Minister of Correctional Services* Judgment *supra* (note 19).

parole is bound to create problems in practice. Given this, there is a need to consider amending this particular requirement to be less stringent in order to ensure that terminally ill prisoners have a “humane and dignified death”. The phrase, “in the final phase”, could be deleted from this section to give the doctors and Parole Boards some discretion in this regard.

The cornerstone of our Constitution is the commitment to the restoration of human dignity to all South Africans and to a large extent to avoid the repetition of the injustices of our past. Accordingly, the intention is to create a society based on democratic values, social justice and fundamental human rights. The ill treatment of those who are terminally ill could never be what the founders of our democracy sought to achieve.

Our courts have consistently held that prisoners do not lose their “basic human rights” upon entering the prison doors. They retain all basic human rights, which is not necessarily inconsistent with being a prisoner.<sup>62</sup>

In a view similar to the position of our Courts, yet expressed in more graphic and colourful language, Krishna Iyer J, in *Charles Sobhraj v Superintendent, Central Jail, Tihar, New Delhi* (1979) 1 SCR 512 (Sup Ct India) at 518-19, said:

*“Whenever fundamental rights are flouted or legislative protection ignored, to any prisoner’s prejudice, this Court’s writ will run, breaking through stone walls and iron bars, to right the wrong and restore the rule of law. Then the parrot-cry of discipline will not deter, of security will not scare, of discretion will not dissuade, the judicial process. For if Courts “cave in” when great rights are gouged (out) within the sound-proof, sight-proof*

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<sup>62</sup> See *Whittaker v Roos and Bateman* 1912 AD 92; *Goldberg and Others v The Minister of Prisons and Others* 1979 (1) SA 14 (A) at 39C-E; *Mandela v Minister of Prisons* 1983 (1) SA 938 (A); *Minister of Justice v Hofmeyr* 1993 (3) SA 131 (A) 139I-140B; *S v Mankwanya and Another* 1995 (6) BCLR 665 (CC) and also 1995 (3) SA 391 (CC) at page 142-143; and *Strydom v Minister of Correctional Services and Others* 1999 (3) BCLR 342 (W).

*precincts of prison houses, where, often, dissenters and minorities are caged, Bastilles will be re-enacted .... Therefore we affirm that imprisonment does not spell farewell to fundamental rights although, by a realistic reappraisal, Courts will refuse to recognize the full panoply of Part III enjoyed by a free citizen.”*

Clearly, if the Department properly utilises the correctional supervision and the parole system, particularly medical parole, it could have a tremendous effect on the reduction of overcrowding in prisons. As this report indicates, there are very few prisoners released on medical parole because of the attitude of the Department’s officials towards release of prisoners on this type of parole.

The Department’s refusal to release prisoners on medical parole has been consistent in most management areas.<sup>63</sup> Unless the Department revisits its approach to issues of medical parole, there is likely to be an upsurge of applications<sup>64</sup> to the High Court for release of prisoners on medical grounds and the taxpayer will bear the legal costs.

## **11 RECOMMENDATIONS**

### **11.1 Parole Generally**

1. To avoid interference from employees of the Department, the Minister of Correctional Services should consider amending the Correctional Services Act and regulations to specify that Parole Boards are accountable only to the Minister.

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<sup>63</sup> See *Du Plooy v Minister of Correctional Services and 4 Others*, above.

<sup>64</sup> It is clear that there has been an increase in the number of prisoners challenging the Department in the High Court and also attempting to enforce their rights as enshrined in the Constitution.

2. The exclusion of officials of the Department as chairpersons and vice-chairpersons of the parole boards and correctional supervision boards should be expressly incorporated in the Act.
3. The Minister should consider delegating the powers of overseeing the Parole Boards to an Independent Board created for that purpose or to the Office of the Inspecting Judge. In the case of the Office of the Inspecting Judge, an assistant should be appointed in terms of section 87 (2) of the Act to set up a new directorate to oversee paroles.
4. The independence of the Parole Boards and the Correctional Supervision Boards should be enshrined in the Act and Regulations.
5. The Parole Boards and Correctional Supervision Boards should be chaired by legally qualified persons on an ad hoc basis.
6. The area of jurisdiction of the Parole Boards and Correctional Supervision Boards should be demarcated according to the provinces or the various command areas in terms of which the Department of Correctional Services is demarcated;
7. The right of a prisoners to review a decision of the Parole Boards or the Correctional Supervision Boards should be enshrined in the Correctional Services Act 1998 and it is recommended that section 75(8) of the Act be amended to read:

*“(8) (i) A decision of the Board is final, unless the prisoner wants to exercise his right to review the proceedings in which case the record of the proceedings before the Board will be prepared and submitted to the Correctional Supervision or Parole Review Board;*

(ii) *A Board shall forthwith inform the prisoner whose parole has been denied that he may inspect and make a copy of the record of the proceedings and that such application for review should be lodged within 14 days of the decision of the Parole Board.”*

8. Payment of the members of the Boards should fall under the Minister and not the Commissioner of Correctional Services. In this regard an amendment should be made to Section 74(8) of the Act.
9. The appointment of members of the Parole Review Boards and the Correctional Supervision Review Boards should not be limited to members of the National Council of Correctional Services. Consideration should be given to the appointment of retired Judges and other retired legal practitioners on an ad hoc basis.
10. Section 79 of the 1998 Act should be amended to have a less restrictive threshold for terminally ill prisoners to be released on medical parole.
11. In the light of the above, it is the Commission’s view that the policy of the Department dealing with the classification of crimes for parole purposes should be reviewed.
12. It is recommended that the parole policies of the Department be amended, more specifically the section classifying assault *per se* as an aggressive offence. More information should be placed before the Board before it decides that the crime was an aggressive crime.

13. Chairpersons of the Boards should give reasons, especially if they are refusing parole, so as to comply with the Constitution and the Promotion of Access to Justice Act.
14. The Department should make a concerted effort to explain the Parole Provision to the inmates. This should include preparing a booklet for the inmates and their families explaining parole. In particular explaining:
  - (a) The legal provisions;
  - (b) The underlying rationale of the system;
  - (c) The manner in which parole operates in practice;
  - (d) How parole affects each individual;
  - (e) The responsibilities of each prisoner released on parole; and
  - (f) How to deal with problems which may affect your parole.

## **11.2 The Matter of Mr Hlongwane**

The Commission recommends that Mr Sithole should never be appointed to any position within the Parole Boards or any position of responsibility within the parole system.

## **11.3 The Stanley Ndlovu Matter**

1. Mrs S. Kunene should be subjected to counselling or training so that she can understand the provisions of the Act and the incorrectness of her reasons for refusing the parole of Mr Ndlovu. She should also be apprised of the consequences of her unlawful refusal of parole.

2. Mr Stanley Ndlovu's application for parole should be referred to the Parole Board immediately.

# **ANNEXURE “A”**

**Annexure To Parole Chapter**

**STATE ATTORNEY’S REPORT,**

**JOHANNESBURG**

## OFFICE OF THE STATE ATTORNEY JOHANNESBURG

### REPORT TO THE JALI COMMISSION

#### **INTRODUCTION**

We were requested to provide the Commission with a report regarding applications by prisoners brought in the Witwatersrand Local Division.

#### **SPECIALISATION**

In May 2003 our office embarked on a specialisation exercise. A component was, inter alia, established to deal with matters relating to the Department of Correctional Services.

#### **STATISTICS: NEW MATTERS**

In 2003 the average number of new applications received per month was 3.

#### **2003**

May	June	July	Aug	Sept	Oct	Nov	Dec
0	4	1	4	3	4	2	1

In the period January 2004 to June 2004 this increased to an average of 6 per month.

## 2004

Jan	Feb	March	April	May	June
5	3	8	4	8	5

The numbers increased dramatically from July 2004. The average for the period July 2004 to January 2005 was 47.

## 2004/5

July	Aug	Sept	Oct	Nov	Dec	Jan
13	20	25	75	98	24	71

### **REASON FOR THE UPWARD TREND**

This increase is ascribed to uncertainty by prisoners regarding the applicable parole system. The new parole system in terms of Act 111 of 1998 was effective as at 1 October 2004. Prisoners sought declaratory orders in this regard. They also sought orders that they be considered by the Parole Board.

## **PROJECT**

In December 2004 I was appointed to act as head of the office. I was confronted with severe criticism by judges in the division who were frustrated by our apparent inability to deal with the flood of applications by prisoners.

The situation was assessed and in January 2005 I implemented a project to deal with the crisis.

This included the appointment of a senior attorney as project manager with definition of his role and that of the team assisting him. A dedicated panel of junior counsel was also identified to assist. Channels of communication were addressed with the Department of Correctional Services.

The aim of the project was to clear the backlog of matters that had accumulated as expeditiously as possible and to ensure that any new matters received were finalised without delay.

Certain monitoring tools were introduced such as a separate register indicating, inter alia, the nature of the application, a separate diary for the set down of matters and various check lists.

## **STATISTICS: TYPES OF APPLICATIONS**

Prior to December 2004 there was no system in place to assess the trends in the various types of applications received.

	<b>Ordinary Parole</b>	<b>Reviews</b>	<b>Medical Parole</b>	<b>Misc</b>	<b>Remissions</b>	<b>Correc Superv</b>
<b>Dec</b>	25	5	1	5	1	
<b>Jan</b>	5	12	4	3	2	1
<b>Feb</b>	6	5	2	10		
<b>Mar</b>	8	8	2	12		
<b>Apr</b>	4	3	2	8	1	1
<b>May</b>	2	1	2	2		
<b>June</b>	2	1	1			
<b>Jul</b>	1		1	1		
<b>Aug</b>	3	2	3	8		
<b>Sep</b>	2		2	1		
<b>TOTAL</b>	<b>58</b>	<b>37</b>	<b>20</b>	<b>50</b>	<b>4</b>	<b>2</b>

Ordinary Parole matters are those matters where prisoners seek orders that they be considered by the Parole Board. Reviews relate to decisions by the Parole Board. Miscellaneous matters include applications relating to single cells, transfers, dietary requirements, access to computers and compassionate leave.

## **STATISTICS: MOTION ROLL**

I am furnished with the following statistic regarding the numbers of matters on the court roll per month. Regrettably, the information does not distinguish the various types of matters on the roll for the period. This information is presently being

compiled. I trust however, that the statistic relating to the types of new matters may be some indicator.

There is a sharp decline in the number of matters on the roll. In December 2004 when I assessed the situation, there were approximately 60 matters on the roll *per week*.

## **2005**

<b>Month</b>	<b>Number</b>
January	13
February	51
March	61
April	41
May	71
June	17

## **AUDIT**

A comprehensive audit of all files is required by the end of December 2005. A complete spread sheet of all matters will be compiled and will be available at the end of January 2005. There is an obvious variance in the numbers of new matters receipted by the office and those categorised and entered in the separate register. This variance is attributed to the fact that subsequent applications by the same prisoner were dealt with on the existing file. This will be rectified with the audit.

**CONCLUSION**

We record a downward trend in relation to new matters from February 2005.

<b>Feb</b>	<b>Mar</b>	<b>Apr</b>	<b>May</b>	<b>Jun</b>	<b>Jul</b>	<b>Aug</b>	<b>Sep</b>
20	26	20	14	8	9	19	6

*W DA SILVA*  
*ACTING STATE ATTORNEY*  
*JOHANNESBURG*  
*14 OCTOBER 2005*