



Commission for Gender Equality
A society free from gender oppression and inequality

CORRECTIONAL SERVICES AMENDMENT BILL [B14 – 2023]

Commission for Gender Equality Comments

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1. Introduction

The Commission for Gender Equality (CGE) wishes to express its gratitude for the opportunity to make written submissions on the publication of the Correctional Services Amendment Bill [B14-2023].

The CGE, as an independent statutory body created in terms of Chapter 9 of the Constitution of the Republic of South Africa, 1996 (the Constitution), is mandated to promote and protect gender equality in government, civil society, and the private sector.

The Commission for Gender Equality Act 39 of 1996, as amended (the CGE Act), gives the Commission the power to:

- Monitor and evaluate policies and practices of organs of State at any level.
- Monitor and evaluate statutory bodies and functionaries.
- Monitor public bodies and authorities and private businesses, enterprises, and institutions to promote gender equality.
- Make any recommendations that the CGE deems necessary.

The CGE welcomes the opportunity to make inputs into the Bill and shall reiterate the proposed sections under review in the Bill and respond thereto.



2. Background

During Apartheid, detention and imprisonment were often used in South Africa to intimidate, terrorize, and dehumanize individuals who acted against the Apartheid government and the general state of legalized segregation and subjugation of black persons. The Apartheid government's overreach in its treatment of detainees in correctional facilities is well documented.

The establishment of the Judicial Inspectorate for Correctional Services (JICS) as part of our constitutional democracy, as well as The National Commissioner's implementation of the mandate and policies of the Department of Correctional Services, confirmed government's intention of ensuring that the Department of Correctional Services's treatment of detainees is monitored.

In *Sonke Gender Justice NPC v The President of the Republic of South Africa*,¹ Constitutional Court had occasion to consider the independence of the JICS and declared sections 88A(1)(b) and section 91 of the Correctional Services Act 11 of 1998 to be unconstitutional as a result. In the opening paragraph of the judgment, Theron J confirmed that:

'The Bill of Rights grants every detained person the rights to life, dignity, bodily security and conditions of detention that are consistent with human dignity. Any person who has stepped into one of this country's correctional centres will know that, in many respects, the treatment of inmates and conditions of detention fall far short of this. ... Who ensures that the Department [of Correctional Services] is doing its part in ensuring

¹ *Sonke Gender Justice NPC v The President of the Republic of South Africa* 2020 (ZACC) 26.



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that incarcerated persons' constitutional rights are not violated? The State has entrusted this important task to the Judicial Inspectorate of Correctional Services (Judicial Inspectorate), a statutory body tasked with inspecting and monitoring correctional centres in South Africa. The Judicial Inspectorate is the body that exercises oversight over the Department.²

The Constitutional Court went on to find that the provisions in question were unconstitutional, because they empowered the same state department which JICS was obligated to oversee, with the power to exercise control over the JICS's budget. This had the potential to impact negatively on the ability of the Judicial Inspectorate to function effectively, and therefore independently. Theron J added:³

'Independence is an inherent characteristic of a successful oversight, or watchdog, entity and is crucial in ensuring the effective oversight of correctional facilities. In the context of an oversight entity like the Judicial Inspectorate, independence requires that it must be able to perform its functions, free from the influence of the executive body it is mandated to scrutinise. Moreover, even if we accept that the Department as a whole is generally committed to assisting the Judicial Inspectorate, the facts and statistics presented in the papers and in the Judicial Inspectorate's annual reports over the past decade reveal that the rights of inmates remain threatened by, among other things, "bad apples" and rogue operators within the Department, whose conduct takes place in spaces that are well-hidden from public view.'

Bearing this judgment in mind, the CGE makes the following observations and recommendations on the proposed amendment to the Correctional Services Act.

² Para 1.
³ Para 52



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3 The Commission for Gender Equality's Submissions on Aspects of the Bill

3.1 General Comments

The CGE welcomes the Bill, which intends to bring the Correctional Services Act in line with the declarations of unconstitutionality of section 88A(1)(b) and section 91 of the Act, by the Constitutional Court in the *Sonke Gender Justice NPC v The President of the Republic of South Africa* judgment. These sections were declared unconstitutional by the Constitutional Court insofar as they fail to provide an adequate level of independence to the Judicial Inspectorate for Correctional Services ("the JICS").

3.2 Amendment of Section 1 of the Correctional Services Act 111 of 1998

The Bill seeks to add to section 1 of the Correctional Services Act the following definitions:

3.2.1 'Head of the Remand Detention Facility' which will mean 'a correctional official designated by the National Commissioner to manage and control a particular remand detention facility';

3.2.2 'sexual violation' which will have the meaning assigned to it in section 1 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007; and

3.2.3 'torture' which will have the meaning assigned to it in section 3 of the Prevention of Combatting and Torture of Persons Act 13 of 2013.



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The Commission agrees with the insertion of these definitions as proposed by the amendment, as they align with the meaning of these words within other applicable legislation.

3.3 *Amendment of Section 30 of the Correctional Services Act 111 of 1998*

The Amendment Bill also seeks to amend section 30 of the Correctional Services Act by obligating the Department to inform any inmate who becomes subjected to segregation of their right to appeal. The Bill also gives the right to such an inmate to refer the matter to JICS who will then provide a decision within 72 hours of receipt. The Head of a Correctional Centre or Remand Detention Facility is further obliged to provide, upon request, all relevant information on the matter to JICS within 24 hours of receipt of the request.

The Commission agrees and supports these amendments, as this affirms that inmates must be informed of their right to appeal their confinement to segregation or solitary confinement. The Commission also notes the sentiment of the proposed amendment is to provide for an inmate's right of appeal of administrative decisions made by correctional officials to an independent organisation. This will ensure that all the decisions can be measured against an objective standard as well as that all decisions which further inhibit the movement of inmates through restraints, are proportionate to any actions with which the inmate may be charged.

The amendment in effect protects such an inmate from abusive treatment by the 'bad apples' and 'rogue operators' as quoted from the *Sonke Justice* judgment above.



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3.4 *Amendment of Section 31 of Correctional Services Act 111 of 1998*

The Bills seeks to amend section 31 of the Correctional Services Act by obligating the Department to inform any inmate who becomes subjected to restraint of their right to appeal. The Bill also gives the right to such an inmate to refer the matter to JICS who will then provide a decision within 72 hours of receipt. As with the proposed amendment to section 30, the Head of a Correctional Centre or Remand Detention Facility is further obliged to provide, upon request, all relevant information on the matter to JICS within 24 hours of receipt of the request.

The comments made above in respect to the amendment of section 30 are equally apposite to the proposed amendment to section 31. The CGE therefore supports the proposed amendment to section 31 for the same reasons.

3.5 *Amendment of section 88A of the Correctional Services Act 111 of 1998*

The Bill seeks to amend section 88A of the Correctional Services Act by empowering the Minister of Correctional Services to appoint JICS's Chief Executive Officer, rather than the National Commissioner of Correctional Services. Furthermore, the appointment, career incidents, and other conditions of service, including salary and allowances of the Chief Executive Officer will be regulated by the Public Service Act. The Inspecting Judge, rather than the National Commissioner, also is empowered to deal with matters relating to the misconduct and incapacity of the Chief Executive Officer.



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The Commission supports the placing of the confirmation process and requirements for the appointment of JCIS's Chief Executive Officer outside realm of the National Commissioner, as this will strengthen JCIS's existence as an independent body, ensuring the full independence of the JICS.

The Commission, however, considers it imperative to deliberate on whether the JICS should be reporting directly to the Minister of Justice and Constitutional Development, because this would still entail JCIS reporting to the executive branch of government. Given Theron J's comments quoted above in *Sonke Justice* that 'independence requires that it must be able to perform its functions, free from the influence of the executive body it is mandated to scrutinise', the CGE is of the view that it would be appropriate for JICS to report to Parliament. Therefore, section 88A of the Correctional Services Act should be amended to this effect, with JCIS's reporting obligations being similar to that of other similar independent oversight entities such as Chapter 9 Institutions.

By doing this, JICS could not be unduly influenced by the executive branch of government over which it exercises oversight, which in turn improves accountability and bolsters our constitutional democracy by ensuring that the Mandela Principles⁴ for the treatment of detainees are upheld.

Considering that the status of the JICS is similar Chapter 9 institutions, direct accountability to Parliament will inhibit undue political or departmental influence on the investigations that JICS embarks on.

⁴ The United Nations Standard Minimum Rules for the Treatment of Prisoners, General Assembly resolution 70/175, adopted on 17 December 2015.



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3.6 *Substitution of section 91 of the Corrections Services Act 111 of 1998*

The Bill also seeks to substitute section 91 of the Correctional Service Act so that the expenses of JCS incurred in connection with the exercise of its powers, carrying out of its duties and functions, and remuneration of its members will be defrayed from monies appropriated by Parliament. The CGE supports this, and notes that if JCS's expenditure is defrayed from monies appropriated by Parliament, this would render Parliament the more appropriate body to which JCS should account, as discussed above.

3.6 *Insertion of proposed section 95D into the Correctional Services Act 111 of 1998*

The Bill also proposes adding a section dealing with mandatory reporting obligations of Department of Correctional Services to the Inspecting Judge on the escape, death, segregation, restraint, use of force, assault, torture, or sexual violation of an inmate, as well as the assault by an inmate on a correctional officer, any hunger strike, attempted suicide, dishonest practice, or corrupt activities in a correctional centres or remand detention facilities.

The Commission is in support this proposed section, as this will ensure that the JCS is able to investigate these events and make appropriate and informed recommendations to assist the National Commissioner in preventing future occurrences. If the JCS were reporting directly to Parliament and is accountable to Parliament, the insertion of this section will additionally allow Parliament to hold the National Commissioner and the Department accountable, where the JCS reporting confirms it appropriate.



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4. Conclusion

The independence of monitoring bodies is imperative to bolster and strengthen our constitutional democracy, especially in the sphere of the mandate of correctional services. Our apartheid past has in many instances informed our constitutional democracy and how we view and implement correctional detention. As a society we should always be mindful and alert to how we treat detainees and ensure that the institutions who monitor the custodians of these detainees are independent, impartial, and unbiased in their investigations and reporting.

The CGE therefore supports the Bill, as the proposed sections contained therein are in line with the remarks made by the Constitutional Court in *Sonke Gender Justice NPC v The President of the Republic of South Africa* regarding the independence of the JICS. However, the CGE is of the view that the most appropriate body to which JICS should report would be Parliament, and that the Bill should provide for this. This would not only further strengthen JICS's independence but would be consistent with the proposed section of the Bill relating to JICS's source of funding. It would also further Parliament's own oversight of the executive arm of government.