

THE LEGAL FRAMEWORK REGULATING MEDICAL PAROLE: A COMPARATIVE STUDY

by

KAROLIEN VAN WYK

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Supervisor: Prof A van der Merwe

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Chapter 1: Introduction

1.1 Context of the study

This mini-dissertation is about the legal framework regulating medical parole in South Africa after recent amendments.¹ There has been recent public questioning about medical parole after Shabir Shaick (a convicted fraudster) was released on medical parole and then recovered from his terminal illness.² A few years later the same events took place when the old Minister of Police, Jackie Selebi was released on medical parole. Recently Xolile Mngeni a sentenced offender applied for medical parole which was denied just to pass away in the correctional facility a few months later.³ Clive Derby-Lewis a 78-year old sentenced offender with terminal cancer who has served 20 years of his 25 year sentence has been denied medical parole for the third time this year.⁴ The new amendments of the Correctional Services Act have now broadened medical parole in South Africa. The prisoner or any party acting on his behalf can now bring a request for medical parole to the parole board, whereas previously only the prisoner's medical practitioner could launch an application.⁵ Furthermore, section 79(7) clearly states that a parolee's medical parole cannot be cancelled for the mere fact that his health has improved. The new amendments have also given the minister of Correctional Services the duty of electing a Medical Advisory Board that will supply the Parole Board with independent opinions surrounding the prisoner's medical health.

¹ Correctional Matters Amendment Act 5 of 2011.

² Bateman C 2012 Tighter medical parole – no more 'Shaik, rattle and roll' *South African Medical Journal* 102(4) pp210-212.

³ "Selebi, Shaik got medical parole - why not a dying Mngeni?" *eNCA* 19 October 2014 (<http://www.enca.com/>).

⁴ "Lawyer to approach high court over Derby-Lewis's parole application" *Mail and Guardian* 21 June 2014 (<http://mg.co.za>).

⁵ Sec 79(2)(ii) of the Correctional Services Act 111 of 1998.

1.2 The purpose of the study

The purpose of this study is to take a comparative critical look at the recent amendments that have been made to the legislation that regulates medical parole. This has been done by means of the Correctional Matters Amendment Act 5 of 2011. A specific reference is made to the amendments made to section 79 that deal with medical parole. This mini-dissertation focuses on four things with regards to medical parole. The criteria that have to be met by the sentenced offender before medical parole will be granted. The application process the sentenced offender has to follow to apply for medical parole.⁶ The way the medical advisory board is structured. And finally, focus is given to section 79(7). This section deals with the cancellation of medical parole. It refers one to section 75(2) and (3)⁷; these sections deal with the criteria that should be adhered to for the cancellation of medical parole. Furthermore section 79(7) mentions that medical parole cannot be cancelled merely because the parolee's health has improved. The question arises whether or not this is reasonable to the other prisoners who are still imprisoned and if it is in the public's best interest. All four of these aspects will be examined and compared in context of Canadian legislation.

1.3 Methodology

The methodological approach that is used during the study is logical-comparison, taking an in-depth look at the existing legal principles as configured in legislation and exploring how it can be developed with reference to academic opinions and the legal system in a foreign jurisdiction, specifically Canada. The study works comparatively with the Canadian parole system as their law system shares many similarities with the South African law system and is open and accessible. It is valuable and beneficial to look to other countries to see how they overcome the issues we deal with in our current parole system.

⁶ Sec 79(2) of the Correctional Services Act 111 of 1998.

⁷ Correctional Services Act 111 of 1998.

1.4 Structure

This mini-dissertation consists of six chapters. The first chapter is an introductory chapter explaining everything that is discussed in this mini-dissertation. This chapter sets out the structure and aim of the mini-dissertation. The following chapter shortly illuminates the history of medical parole in South Africa contextualising the reasons for the amendments to the legislation over the years. This chapter also define parole and medical parole and examines the history of medical parole in South Africa. This chapter investigates the decision making bodies that are involved in granting a prisoner medical parole. Chapter three investigates the application procedure that needs to be followed to apply for medical parole in South Africa. The difference between parole and medical parole especially in terms of breaking the parole agreements is also discussed in this chapter. It critically investigates section 79(7) that specifies that medical parole cannot be cancelled merely because the parolee's health improved and he is no longer suffering from a terminal illness or incapacitated. The fourth chapter examines the current situation in Canada surrounding sentenced offenders that fall ill. This country was chosen because the South African criminal procedural law was broadly based on this country and furthermore it also has a well-developed parole system.⁸ The fifth chapter compares the South African approach of dealing with sentenced offenders who fall ill to the approach followed in Canada. The final chapter consists of suggestions on how to alleviate the problem areas in the current section 79 which regulates medical parole and is a conclusion to this mini-dissertation.

⁸ Graser RR 1982 *Parole in South Africa*. Doctor Philosophiae Durban University of Durban-Westville.

Chapter 2: A brief history of medical parole in South Africa

2.1 Introduction

The following chapter shortly illuminates the history of medical parole in South Africa contextualising the reasons for the recent amendments to the legislation. This chapter also defines parole and medical parole.

2.2 Parole and medical parole

The legislative framework governing parole and medical parole in South Africa is the Correctional Services Act 111 of 1998 as amended by the Correctional Matters Amendment Act 5 of 2011.⁹

Section 73¹⁰ that deals with the length and form of sentences states that a sentenced offender should remain in a correctional centre for the full period of the sentence, and if the offender is sentenced to life imprisonment then he or she should remain there for the rest of their lives.¹¹ But in section 73(4) it states “that a sentenced offender may be placed under correctional supervision, day parole, parole or medical parole before the expiration of his or her term of incarceration.”¹²

According to the definitions set out in section 1¹³ parole means “a form of community corrections contemplated in Chapter VI”. Parole is a method of placement whereby an offender is released from the correctional centre before serving his or her full sentence but after serving a minimum period. The minimum periods that should be served is governed by

⁹ CSPRI Newsletter. No 40 January 2012.

¹⁰ Correctional Services Act 111 of 1998.

¹¹ Department of Correctional Services *Placement on parole and correctional supervision: How the process affects the offender* Accessed on 2 September 2014 <https://www.dcs.gov.za>.

¹² Correctional Services Act 111 of 1998.

¹³ Ibid.

the same section.¹⁴ A person out on parole is known as a parolee.¹⁵ The parolee will be placed under strict conditions and under the supervision of a parole officer.¹⁶ This will remain the position until the remainder of the original sentence is completed in full.¹⁷ If the parolee contravenes any of the conditions he or she may be re-arrested and will have to serve the remainder of the sentence incarcerated.¹⁸

There are certain characteristics of parole that is shared by all countries.¹⁹ Firstly it is a form of discharge from incarceration and it is discretionary. Next, the authority that grants the parole has certain powers so that they are capable of fulfilling the job. The parolee must be placed under supervision. And lastly, parole is conditional and the parole boards have the power to cancel the parole.²⁰

Parole differs from medical parole in that medical parole is when a sentenced offender is released due to ill-health, regardless of the length of the sentenced already served.²¹ But in essence medical parole is just a ground to be released on parole.

2.3 History of medical parole in South Africa

Both Correctional Matters Act 8 of 1959 (which was repealed by the legislation that followed) and Correctional Matters Act 111 of 1998 clearly made provision for medical parole.²² The

¹⁴ Department of Correctional Services *Placement on parole and correctional supervision: How the process affects the offender* Accessed on 2 September 2014 <https://www.dcs.gov.za>; Cilliers CH 2006 Editorial *Acta Criminologica* 19(3) 2006 pi; Louw FCM and Luyt WFM 2009 Parole and parole decisions in South Africa *Acta Criminologica* 22(2) p5.

¹⁵ Louw FCM 2008 *The parole process from a South African perspective* Master of Arts University of South Africa.

¹⁶ Department of Correctional Services *Placement on parole and correctional supervision: How the process affects the offender* Accessed on 2 September 2014 <https://www.dcs.gov.za>; Cilliers CH 2006 Editorial *Acta Criminologica* 19(3) 2006 p i; Louw FCM and Luyt WFM 2009 Parole and parole decisions in South Africa *Acta Criminologica* 22(2) p5.

¹⁷ Government of South Africa *Placement on parole and correctional supervision: How the process affects the offender*. Accessed on 2 September 2014 <https://www.dcs.gov.za>.

¹⁸ Ibid.

¹⁹ Cilliers CH 2006 Editorial *Acta Criminologica* 19(3) 2006 i.

²⁰ Ibid.

²¹ Maravanyika EO "Prison-breakers: Medical Parole in South Africa" Monash University South Africa Accessed on 2 September 2014 <http://www.monash.ac.za>.

²² Dintwe SI 2011 Nascent policy framework regulating medical parole *Journal of Public Administration* 46(4) p1401.

two legislations stated mainly the same thing in this regard and the biggest difference is whether the sentence was made before or after October 2004.²³ If the sentencing took place before October 2004, Act 8 of 1959 will be taken into account and if it took place after October 2004, Act 111 of 1998 will be used.²⁴ Furthermore, the role of the parole boards didn't have any real powers under Act 8 of 1959, the decisions were left mostly up to the National Commissioner, and this changed with Act 111 of 1998. Not one of the pieces of legislation mentioned a minimum sentence that should be served before the sentenced offender will be legible to apply for medical parole.²⁵ This has remained the same even after the current amendments.²⁶

The release of sentenced offenders on medical parole is currently regulated by section 79 of the Correctional Services Act 111 of 1998. This section has been amended by the Correctional Matters Amendment Act 5 of 2011 as of the 1st of March 2012. Previously section 79 was only one paragraph; it has now been expanded to include more details. It not only has an expanded provision on who is eligible to apply for medical parole, it states the procedure one has to follow, the criteria that has to be met and also how the medical parole will be managed if it is granted.²⁷

Before the amendment the section stipulated that "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."²⁸

After the amendments section 79²⁹ now reads as follows "any sentenced offender may be considered for placement on medical parole, by the National Commissioner, the Correctional Supervision and Parole Board or the Minister, as the case may be, if

²³ Ibid.

²⁴ Ibid.

²⁵ Ibid.

²⁶ Correctional Matters Amendment Act 5 of 2011.

²⁷ CSPRI Newsletter No 38 June 2011.

²⁸ Section 79 of the Correctional Services Act 111 of 1998 (before it was amended).

²⁹ Section 79 of the Correctional Services Act 111 of 1998.

(a) such offender is suffering from a terminal disease or condition or if such offender is rendered physically incapacitated as a result of injury, disease or illness so as to severely limit daily activity or inmate self-care;

(b) the risk of re-offending is low; and

(c) there are appropriate arrangements for the inmate's supervision, care and treatment within the community to which the inmate is to be released."

The amendments changed the description and requirements of sentenced offenders who qualified to be released on medical parole.³⁰ If the two sections are compared it is clear that before the amendments medical parole was only available to sentenced offenders that were in the final phase of any terminal disease. Currently the criteria have been widened and it is now also available to sentenced offenders that are physically incapacitated or suffering from a diseases or condition that severely limits their daily activity or self-care.³¹

The section has also been expanded so that it now includes two more criterions that should be met in order to be granted medical parole. Firstly, the risk of re-offending should be low.³² Here it should be taken into account the type of offence the person was originally sentenced for. If the offence was, for example, a crime that would require a lot of physical activity, for instance assault, a person who is terminally ill or physically incapacitated has a lesser chance of re-offending than for instance someone who committed fraud or an offence that could be committed with less physical movement.³³ In the case *Stanfield v. Minister of Correctional Services and others*³⁴ the court said: "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."³⁵ Therefore that criterion should not really be an obstacle for medical parole.

³⁰ "New medical parole policy heads for Parliament" *City Press* 28 October 2010 (<http://www.citypress.co.za>).

³¹ CSPRI Newsletter No 38 June 2011; Department of Correctional Services *Minister announces new Medical Parole Advisory Board* Accessed on 2 September 2014 <https://www.dcs.gov.za>.

³² Section 79(1)(b) of the Correctional Services Act 111 of 1998.

³³ Maravanyika EO "Prison-breakers: Medical Parole in South Africa" Monash University South Africa Accessed on 2 September 2014 <http://www.monash.ac.za>.

³⁴ [2003] 4 All SA 282(C).

³⁵ *Stanfield v. Minister of Correctional Services and others* [2003] 4 All SA 282(C) par 110.

The last criterion is that the community the person is being released into should be able to give him or her needed supervision, care and treatment.³⁶ This might be an obstacle for certain sentenced offenders because the community that should take care of them after their release might not be able to afford the extra financial burden on them. They might also not be able to take care of them because of their illness.³⁷ The quality of medical service they receive in the correctional centre might be better than what they will be getting from the community.³⁸

Before the amendments it was up to only the Parole Board to decide which sentenced offenders will be granted parole on medical grounds.³⁹ Now a Medical Parole Advisory Board will decide whether or not the sentenced offender is suffering from a condition described in the legislation and therefor can be approved for medical parole.⁴⁰ The minister of Correctional Services of South Africa at the time, Nosiviwe Mapisa-Nqakula, announced the Advisory Board at a justice, crime prevention and security cluster briefing held at Pretoria on the 23rd of February 2012.⁴¹ This Board consists out of 10 independent medical doctors.⁴² In regulation 29A (5)(a) and (b)⁴³ is a list of conditions that the sentenced offender should suffer from for the Board to consider them for medical parole. If the sentenced offender doesn't meet any of those conditions, the condition he or she is suffering from should comply with the principles in section 79.⁴⁴ After the Medical Parole Advisory Board has confirmed the medical condition, it is still up to the Parole Board to consider the other two criteria set out in the section.⁴⁵

³⁶ Section 79(1)(c) of the Correctional Services Act 111 of 1998.

³⁷ Maravanyika EO "Prison-breakers: Medical Parole in South Africa" Monash University South Africa Accessed on 2 September 2014 <http://www.monash.ac.za>.

³⁸ Ibid.

³⁹ "Correctional services widens criteria for medical parole" *Mail and Guardian* 23 February 2013 (<http://mg.co.za>).

⁴⁰ Section 79(3)(a) of the Correctional Services Act 111 of 1998.

⁴¹ Department of Correctional Services *Minister announces new Medical Parole Advisory Board* Accessed on 2 September 2014 <https://www.dcs.gov.za>.

⁴² Ibid.

⁴³ Correctional Services Act 111 of 1998.

⁴⁴ Albertus C 2012 Protecting inmates' dignity and the public's safety: A critical analysis of the new law on medical parole in South Africa *Law Development & Democracy* Vol 16 p186; People's Assembly *Department of Correctional Services reports back on medical parole* <http://www.pa.org.za> (March 5 2014).

⁴⁵ Department of Correctional Services *Speech by Hon NN Masipa-Nqakula at the parole board working session held at Pretoria area on 26 March 2012* Accessed on 2 September 2014 <https://www.dcs.gov.za>.

Another aspect that has been amended is who is able to bring the application for the release on medical parole. Previously only the medical practitioner who was treating the sentenced offender was able to apply. This has now been widened to include the sentenced offender or any person acting on his or her behalf.⁴⁶

With the new amendments specific provision.⁴⁷ has also been made for victim involvement and to give recognition to the victims.⁴⁸ This is to ensure that the rights of the victims are respected.⁴⁹

2.4 Reasons for the recent amendments to the Correctional Services Act 111 of 1998

In 2009 there was a lot of controversy surrounding medical parole in South Africa. In response to this the Minister of Correctional Services at the time, Mapisa-Nqakula decided to review the medical parole policy. The aim of the review was to address the limitations of the system.⁵⁰ This brought on the amendments we have today.

One of the main limitations to the old legislation was that only those sentenced offenders that the treating medical practitioner found to be in the “final phase of any terminal disease” was considered for medical parole.⁵¹ Medical practitioners were wary to recommend sentenced offenders for medical parole because of this.⁵² It is very difficult to determine who is actually terminally ill because there was no clear definition of this in the legislation.⁵³ It also

⁴⁶ Section 79(1) of the Correctional Services Act 111 of 1998; “Correctional services widens criteria for medical parole” *Mail and Guardian* 23 February 2013 (<http://mg.co.za>).

⁴⁷ Section 79(6) of the Correctional Services Act 111 of 1998 reads: “Nothing in this section prohibits a complainant or relative from making representations in accordance with section 75(4)”.

⁴⁸ Department of Correctional Services *Speech by Hon NN Masipa-Nqakula at the parole board working session held at Pretoria area on 26 March 2012* Accessed on 2 September 2014 <https://www.dcs.gov.za>; CSPRI Newsletter No 38 June 2011.

⁴⁹ Department of Correctional Services *Speech by Hon NN Masipa-Nqakula at the parole board working session held at Pretoria area on 26 March 2012* Accessed on 2 September 2014 <https://www.dcs.gov.za>.

⁵⁰ CSPRI Newsletter No 40 January 2012; Department of Correctional Services *Minister announces new Medical Parole Advisory Board* Accessed on 2 September 2014 <https://www.dcs.gov.za>.

⁵¹ Section 79 of the Correctional Services Act 111 of 1998 (before it was amended).

⁵² Albertus C 2012 Protecting inmates’ dignity and the public’s safety: A critical analysis of the new law on medical parole in South Africa. *Law Development & Democracy* Vol 16 p187.

⁵³ CSPRI Newsletter No 41 June 2012.

created problems and scepticism in the eyes of the public if a sentenced offender who was released on medical parole recovers from his illness.⁵⁴ If someone is granted medical parole the public had the assumption that that person is likely to die.⁵⁵ The fact that 60 per cent of inmates that were released on medical parole prior to the amendments did not die after their release on also highlighted the need to assess the legislation.⁵⁶

A new medical parole system was needed that gave consideration to the human dignity of those sentenced offenders suffering from terminal illnesses. In the case of *Du Plooy v Minister of Correctional Services*,⁵⁷ medical practitioners estimated that the sentenced offender had between one and three months to live, yet he was not granted release on medical parole.⁵⁸ The Judge said: "The applicant is critically ill. He is dying. Imprisonment is too onerous for him by reason of his rapidly deteriorating state of health to continue remaining in jail and to be treated as a prison hospital. What he is in need of is humanness, empathy and compassion. These values are inherently embodied in Ubuntu. When these values are weighed against the applicant's continued imprisonment, then, in my view, his continued incarceration violates his human dignity and security, and the very punishment itself becomes cruel, inhuman and degrading."⁵⁹ South Africa is a constitutional democracy which has human dignity, equality and freedom as cornerstones⁶⁰ and the fundamental rights enshrined by the Bill of Rights should be respected, protected and promoted by the State.⁶¹ Every person in South Africa has inherent dignity and the right not to have that dignity respected and protected.⁶² Sentenced offenders also enjoy this fundamental right.⁶³ The Constitution also provides all sentenced

⁵⁴ Schwikkard PJ 2013 Death in democracy *Singapore Academy of Law Journal* Vol 5 p746; "New medical parole policy heads for Parliament" *City Press* 28 October 2010 (<http://www.citypress.co.za>).

⁵⁵ "New medical parole policy heads for Parliament" *City Press* 28 October 2010 (<http://www.citypress.co.za>).

⁵⁶ Albertus C 2012 Protecting inmates' dignity and the public's safety: A critical analysis of the new law on medical parole in South Africa. *Law Development & Democracy* Vol 16 p187; Parliamentary Monitoring Group *Reviewing medical parole: Brief notes on the proposed amendment of section 79 of the Correctional Services Act, 1998* Accessed on 2 September 2014 <http://www.pmg.org.za>.

⁵⁷ 2004 (3) All SA 613 (T).

⁵⁸ NICRO *NICRO Submission: Correctional Matters Amendment Bill [B41-2010]* Accessed on 2 September 2014 <http://www.nicro.org.za>.

⁵⁹ *Du Plooy v Minister of Correctional Services and Others* 2004 (3) All SA 613 (T) par 29.

⁶⁰ Section 7(1) of the Constitution.

⁶¹ Section 7(2) of the Constitution.

⁶² Section 10 of the Constitution; Albertus C 2012 Protecting inmates' dignity and the public's safety: A critical analysis of the new law on medical parole in South Africa *Law Development & Democracy* Vol 16 p187; Barrie GN 2008 Access of incarcerated persons to medical treatment as a socio-economic right in South Africa : annotation *Tydskrif vir die Suid-Afrikaanse Reg* 1 p124.

⁶³ Barrie GN 2008 Access of incarcerated persons to medical treatment as a socio-economic right in South Africa : annotation *Tydskrif vir die Suid-Afrikaanse Reg* 1 p124.

offenders with the right to be detained in conditions that are consistent with human dignity.⁶⁴ The framework that regulates medical parole is legislative of nature therefor in accordance with the Constitution⁶⁵ it should be interpreted in a way that promotes the spirit, purport and objects of the Bill of Rights.⁶⁶

Another limitation of the previous section 79 was brought up by the Minister of Correctional Services Mapisa-Nqakula when she said “you can’t have a process confined to the doctor treating the inmate. There may be abuse arising from the personal relationship developed between patient and caregiver and as such parole is applied for incorrectly.”⁶⁷ Currently the Medical Advisory Parole Board will motivate whether or not certain sentenced offenders qualify for medical parole because they meet the criteria set out in Regulation 29A.⁶⁸ They will not be affiliated with the sentenced offenders that they need to consider and therefor no doubt can be cast about individuals receiving preferential treatment.⁶⁹

2.5 Conclusion

In this chapter parole and medical parole were defined by looking at definitions through articles as well as the use of legislation.⁷⁰ Medical parole has been expanded by the recent amendments to its governing legislation. It is now also available to not only sentenced offenders suffering from terminal illnesses or diseases but also to those whose daily activities are severely limited by their illnesses.⁷¹ It also discussed the history of medical parole through the various legislations and how it differed each time.⁷² With the most recent amendments the decision making power has been shifted. A Medical Parole Advisory Board has been set in

⁶⁴ Section 35(2)(e) of the Constitution.

⁶⁵ Section 39(2) of the Constitution.

⁶⁶ Schwikkard PJ 2013 Death in democracy *Singapore Academy of Law Journal* Vol 5 p745.

⁶⁷ “Correctional services widens criteria for medical parole” *Mail and Guardian* 23 February 2013 (<http://mg.co.za>); Department of Correctional Services *Minister announces new Medical Parole Advisory Board* Accessed on 2 September 2014 <https://www.dcs.gov.za>.

⁶⁸ “Selebi spotted shopping sparks renewed medical parole debate” *Wits Justice Project* 7 October 2013 (<http://witsjusticeproject.com/>)

⁶⁹ Maravanyika EO “Prison-breakers: Medical Parole in South Africa” Monash University South Africa Accessed on 2 September 2014 <http://www.monash.ac.za>.

⁷⁰ Chapter 2.1 Parole and medical parole.

⁷¹ Section 79 of the Correctional Services Act 111 of 1998.

⁷² Paragraph 2.3 History of medical parole.

place to assist the Parole Board on the granting or denying of medical parole. The Advisory Board will decide whether or not the sentenced offender applying for medical parole adheres to the first criterion in section 79(1)(a)⁷³. According to this subsection the sentenced offender must be suffering from a terminal illness or disease or their daily activities must be severely limited because of their condition. Finally the reasons for the most recent amendments were contextualised as well.⁷⁴ The most prominent reasons being that doctors were afraid of classifying sentenced offenders as in the final phase of a terminal illness and also the human dignity aspect of sentenced offenders not released on medical parole.

⁷³ Correctional Services Act 111 of 1998.

⁷⁴ Paragraph 2.4 Reasons for the recent amendments to the Correctional Services Act 111 of 1998.

Chapter 3: The framework regulating the cancellation of medical parole

3.1 Introduction

This chapter critically investigates the amended section 79 that regulates medical parole. Specifically section 79(7) that specifies that medical parole cannot be cancelled merely because the parolee's health improved and he is no longer terminally ill or incapacitated. The difference between parole and medical parole especially in terms of not adhering to the parole conditions that will lead to the cancellation of the parole will also be examined in this chapter.

3.2 Parole and the cancellation thereof

The parole system is there to give sentenced offenders a second chance and to extend their opportunities.⁷⁵ It is a continuation of the offender's sentence; he or she is just serving it outside of the correctional centre.⁷⁶ It is not a right that sentenced offenders have.⁷⁷ It is simply a privilege that they have.⁷⁸ It is also a vital part of South Africa's criminal justice system because, without it life imprisonment might have been declared unconstitutional.⁷⁹ Sentenced offenders have a legitimate expectation to be considered for release on parole before they have served their full sentence.⁸⁰ Section 73(4)⁸¹ allows for sentenced offenders to be released under correctional supervision, day parole, parole or medical parole. This release will have to be in accordance with the provisions mentioned in Chapter VI⁸² of the

⁷⁵ Mujuzi JD 2011 Unpacking the law and practice relating to parole in South Africa *Potchefstroom Electronic Law Journal* 14(5) p7.

⁷⁶ Commission for Gender Equality *Comment to the parole board for offender, Thulani Cosmos Cele* Accessed on 8 September 2014 <http://www.cge.org.za>.

⁷⁷ Terblanche SS 2007 *A guide to sentencing in South Africa* LexisNexis Durban p254; Moses J 2012 *Parole in South Africa* Juta Cape Town p127.

⁷⁸ Moses J 2012 *Parole in South Africa* Juta Cape Town p127.

⁷⁹ Moses J 2012 *Parole in South Africa* Juta Cape Town 127; *Motsemme v Minister of Correctional Services and Others* 2006(2) SACR 277(W) p285.

⁸⁰ Moses J 2012 *Parole in South Africa* Juta Cape Town p128.

⁸¹ Correctional Services Act 111 of 1998.

⁸² This chapter deals with various community corrections and possible conditions for parole.

Correctional Services Act 111 of 1998 as well as the sentenced offender agreeing to the parole conditions.⁸³ These conditions are listed in section 52 of the governing legislation and can include that the parolee should seek employment, have a fixed address, refrains from using alcohol or illegal drugs and is subject to monitoring. Compensation may not be one of the conditions as it would have originally been part of the sentence passed down by the court.⁸⁴ A sentenced offender can only be considered for release if they have served a minimum amount of their original sentence.⁸⁵ The minimum amount of the sentence that should be served is also dependant on when the offender was sentenced.⁸⁶ When a sentenced offender is considered for release on parole the type of offence originally committed, the conduct of the sentenced offender, his or her adaptation in the correctional centre as well as their rehabilitation all have to be investigated.⁸⁷ There are certain circumstances that would make a sentenced offender unsuitable for release on parole. For instance if it is found that he or she is a real threat to the community, has shown no respect for conditions set to him or her or if they do not comply with the expectations of imprisonment.⁸⁸

A parolee's parole may be cancelled if they do not adhere to their parole conditions.⁸⁹ This is also the situation if the parolee commits further crimes while released on parole.⁹⁰ The process of cancelling parole is regulated by section 75(2).⁹¹ In accordance with that section the Head of the Community Corrections will recommend to the Head of the Correctional Centre or the Parole Board that a parolee's parole should be cancelled.⁹² After the recommendation is made, the Head of the Correctional Centre or of the Parole Board will have 14 days to make a final decision. If they fail to make a decision within the provided time

⁸³ Section 73(5)(b) of the Correctional Services Act 111 of 1998.

⁸⁴ Section 52(2) of Correctional Services Act 111 of 1998.

⁸⁵ Section 73 of Correctional Services Act 111 of 1998.

⁸⁶ As discussed in Chapter 2 of this mini-dissertation.

⁸⁷ Cilliers CH 2006 Editorial *Acta Criminologica* 19(3) 2006 piii.

⁸⁸ Cilliers CH 2006 Editorial *Acta Criminologica* 19(3) 2006 piv.

⁸⁹ Section 70 of the Correctional Services Act 111 of 1998; Albertus C 2012 Protecting inmates' dignity and the public's safety: A critical analysis of the new law on medical parole in South Africa *Law Development & Democracy* Vol 16 p195.

⁹⁰ Albertus C 2012 Protecting inmates' dignity and the public's safety: A critical analysis of the new law on medical parole in South Africa *Law Development & Democracy* Vol 16 p195.

⁹¹ Correctional Services Act 111 of 1998.

⁹² Louw FCM 2013 *A mixed method research study on parole violations in South Africa* Doctor of Literature and Philosophy University of South Africa; Department of Correctional Services *Placement on parole and correctional supervision: How the process affects the offender* Accessed on 8 September 2014 <https://www.dcs.gov.za>.

the recommendation will be invalid and the parolee will be released again on parole.⁹³ The recommendations can be implemented provisionally until the final decision is made.⁹⁴ The final decision can either uphold the recommendations of the Head of the Community Corrections or it change the parole conditions.⁹⁵ In principal, if parole is cancelled the sentenced offender should not serve a sentence longer than he or she would have in the normal course of events.⁹⁶

3.3 Medical parole and the cancellation thereof

A sentenced offender can also be released on parole because of medical reasons; this is known as medical parole. Medical parole is available to all sentenced offenders, regardless of the date the sentence was passed down.⁹⁷ The sentenced offender does not need to serve a minimum sentence to be eligible for this type of parole, unlike parole.⁹⁸ This type of parolee will also have to adhere to certain parole conditions set to him or her.⁹⁹ The cancellation of medical parole is regulated by section 79(9) of the Correctional Services Act 111 of 1998. This section after amendments reads as follow: “A decision to cancel medical parole must be dealt with in terms of section 75(2) and (3).¹⁰⁰ Provided that no placement on medical parole may be cancelled merely on account of the improved medical condition of an offender.” Therefore a parolee out on medical parole can have his or her medical parole cancelled if they do not adhere to the conditions set to them or if they commit any further crimes.¹⁰¹ This situation is

⁹³ Ibid.

⁹⁴ Louw FCM 2013 *A mixed method research study on parole violations in South Africa* Doctor of Literature and Philosophy University of South Africa; Department of Correctional Services *Placement on parole and correctional supervision: How the process affects the offender* Accessed on 8 September 2014 <https://www.dcs.gov.za>.

⁹⁵ Ibid.

⁹⁶ *S v Boltney* 2005(1) SACR 278(C) p278.

⁹⁷ Van der Merwe A 2012 Justice ‘beyond’ the law in *The secret in their eyes: Rights of victims and offenders in the post-sentencing phase* In Viljoen F (editor) *Beyond the law: Multi-disciplinary perspectives on human rights* Pretoria PULP p251; Department of Correctional Services *Placement on parole and correctional supervision: How the process affects the offender* Accessed on 2 September 2014 <https://www.dcs.gov.za>.

⁹⁸ Department of Correctional Services *Placement on parole and correctional supervision: How the process affects the offender* Accessed on 2 September 2014 <https://www.dcs.gov.za>.

⁹⁹ Section 75(1)(a) of the Correctional Services Act 111 of 1998.

¹⁰⁰ These two subsections deal with the administrative process of cancelling, suspending or amending parole, day parole or correctional supervision.

¹⁰¹ Albertus C 2012 Protecting inmates’ dignity and the public’s safety: A critical analysis of the new law on medical parole in South Africa *Law Development & Democracy* Vol 16 p195; Bateman C 2012 Tighter medical parole – no more ‘Shaik, rattle and roll’ *South African Medical Journal* 102(4) p210.

the same as with parole. Medical parole cannot be cancelled just because the parolee has recovered from his or her illness.

3.4 A critical analyses of section 79(7) that regulates the cancellation of medical parole

The primary reason a sentenced offender will be considered for medical parole is that he or she has a severe illness or is incapacitated.¹⁰² The last sentence of this section is that medical parole cannot be cancelled even though the primary reason this type of parole was granted in the first place no longer exists.¹⁰³ This is a very unusual clause especially in the light of Shabir Schaik and Jackie Selebi being released on medical parole and then miraculously recovering from their illnesses¹⁰⁴, compared to Xolile Mngeni being denied medical parole and then dying in the correctional facility.¹⁰⁵

Shabir Schaik, Jacob Zuma's friend and financial advisor, was convicted of two counts of corruption and one count of fraud on the 2nd of June 2005.¹⁰⁶ He was effectively sentenced to 15 years of imprisonment.¹⁰⁷ He only started serving out his sentence the 6th of November 2006. After his imprisonment his medical condition showed a pattern of stress related illnesses and on the 25th of November he suffered a mild stroke. This was just two weeks after his sentence had started. This could have been because of the inherent damaging effect that imprisonment has on a person's physical and mental health.¹⁰⁸ Since then he suffered an array of medical problems including dental surgery, another mild stroke and deteriorating blood

¹⁰² Section 79 of Correctional Services Act 111 of 1998; Albertus C 2012 Protecting inmates' dignity and the public's safety: A critical analysis of the new law on medical parole in South Africa *Law Development & Democracy* Vol 16 p195.

¹⁰³ Albertus C 2012 Protecting inmates' dignity and the public's safety: A critical analysis of the new law on medical parole in South Africa *Law Development & Democracy* Vol 16 p195.

¹⁰⁴ Ibid.

¹⁰⁵ "Anni Dewani's honeymoon hitman dies" *eNCA* 18 October 2014 (<http://www.enca.com/>).

¹⁰⁶ *S v Shaik* unreported Case No CC27/04 High Court of SA (DLD); Wolf L 2011 Pre- and post- trial equality in criminal justice in the context of separation of powers *Potchefstroom Electronic Law Journal* 14(5) p99.

¹⁰⁷ *S v Shaik* unreported Case No CC27/04 High Court of SA (DLD).

¹⁰⁸ Albertus C 2012 Protecting inmates' dignity and the public's safety: A critical analysis of the new law on medical parole in South Africa *Law Development & Democracy* Vol 16 p196.

pressure.¹⁰⁹ In March 2009 he was released on medical parole under a lot of controversy. He only spent 84 days in prison of the 28 months he served of his sentence.¹¹⁰ The doctors who wrote the medical report suggesting he should be released on medical parole did not state that he was terminally ill, as was required by the legislation at that time.¹¹¹ They simply stated that his blood pressure could be managed by the prison clinic, but if they did not want to treat him the alternative is medical parole.¹¹² The controversy surrounding him has not stopped since his release on medical parole. In February 2011 it was reported that he allegedly assaulted a journalist on a golf course.¹¹³ Two weeks later he allegedly punched and slapped a man in front of a mosque.¹¹⁴ On this occasion he was rearrested, but in the long run nothing came of it. He was also accused of assaulting a golf caddie in October 2013.¹¹⁵

Jackie Selebi who is the former national police commissioner and president of Interpol, was convicted of corruption and was sentenced to 15 year's imprisonment.¹¹⁶ After spending 229 days of his sentence imprisoned he was released on medical parole. The medical parole was granted because he suffered from kidney, heart and eye failure, pulmonary embolism and a stroke. He also has to receive dialysis 4 times a day.¹¹⁷ The controversy surrounding him is the fact that it does not seem that he is on his last legs, as he was seen shopping in Pretoria in October 2013.¹¹⁸ He was also quoted saying: "I am not bedridden because I am not sick."¹¹⁹

This has led to a lot of uproar about the new section 79(7) of the Correctional Services Act 111 of 1998. Politicians feel that medical parole is being used to benefit the politically connected sentenced offenders.¹²⁰ They have even referred to this specific clause as the

¹⁰⁹ Wolf L 2011 Pre- and post- trial equality in criminal justice in the context of separation of powers *Potchefstroom Electronic Law Journal* 14(5) pp100 – 101.

¹¹⁰ Wolf L 2011 Pre- and post- trial equality in criminal justice in the context of separation of powers *Potchefstroom Electronic Law Journal* 14(5) p102.

¹¹¹ Section 79 of Correctional Services Act 111 of 1998 before the amendments.

¹¹² Wolf L 2011 Pre- and post- trial equality in criminal justice in the context of separation of powers *Potchefstroom Electronic Law Journal* 14(5) p102.

¹¹³ "Schabir Shaik accused of assaulting journalist" *Mail and Guardian* 27 February 2011 (<http://mg.co.za>).

¹¹⁴ "Schabir Shaik arrested" *Mail and Guardian* 14 March 2011 (<http://mg.co.za>).

¹¹⁵ "Shaik denies new assault allegations" *Mail and Guardian* 14 October 2013 (<http://mg.co.za>).

¹¹⁶ "Selebi release not preferential – official" *news24* 20 July 2012 (<http://www.news24.com>).

¹¹⁷ "Selebi gravely ill – parole board" *City Press* 7 August 2012 (<http://www.citypress.co.za>).

¹¹⁸ "Jackie Selebi: 'n Wonderwerk!" *Beeld* 7 October 2013 (<http://www.beeld.com>).

¹¹⁹ "Jackie Selebi: My health is fine" *City Press* 8 October 2013 (<http://www.citypress.co.za>).

¹²⁰ Democratic Alliance *Selebi: New legislative review of medical parole needed* Accessed on 9 September 2014 <http://www.da.org.za>; van der Merwe A 2012. Justice 'beyond' the law in *The secret in their eyes: Rights of*

“Shaik clause.”¹²¹ In the same press release it was also pointed out that nowhere in the abovementioned section does it state that a parolee released on medical parole has to undergo mandatory and periodical medical examinations in order to determine the medical condition of that parolee.¹²² Prisoners have also felt that sentenced offenders that were seriously ill’s medical parole applications were overlooked in favour of well-connected sentenced offenders’ medical parole applications.¹²³

There is also an inequality amongst the sentenced offenders applying for medical parole. Schabir Shaik and Jackie Selebi is able to pay for the best medical experts to fight for their cause, but a sentenced offender who does not have the money to pay for a private doctor has to rely on the state doctors who are normally overworked.¹²⁴ In an annual report of the Judicial Inspectorate for Correctional Services it was noted that even though the authorities at the correctional centre was aware of the declining health of certain sentenced offenders they were never released on medical parole.¹²⁵

Finally, most sentenced offenders work towards being released on parole so that they can serve the remainder of their sentence outside of the correctional centre.¹²⁶ This together with the knowledge that if they are released on medical parole and their health improves they will not be sent back to a correctional centre, may cause inmates to manipulate their own health.¹²⁷ If such a parolee recovers from their illness, they may be tempted to commit another crime and without any provision to rearrest them because they have recovered, it might be detrimental to public safety.¹²⁸

victims and offenders in the post-sentencing phase In Viljoen F (editor) *Beyond the law: Multi-disciplinary perspectives on human rights* Pretoria PULP p246.

¹²¹ Democratic Alliance *Selebi: New legislative review of medical parole needed* Accessed on 9 September 2014 <http://www.da.org.za>.

¹²² Ibid.

¹²³ Bateman C 2012 Tighter medical parole – no more ‘Shaik, rattle and roll’ *South African Medical Journal* 102(4) p210.

¹²⁴ “Selebi paroled on medical grounds” *Mail and Guardian* 20 July 2012 (<http://mg.co.za>).

¹²⁵ Schwikkard PJ 2013 Death in democracy *Singapore Academy of Law Journal*. Vol 5 p746.

¹²⁶ Albertus C 2012 Protecting inmates’ dignity and the public’s safety: A critical analysis of the new law on medical parole in South Africa *Law Development & Democracy* Vol 16 p196.

¹²⁷ Ibid.

¹²⁸ Albertus C 2012 Protecting inmates’ dignity and the public’s safety: A critical analysis of the new law on medical parole in South Africa *Law Development & Democracy* Vol 16 p197.

3.5 Conclusion

This chapter examined the difference between parole and medical parole, specifically the grounds on which they can be cancelled.¹²⁹ Parole can be cancelled if any of the conditions set to a parolee, when his parole is initially granted, is not adhered to. It can also be cancelled if a parolee commits any other crime whilst they are out on parole. Medical parole can also be cancelled on these grounds. As examined in this chapter medical parole cannot be cancelled merely because the parolee has recovered from their terminal illness or incapacitation. The amended section 79(7) was critically analysed in this regard.¹³⁰ Schabir Shaik and Jackie Selebi was used as examples of sentenced offenders out on medical parole who recovered but did not go back to any correctional facility to serve out the rest of their sentences.

¹²⁹ Paragraph 3.2 Parole and the cancellation thereof; Paragraph 3.3 Medical parole and the cancellation thereof.

¹³⁰ Paragraph 3.3 A critical analyses of section 79(7) that regulate the cancellation of medical parole.

Chapter 4: The Canadian approach to the medical release of sentenced offenders

4.1 Introduction

This chapter investigates the approach followed in Canada with regards to the medical release of sentenced offenders who fall ill. It examines temporary absences for medical purposes. It focuses on the decision makers involved in the process, the eligibility of sentenced offenders, the criteria that needs to be met, and the procedure to follow as well as the cancellation of temporary absences. Canada was chosen because the South African criminal procedural law was broadly based on this country's legislation and furthermore it also has a well-developed parole system.¹³¹

4.2 Temporary absences under the Canadian law

4.2.1 Introduction

In accordance with the Canadian law a sentenced offender cannot apply for medical parole as it is in the South Africa legal framework. In accordance with Canadian law a sentenced offender who falls ill can apply for a temporary absence based on medical grounds.¹³² Temporary absences are regulated by the Corrections and Conditional Release Act (S.C. 1992, c. 20) and the Corrections and Conditional Release Regulations (SOR/92-620). The purpose of temporary absences is to allow the sentenced offender to partake in rehabilitative programs, community work, keep up with responsibilities towards family members or to undergo medical examination or treatment that is not provided for in the correctional facility.¹³³ Temporary absences based on medical grounds can be granted to address anything from emergency treatment, routine medical, medical tests, dental care or surgeries and treatment

¹³¹ Graser RR 1982 *Parole in South Africa* Doctor Philosophiae University of Durban-Westville.

¹³² Sections 17 and 116 of the Corrections and Conditional Release Act (S.C. 1992, c. 20); Regulation 9 of the Corrections and Conditional Release Regulations (SOR/92-620).

¹³³ Correctional Services Canada *Temporary Absences* Accessed on 29 September 2014
<http://www.csc-scc.gc.ca>.

after traumatic injuries.¹³⁴ Temporary absences differ from parole in that the purpose of parole is that the sentenced offender can serve out the remainder of his or her sentence outside of the correctional facility. A temporary absence only grants the sentenced offender the privilege of not being in the correctional facility, but only for a certain period of time.¹³⁵ It is not for the rest of their sentence as is the situation with full parole. Another difference is the eligibility of the sentenced offender being granted parole or temporary absences. This will be discussed in a paragraph that follows.¹³⁶

4.2.2 Types of conditional release: parole, temporary absences and statutory release

There are different types of conditional release in Canada available to both federal and provincial sentenced offenders. These can be classified into parole, temporary absences and statutory release.¹³⁷ Temporary absences are normally the first type of release that a sentenced offender may apply for. It can either be escorted where the sentenced offender will be escorted with an employee of the correctional facility or unescorted.¹³⁸ As was mentioned in a previous paragraph there are various reasons for a sentenced offender to be granted a temporary absence.¹³⁹

There are two types of parole available to sentenced offenders, day parole and full parole.¹⁴⁰ Day parole is set in place to prepare a sentenced offender for possible release on full parole. This is done by allowing the sentenced offender to partake in community based events during

¹³⁴ Grant BA and Millson WA 1998 *Research Report: The Temporary Absence Program: Descriptive Analysis*.

¹³⁵ Correctional Services Canada *Temporary Absences* Accessed on 29 September 2014 <http://www.csc-scc.gc.ca>; The Ontario Parole and Earned Release Board *Temporary Absence Program* Accessed on 15 October 2014 <https://www.operb.gov.on.ca>.

¹³⁶ Paragraph 4.2.4 Eligibility.

¹³⁷ Parole Board of Canada *Parole Board of Canada: Contributing to Public Safety* Accessed on 20 October 2014 <http://www.pbc-clcc.gc.ca>; Parole Board of Canada *Fact Sheet* Accessed on 21 October 2014 <http://www.pbc-clcc.gc.ca>.

¹³⁸ Section 17 of the Corrections and Correctional Release Act (S.C. 1992, c. 20); Parole Board of Canada *Parole Board of Canada: Contributing to Public Safety* Accessed on 20 October 2014 <http://www.pbc-clcc.gc.ca>; Parole Board of Canada *Fact Sheet* Accessed on 21 October 2014 <http://www.pbc-clcc.gc.ca>.

¹³⁹ Paragraph 4.2.1 Introduction.

¹⁴⁰ Sections 119 and 120 of the Corrections and Correctional Release Act (S.C. 1992, c. 20); Parole Board of Canada *Parole Board of Canada: Contributing to Public Safety* Accessed on 20 October 2014 <http://www.pbc-clcc.gc.ca>; Parole Board of Canada *Fact Sheet* Accessed on 21 October 2014 <http://www.pbc-clcc.gc.ca>.

the day. At night the sentenced offender has to return to a correctional facility, halfway house or residential facility, unless the Parole Board of Canada has authorised differently.¹⁴¹ Full parole is normally the next step after the sentenced offender has successfully completed their day parole. It allows the sentenced offender to serve out the remainder of their sentence in the community under supervision and with specific conditions that needs to be adhered to. The sentenced offender will not have to spend their nights in a facility specified by the Parole Board of Canada; they will normally reside in their own private residence.¹⁴²

The final type of conditional release is statutory release. This is not a type of parole. By law it is mandatory for all sentenced offenders to be released with supervision after they have served two thirds of their sentence, if they have not been granted parole already.¹⁴³ This does not include sentenced offenders serving out life or indeterminate sentences. The same conditions that can be given to a sentenced offender out on parole can also be given to a sentenced offender out on statutory release.¹⁴⁴ This type of release will not be granted if the Board is feels it is likely that the sentenced offender will commit a crime that involves death or serious harm, a sexual offence involving a minor or any serious drug offence.¹⁴⁵

4.2.3 Decision makers

In Canada a different approach is followed in regards to federal and provincial (also referred to as territorial) sentenced offenders. A provincial sentenced offender would be a person serving a continuous sentence of less than two years. The sentence should be served in a

¹⁴¹ Section 99 of the Corrections and Correctional Release Act (S.C. 1992, c. 20); Parole Board of Canada *Parole Board of Canada: Contributing to Public Safety* Accessed on 20 October 2014 <http://www.pbc-clcc.gc.ca>; Parole Board of Canada *Fact Sheet*. Accessed on 21 October 2014. <http://www.pbc-clcc.gc.ca>.

¹⁴² Ibid.

¹⁴³ Sections 99 and 127 of the Corrections and Correctional Release Act (S.C. 1992, c. 20).

¹⁴⁴ Parole Board of Canada *Parole Board of Canada: Contributing to Public Safety* Accessed on 20 October 2014 <http://www.pbc-clcc.gc.ca>; Parole Board of Canada *Fact Sheet* Accessed on 21 October 2014 <http://www.pbc-clcc.gc.ca>.

¹⁴⁵ Sections 99 and 127 of the Corrections and Correctional Release Act (S.C. 1992, c. 20); Parole Board of Canada *Parole Board of Canada: Contributing to Public Safety* Accessed on 20 October 2014 <http://www.pbc-clcc.gc.ca>; Parole Board of Canada *Fact Sheet* Accessed on 21 October 2014 <http://www.pbc-clcc.gc.ca>.

provincial correctional facility.¹⁴⁶ Every sentenced offender serving a sentence of imprisonment of two or more years is classified as a federal sentenced offender.¹⁴⁷ The National Parole Board has jurisdiction over all federal sentenced offenders as well as all provincial sentenced offenders serving out their sentences in a jurisdiction that does not have its own paroling authority.¹⁴⁸ Currently the only two provinces that have their own paroling authority are Ontario and Quebec.¹⁴⁹ The rest of the correctional facilities in the country are governed by the Parole Board of Canada that is authorised by the Corrections and Conditional Release Act.¹⁵⁰

The Parole Board of Canada's prime directive is "to contribute to the maintenance of a just, peaceful and safe society by means of decisions on the timing and conditions of release that will best facilitate the rehabilitation of offenders and their reintegration into the community as law-abiding citizens."¹⁵¹ From this, three core principles can be deduced that the Board investigates when deciding temporary absences and conditional release for sentenced offenders. The most important aspect to consider is always the safety of the public. Therefore the Board has to bear in mind the risk of the sentenced offender committing a crime whilst on conditional release.¹⁵² Secondly if a sentenced offender is firstly released into society

¹⁴⁶ Louw FCM 2008 *The parole process from a South African perspective* Master of Arts University of South Africa; Parole Board of Canada *Policy Manual* Accessed on 20 October 2014 <http://www.pbc-clcc.gc.ca>; JohnHoward Society of Ontario *Provincial Parole in Ontario: The case for renewal* Accessed on 21 October 2014 <http://www.johnhoward.on.ca>.

¹⁴⁷ Louw FCM 2008 *The parole process from a South African perspective* Master of Arts University of South Africa; Parole Board of Canada *Policy Manual* Accessed on 20 October 2014 <http://www.pbc-clcc.gc.ca>; JohnHoward Society of Ontario *Provincial Parole in Ontario: The case for renewal* Accessed on 21 October 2014 <http://www.johnhoward.on.ca>.

¹⁴⁸ Section 108 of the Corrections and Conditional Release Act (S.C. 1992, c. 20); International Society for the Reform of Criminal Law *The National Parole Board: An Overview* Accessed on 22 October 2014 <http://www.isrcl.org>; Parole Board of Canada *Parole Board of Canada: Contributing to Public Safety* Accessed on 20 October 2014 <http://www.pbc-clcc.gc.ca>.

¹⁴⁹ Ministry of Public Safety and Security *The Ontario Parole and Earned Release Board* Accessed on 22 October 2014 <http://www.auditor.on.ca>; International Society for the Reform of Criminal Law *The National Parole Board: An Overview* Accessed on 22 October 2014 <http://www.isrcl.org/>; Correctional Service Canada *Commissioner's Directive 716 Provincial Offenders Pre-Release Case Preparation* Accessed on 22 October 2014 <http://www.csc-scc.gc.ca>; Parole Board of Canada *Policy Manual* Accessed on 20 October 2014. <http://www.pbc-clcc.gc.ca>.

¹⁵⁰ Section 99 of the Corrections and Conditional Release Act (S.C. 1992, c. 20).

¹⁵¹ Section 100 of the Corrections and Conditional Release Act (S.C. 1992, c. 20); Parole Board of Canada *Policy Manual* Accessed on 20 October 2014 <http://www.pbc-clcc.gc.ca>.

¹⁵² Parole Board of Canada *The History of the Parole Board of Canada* Accessed on 20 October 2014 <http://www.pbc-clcc.gc.ca>; Parole Board of Canada *Policy Manual* Accessed on 20 October 2014 <http://www.pbc-clcc.gc.ca>.

supervised it is a more productive way of integrating that person back into society which can lead to long-lasting public safety. Finally the restrictions of the sentenced offender in the community must only be of such a nature to protect the society and help integrate the person back into community.¹⁵³ For temporary absences based on medical reasons the institution head is the authority that grants it for all federal sentenced offenders.¹⁵⁴

In the province of Quebec the paroling authority is governed by The Act respecting the Quebec Correctional System.¹⁵⁵ The paroling authority is the Quebec Parole Board, but in the case of a sentenced offender being granted temporary absence for medical purposes it is the facility director that will make the decision.¹⁵⁶ In the province of Ontario the paroling authority is the Ontario Parole and Earned Release Board together with the superintendents of the correctional facilities.¹⁵⁷ Their authority is derived from the provincial legislation the Ministry of Correctional Services Act.¹⁵⁸ The Board has the authority when the temporary absence is more than 72 hours and unescorted. The superintendents have the authority with all other types of temporary absences.¹⁵⁹ This will include all temporary absences based on medical purposes.¹⁶⁰

¹⁵³ Parole Board of Canada *Policy Manual* Accessed on 20 October 2014 <http://www.pbc-clcc.gc.ca>; Louw FCM 2008 *The parole process from a South African perspective* Master of Arts University of South Africa.

¹⁵⁴ Section 17 of the Corrections and Conditional Release Act (S.C. 1992, c. 20); Regulation 9 of the Corrections and Conditional Release Regulations SOR/92-620.

¹⁵⁵ The Act Respecting the Quebec Correctional System CQLR c S-40.1.

¹⁵⁶ Section 42 of the Act Respecting the Quebec Correctional System CQLR c S-40.1; Securite Publique Quebec *Act respecting the Québec Correctional System Information for Inmates* Accessed on 20 October 2014 <http://www.securitepublique.gouv.qc.ca>; Correctional Services Canada *Information Sharing with Partners from the Criminal Justice System* Accessed on 21 October 2014 <http://www.csc-scc.gc.ca>.

¹⁵⁷ Section 24 and 27 of the Ministry of Correctional Services Act R.S.O. 1990, Chapter M.22.

¹⁵⁸ Ministry of Correctional Services Act R.S.O. 1990, Chapter M.22; Ministry of Public Safety and Security *The Ontario Parole and Earned Release Board* Accessed on 22 October 2014 <http://www.auditor.on.ca>; Human Services and Justice Coordinating Committee *Ontario Parole Board A General Presentation* Accessed on 21 October 2014 <http://www.hsjcc.on.ca>.

¹⁵⁹ Human Services and Justice Coordinating Committee *Ontario Parole Board A General Presentation* Accessed on 21 October 2014 <http://www.hsjcc.on.ca>; Ministry of Public Safety and Security *The Ontario Parole and Earned Release Board* Accessed on 22 October 2014 <http://www.auditor.on.ca>; Ontario Parole Board *Temporary Absences Program* Accessed on 22 October 2014 <https://www.opb.gov.on.ca>.

¹⁶⁰ Section 24 of the the Ministry of Correctional Services Act R.S.O. 1990, Chapter M.22.

4.2.4 Eligibility

In accordance with Canadian legislation there are two types of parole, day parole and full parole.¹⁶¹ Each of these differs with regards to the eligibility for sentenced offenders to apply. A federal sentenced offender becomes eligible for day parole six months into serving his or her sentence, or 6 months before they will be eligible for full parole.¹⁶² They will be eligible for full parole after serving a third, or seven years of their sentence whichever is less. If the sentenced offender is serving a life sentence the Court would have set a time when they will be eligible for parole. It would be 25 years for first degree murder and between 10 and 25 years for second degree murder.¹⁶³

This differs from temporary absences. Sentenced offenders may apply for an escorted temporary absence during their sentence regardless of how long they have served.¹⁶⁴ For a sentenced offender to be eligible for an unescorted temporary absence he or she only needs to serve one sixth of the sentence passed down onto them if they are serving a sentence of three or more years, or six months if they are serving a sentence of between two and three years.¹⁶⁵ Sentenced offenders that are serving life sentences will only be eligible for an unescorted temporary absence three years before they are eligible for parole. Sentenced offenders that have been classified as maximum security will not be eligible for any unescorted temporary absences.¹⁶⁶ If the temporary absence is based on medical grounds

¹⁶¹ Section 119 and 120 of the Corrections and Conditional Release Act (S.C. 1992, c. 20); Parole Board of Canada *Parole Board of Canada: Contributing to Public Safety* Accessed on 20 October 2014 <http://www.pbc-clcc.gc.ca>.

¹⁶² Section 119 of the Corrections and Conditional Release Act (S.C. 1992, c. 20); Parole Board of Canada *Parole Board of Canada: Contributing to Public Safety* Accessed on 20 October 2014 <http://www.pbc-clcc.gc.ca>; Parole Board of Canada *Fact Sheet* Accessed on 22 October 2014 <http://www.pbc-clcc.gc.ca>.

¹⁶³ Section 120 of the Corrections and Correctional Release Act (S.C. 1992, c. 20); Parole Board of Canada *Parole Board of Canada: Contributing to Public Safety*. Accessed on 20 October 2014. <http://www.pbc-clcc.gc.ca>; Parole Board of Canada *Fact Sheet* Accessed on 22 October 2014 <http://www.pbc-clcc.gc.ca>.

¹⁶⁴ Parole Board of Canada *Fact Sheet* Accessed on 22 October 2014 <http://www.pbc-clcc.gc.ca>.

¹⁶⁵ Section 115(1)(c) Corrections and Conditional Release Act (S.C. 1992, c. 20); Correctional Services Canada. *Temporary Absences* Accessed on 29 September 2014 <http://www.csc-scc.gc.ca>; The Ontario Parole and Earned Release Board *Temporary Absence Program* Accessed on 15 October 2014 <https://www.opb.gov.on.ca>; Parole Board of Canada *Fact Sheet* Accessed on 22 October 2014 <http://www.pbc-clcc.gc.ca>.

¹⁶⁶ Parole Board of Canada *Parole Board of Canada: Contributing to Public Safety* Accessed on 23 October 2014 <http://www.pbc-clcc.gc.ca>; Parole Board of Canada *Fact Sheet* Accessed on 23 October 2014 <http://www.pbc-clcc.gc.ca>.

and where the sentenced offender's life or health is in danger it can be granted at any time regardless of the time the sentenced offender has served.¹⁶⁷

In the province of Quebec a sentenced offender, regardless if they are serving a sentence of less or more than six months are eligible for temporary absences for medical purposes,¹⁶⁸ to participate in spiritual activities¹⁶⁹ or for humanitarian purposes at any time during their sentence¹⁷⁰. They only become eligible for temporary absences for reintegration purposes after serving out a sixth of their sentence.¹⁷¹ A sentenced offender serving more than six months will only be eligible for temporary absences in preparation for conditional release after serving a sixth of their sentence, the same as integration purposes.¹⁷²

In the province of Ontario a provincial sentenced offender must serve one third of their sentence in order to be eligible for parole.¹⁷³ To be eligible for temporary absences the sentenced offender must serve out one sixth of his or her sentence.¹⁷⁴

4.2.5 Criteria

There are certain criteria a federal sentenced offender (or a provincial sentenced offender that is not serving time in Ontario or Quebec) has to meet before they will be granted temporary absence. The Parole Board of Canada (the Board) can only grant a person temporary absence if they are certain that the person will not reoffend during that time and

¹⁶⁷Section 115(2) Corrections and Conditional Release Act (S.C. 1992, c. 20); Securite Publique Quebec Act respecting the Québec Correctional System Information for Inmates Accessed on 23 October 2014 <http://www.securitepublique.gouv.qc.ca>; Parole Board of Canada Policy Manual Accessed on 23 October 2014 <http://www.pbc-clcc.gc.ca>.

¹⁶⁸ Section 42 of the Act respecting the Quebec Correctional System Chapter S-40.1.

¹⁶⁹ Section 45 of the Act respecting the Quebec Correctional System Chapter S-40.1.

¹⁷⁰ Section 49 of the Act respecting the Quebec Correctional System Chapter S-40.1.

¹⁷¹ Section 53 of the Act respecting the Quebec Correctional System Chapter S-40.1.

¹⁷² Securite Publique Quebec Act respecting the Québec Correctional System Information for Inmates Accessed on 20 October 2014 <http://www.securitepublique.gouv.qc.ca>.

¹⁷³ Section 35 of the Ministry of the Correctional Services Act R.S.O. 1990, Chapter M.22; Human Services and Justice Coordinating Committee Ontario Parole Board A General Presentation Accessed on 23 October 2014 <http://www.hsjcc.on.ca>.

¹⁷⁴ The Ontario Parole and Earned Release Board Temporary Absence Program Accessed on 15 October 2014 <http://operb.gov.on.ca>.

therefore be a danger to society.¹⁷⁵ Another aspect the Board investigates is whether or not it will be desirable for the sentenced offender to not be in the correctional facility for the duration of the absence.¹⁷⁶ The third aspect that will be taken into account is the sentenced offender's behaviour in the correctional facility before applying for the temporary absence.¹⁷⁷ For example if the sentenced offender has gotten into trouble with staff or other inmates that will have a negative impact on their application. Finally the Board must be convinced that a structured plan for the absence has been worked out and is in place.¹⁷⁸ Temporary absences for medical purposes are exempt of the approval requirement of the Board.¹⁷⁹

In the Province of Quebec a provincial sentenced offender is eligible for a temporary absence for medical purposes any time during their imprisonment.¹⁸⁰ This is the same with provincial sentenced offenders in the province of Ontario as well as federal sentenced offenders.¹⁸¹ In Quebec temporary absences for medical purposes can be granted for certain reasons. The reasons include terminal illness, if the state of the sentenced offender is in such a way that they would require immediate hospitalisation, if they need to undergo an evaluation or medical examination that is in a specialised environment, they need any care that is not available in the correctional facility, or any other reason that is similar to the ones already mentioned.¹⁸²

The Ontario Parole and Earned Release Board will grant conditional release to the provincial sentenced offenders serving their sentences in the province if they are convinced about the

¹⁷⁵ Section 17(1)(a) Corrections and Conditional Release Act (S.C. 1992, c. 20); Correctional Services Canada *Temporary Absences* Accessed on 22 October 2014 <http://www.csc-scc.gc.ca>.

¹⁷⁶ Section 17(1)(b) Corrections and Conditional Release Act (S.C. 1992, c. 20); Correctional Services Canada *Temporary Absences* Accessed on 22 October 2014 <http://www.csc-scc.gc.ca>.

¹⁷⁷ Section 17(1)(c) Corrections and Conditional Release Act (S.C. 1992, c. 20); Correctional Services Canada *Temporary Absences* Accessed on 22 October 2014 <http://www.csc-scc.gc.ca>.

¹⁷⁸ Section 17(1)(d) Corrections and Conditional Release Act (S.C. 1992, c. 20); Correctional Services Canada *Temporary Absences* Accessed on 22 October 2014 <http://www.csc-scc.gc.ca>.

¹⁷⁹ Parole Board of Canada *Policy Manual* Accessed on 20 October 2014 <http://www.pbc-clcc.gc.ca>.
¹⁸⁰ Securite Publique Quebec *Act respecting the Québec Correctional System Information for Inmates* Accessed on 20 October 2014 <https://www.securitepublique.gouv.qc.ca>.

¹⁸¹ Parole Board of Canada *Policy Manual* Accessed on 20 October 2014 <http://www.pbc-clcc.gc.ca>; The Ontario Parole and Earned Release Board *Temporary Absence Program* Accessed on 15 October 2014 <http://operb.gov.on.ca>.

¹⁸² Section 42 of the Act Respecting the Quebec Correctional System, CQLR c S-40.1; Securite Publique Quebec *Act respecting the Québec Correctional System Information for Inmates* Accessed on 20 October 2014 <https://www.securitepublique.gouv.qc.ca>.

same criteria as the Parole Board of Canada.¹⁸³ It is a two prong decision. Firstly and foremostly the safety of the public must be taken into account. If there is a chance of the sentenced offender committing a crime whilst out on a temporary absence, it will not be granted.¹⁸⁴ Secondly, the public should benefit from the temporary absence. This is when the sentenced offender's reintegration into society is facilitated and thus giving them the best chance of becoming law abiding citizen.¹⁸⁵ Furthermore just as with federal sentenced offender the following should also be examined; the sentenced offender should benefit from the temporary absence, their behaviour in the correctional facility should be favourable and a plan for the absence should be set in place.¹⁸⁶

4.2.6 Procedure

Federal sentenced offenders that want to apply for temporary absences have to submit an "Application for Temporary Absence" form. The form number is CSC/SCC 1078.¹⁸⁷ Then the parole or correctional officer will review the application received as well as the inmate's progress and the risk involved with the applied absences.¹⁸⁸ If there is found to be any risk, the need to put special conditions in place to manage the risk should also be considered. He or she will also review and take into account any victim information or victim statements that

¹⁸³ Ministry of Public Safety and Security *The Ontario Parole and Earned Release Board* Accessed on 22 October 2014 <http://www.auditor.on.ca>; Human Services and Justice Coordinating Committee *Ontario Parole Board A General Presentation* Accessed on 21 October 2014 <http://www.hsicc.on.ca>.

¹⁸⁴ Ministry of Public Safety and Security *The Ontario Parole and Earned Release Board* Accessed on 22 October 2014 <http://www.auditor.on.ca>; Human Services and Justice Coordinating Committee *Ontario Parole Board A General Presentation* Accessed on 21 October 2014 <http://www.hsicc.on.ca>; Parole Board of Canada *Policy Manual* Accessed on 20 October 2014 <http://www.pbc-clcc.gc.ca>.

¹⁸⁵ Ministry of Public Safety and Security *The Ontario Parole and Earned Release Board* Accessed on 22 October 2014 <http://www.auditor.on.ca>; Human Services and Justice Coordinating Committee *Ontario Parole Board A General Presentation* Accessed on 21 October 2014 <http://www.hsicc.on.ca>; Parole Board of Canada *Policy Manual* Accessed on 20 October 2014 <http://www.pbc-clcc.gc.ca>.

¹⁸⁶ Human Services and Justice Coordinating Committee *Ontario Parole Board A General Presentation* Accessed on 21 October 2014 <http://www.hsicc.on.ca>; Section 17(1)(b), (c) and (d) of the Corrections and Conditional Release Act (S.C. 1992, c. 20); Correctional Services Canada *Temporary Absences* Accessed on 22 October 2014 <http://www.csc-scc.gc.ca>; The Ontario Parole and Earned Release Board *Temporary Absence Program* Accessed on 23 October 2014 <http://www.operb.gov.on.ca>.

¹⁸⁷ Correctional Services Canada *Temporary Absences* Accessed on 25 October 2014 <http://www.csc-scc.gc.ca>.

¹⁸⁸ Section 101 and 102 of the Corrections and Correctional Release Act (S.C. 1992, c. 20); Correctional Services Canada *Temporary Absences* Accessed on 25 October 2014 <http://www.csc-scc.gc.ca>.

were handed in. Then an “Assessment of Decision” form will be submitted no later than 60 days after receiving the initial application.¹⁸⁹

In the province of Quebec the procedure to follow is quite similar to the one federal sentenced offenders have to follow. Sentenced offenders serving different sentences and applying for any temporary absences follow the same procedure. Only sentenced offenders serving a sentence of longer than 6 months and applying for a temporary absence based on preparation of conditional release follow a different procedure.¹⁹⁰ For all the other temporary absences the sentenced offender has to submit an “Application for Temporary Absences” form as well. This is the same as for the federal sentenced offenders. If the sentenced offender’s application has been successful they will receive a “Temporary Absence Permit” which will set out the conditions they have to comply with. If their application has been unsuccessful they will receive a “Decision on Temporary Absence” document that will stipulate the reasons for the decision.¹⁹¹

Sentenced offenders that are applying for a temporary absence in preparation for conditional release must submit and present a structured plan for the temporary absence. This is done by using the “Application for Temporary Absence in Preparation for Conditional Release” form.¹⁹² If it was successful they will receive a “Temporary Absence Permit – Preparation for Conditional Release”, this will set out the conditions that they need to comply with. If it was unsuccessful they will receive a “Decision on Temporary Absence in Preparation for Conditional Release” document. This will also explain the reasons for the decision.¹⁹³ The written application may be forfeited if the life of the sentenced offender is in danger and they need to receive urgent medical treatment. The facility director may grant the temporary absence without first receiving a written application.¹⁹⁴

¹⁸⁹ Correctional Services Canada *Temporary Absences* Accessed on 25 October 2014 <http://www.csc-scc.gc.ca>.

¹⁹⁰ Section 54 of the Act Respecting the Quebec Correctional System CQLR c S-40.1; Securite Publique Quebec *Act respecting the Québec Correctional System Information for Inmates* Accessed on 25 October 2014 <https://www.securitepublique.gouv.qc.ac>.

¹⁹¹ Securite Publique Quebec *Act respecting the Québec Correctional System Information for Inmates* Accessed on 25 October 2014 <https://www.securitepublique.gouv.qc.ac>.

¹⁹² Ibid.

¹⁹³ Ibid.

¹⁹⁴ Ibid.

In the province of Ontario sentenced offenders also have to apply in writing for a temporary absence and they also need to submit a plan for the temporary absence.¹⁹⁵ After the written application has been submitted the superintendent will grant or deny the application if it is for a temporary absence of 72 hours or less.¹⁹⁶ If the temporary absence is for more than 72 hours, a hearing will be held. The hearing will be held in the correctional facility in which the sentenced offender is serving his or her sentence. The sentenced offender is present at the hearing to give additional information that might be needed to make the decision. He or she may also ask any questions to the Board that they might have. When the deliberation starts the sentenced offender is asked to leave the room.¹⁹⁷

4.2.7 Cancellation

Both escorted and unescorted temporary absences may be cancelled.¹⁹⁸ This will be done if the escort to the sentenced offender feels there are relevant reasons to do so. The reasons can be that the sentenced offender has breached any of the conditions set to them when the temporary absence was initially granted, to prevent the sentenced offender from breaching any of the conditions or if it is for the protection of the public.¹⁹⁹ It can also be cancelled if the grounds for granting the temporary absence no longer exist or they have changed, or if new information has been made available.²⁰⁰ If the temporary absence has been cancelled a warrant for arrest will be issued for that sentenced offender and they will be recommitted into the correctional facility.²⁰¹ Therefore temporary absence for medical purposes can be cancelled if the grounds for granting it no longer exist.

¹⁹⁵ Legislative Assembly of Ontario *Official Records for 9 April 1984* Accessed on 25 October 2014 <http://www.ontla.on.ca>; Human Services and Justice Coordinating Committee *Ontario Parole Board A General Presentation* Accessed on 25 October 2014 <http://www.hsjcc.on.ca>.

¹⁹⁶ Human Services and Justice Coordinating Committee *Ontario Parole Board A General Presentation* Accessed on 25 October 2014 <http://www.hsjcc.on.ca>.

¹⁹⁷ Ibid.

¹⁹⁸ Section 17(3) and 116(10) of the Corrections and Conditional Release Act (S.C. 1992, c. 20).

¹⁹⁹ Correctional Services Canada *Temporary Absences* Accessed on 25 October 2014 <http://www.csc-scc.gc.ca>.

²⁰⁰ Human Services and Justice Coordinating Committee *Ontario Parole Board A General Presentation* Accessed on 25 October 2014 <http://www.hsjcc.on.ca>.

²⁰¹ Section 118 of the Corrections and Conditional Release Act (S.C. 1992, c. 20); Correctional Services Canada *Temporary Absences* Accessed on 25 October 2014 <http://www.csc-scc.gc.ca>;

4.3 Conclusion

This chapter focussed on the Canadian approach taken with the medical release of sentenced offenders who fall ill. They release the sentenced offender on a temporary absence for medical reasons. This chapter furthermore examines the different types of conditional release available to sentenced offenders in the jurisdiction of Canada. They are parole, temporary absences and statutory release.²⁰² It also describes the various decision makers that grant or deny the various conditional releases applied for.²⁰³ Federal sentenced offenders' conditional release is decided by the Parole Board of Canada. The provincial sentenced offenders serving their time in Quebec's conditional release will be decided by the Quebec Parole Board. The ones serving their sentence in Ontario's conditional release will be decided by the Ontario Parole and Earned Release Board.

The eligibility of federal and provincial sentenced offenders to apply for temporary absences is also investigated.²⁰⁴ Federal sentenced offenders are eligible for an escorted temporary absence at any time and an unescorted temporary absence after serving a sixth of their sentence. In Quebec there are no minimum time served to be eligible for temporary absences. This differs from Ontario where sentenced offenders have to serve a third to be eligible of temporary absences. Temporary absences for medical purposes can be granted to both federal and provincial sentenced offenders at any time.

The criterion that has to be met is also described.²⁰⁵ The most important one in both federal and provincial legislation is that the risk of re-offending is low. This is to protect the public. The procedure to be followed is examined and for both federal and provincial offenders it is a written application that must be handed in.²⁰⁶ Finally, the cancellation of temporary absences for medical purposes is investigated.²⁰⁷ It can be cancelled if the grounds for

²⁰² Paragraph 4.2.2 Types of Conditional Release: Parole, temporary absences and statutory release.

²⁰³ Paragraph 4.2.3 Decision makers.

²⁰⁴ Paragraph 4.2.4 Eligibility.

²⁰⁵ Paragraph 4.2.5 Criteria.

²⁰⁶ Paragraph 4.2.6 Procedure.

²⁰⁷ Paragraph 4.2.7 Cancellation.

granting it have changed or no longer exist. Therefore it can be cancelled if the sentenced offender's health improves.

Chapter 5: The Comparative result between the South African and Canadian approach to the medical release of sentenced offenders

5.1 Introduction

This chapter compares the South African and Canadian approaches with regards to sentenced offenders who fall ill. It specifically focusses and compares the criteria that have to be met by the sentenced offender before they will be released for medical purposes. The authority involved in granting or denying the release. The procedure the sentenced offender needs to follow to apply for medical release and finally the cancellation of the release.

5.2 Medical parole compared to temporary absences for medical purposes

In South Africa we have the term medical parole that is associated with medical release. The situation differs from the one in Canada where they have temporary absences for medical purposes.²⁰⁸ The biggest difference between the two is that medical parole is a type of parole that is granted on the ground that the person is suffering from a terminal illness or is incapacitated because of it.²⁰⁹ Thus, the sentenced offender is allowed to serve out the rest of their sentence not in the correctional facility but at their private residence. The Canadian approach of temporary absences allows the sentenced offender to leave the correctional facility escorted or unescorted, go to the hospital or medical facility to receive the treatment and then return to the correctional facility.²¹⁰

²⁰⁸ Paragraph 4.2.1 Introduction; Section 17 of the Corrections and Conditional Release Act (S.C. 1992, c. 20).

²⁰⁹ Paragraph 2.2 Parole and medical parole. Section 79 of the Correctional Services Act 111 of 1998.

²¹⁰ Section 17 of the Corrections and Conditional Release Act (S.C. 1992, c. 20).

5.3 Criteria

In South Africa a sentenced offender can apply for medical parole if he or she is “suffering from a terminal disease or condition or if such offender is rendered physically incapacitated as a result of injury, disease or illness so as to severely limit daily activity or inmate self-care.”²¹¹ In Canada a sentenced offender can apply for temporary absence for medical purposes for a variety of reasons, from urgent medical treatment, treatment not provided in the correctional facility or dental problems.²¹² In both jurisdictions the risk of re-offending has to be low before the sentenced offender will be granted medical parole or temporary absences for medical purposes.²¹³ In South Africa the proper supervision, care and treatment for the sentenced offender should be available in the environment that he or she is being released into.²¹⁴ This is not a concern in Canada because after the sentenced offender’s medical treatment and care they will return to the correctional facility to serve out the rest of their sentence.²¹⁵

5.4 Decision makers

In South Africa the decision whether a sentenced offender is suffering from a terminal disease, injury or condition that is severely limiting their daily activity lies with the Medical Parole Advisory Board.²¹⁶ If the Board finds that they do qualify for medical parole, it is up to the Parole Board to take the last two criteria into account, that the risk of reoffending is low

²¹¹ Paragraph 2.2 Parole and medical parole; Section 79 of the Correctional Services Act 111 of 1998.

²¹² Paragraph 4.2.2 Types of conditional release; Grant BA and Millson WA 1998 *Research Report: The Temporary Absence Program: Descriptive Analysis*; Correctional Services Canada *Temporary Absences* Accessed on 25 October 2014 <http://www.csc-scc.gc.ca>.

²¹³ Paragraph 3.3 Medical parole and the cancellation thereof; Paragraph 4.2.5 Criteria; Section 79(1)(b) of the Correctional Services Act 111 of 1998; Section 17(1)(a) Corrections and Conditional Release Act (S.C. 1992, c. 20); Correctional Services Canada *Temporary Absences* Accessed on 22 October 2014 <http://www.csc-scc.gc.ca>.

²¹⁴ 2.2 Parole and medical parole; Section 79(1)(c) of the Correctional Services Act 111 of 1998.

²¹⁵ Paragraph 4.2.2 Types of conditional release; Correctional Services Canada *Temporary Absences* Accessed on 25 October 2014 <http://www.csc-scc.gc.ca>; Parole Board of Canada *Fact Sheet* Accessed on 21 October 2014 <http://www.pbc-clcc.gc.ca>.

²¹⁶ Section 79(3)(a) of the Correctional Services Act 111 of 1998.

and that the environment they are being released into has adequate provision to care for them, and finally grant or deny the medical parole.²¹⁷ In Canada the decision of temporary absences for medical purposes is done by the head or the superintendent of the facility if it is an emergency and life threatening situation.²¹⁸ If it is a federal sentenced offender applying for escorted temporary absences for medical purposes, the head of the institution will also make the decision.²¹⁹ This is not the case when they are applying for unescorted temporary absences not for medical purposes, then the Parole Board of Canada will make the decision.²²⁰

5.5 Procedure

The procedure that has to be followed in both jurisdictions is quite similar. In both it is a written application.²²¹ In South Africa the sentenced offender, medical practitioner or any person acting on the behalf of the sentenced offender can submit the application, but in Canada the sentenced offender submits the application.²²²

²¹⁷ Paragraph 2.3 History of medical parole; Section 79(3)(b) and (c) of the Correctional Services Act 111 of 1998; Department of Correctional Services *Speech by Hon NN Masipa-Nqakula at the parole board working session held at Pretoria area on 26 March 2012* Accessed 25 October 2014 <https://www.dcs.gov.za>.

²¹⁸ Paragraph 4.2.3 Decision makers; Section 115(2) Corrections and Conditional Release Act (S.C. 1992, c. 20); Securite Publique Quebec *Act respecting the Québec Correctional System Information for Inmates* Accessed on 25 October 2014 <https://www.securitepublique.gouv.qc.ac/>; The Ontario Parole and Earned Release Board *Temporary Absence Program* Accessed on 15 October 2014 <https://www.operb.gov.on.ca>.

²¹⁹ Paragraph 4.2.3 Decision makers; Section 17 Corrections and Conditional Release Act (S.C. 1992, c. 20).

²²⁰ Paragraph 4.2.3 Decision makers; Section 116 Corrections and Conditional Release Act (S.C. 1992, c. 20).

²²¹ Paragraph 4.2.6 Procedure; Section 79(2)(b) of the Correctional Services Act 111 of 1998; Correctional Services Canada *Temporary Absences* Accessed on 25 October 2014 <http://www.csc-scc.gc.ca>; Securite Publique Quebec *Act respecting the Québec Correctional System Information for Inmates* Accessed on 25 October 2014 <https://www.securitepublique.gouv.qc.ac/>; Legislative Assembly of Ontario *Official Records for 9 April 1984* Accessed on 25 October 2014 <http://www.ontla.on.ca>.

²²² Paragraph 4.2.6 Procedure; Section 79(2)(b) of the Correctional Services Act 111 of 1998; Correctional Services Canada *Temporary Absences* Accessed on 25 October 2014 <http://www.csc-scc.gc.ca>.

5.6 Cancellation

In South Africa medical parole cannot be cancelled merely because of the fact that the parolee has recovered from their illness.²²³ This is not the same in Canada. In Canada temporary absences can be cancelled if the grounds it was granted on no longer exist.²²⁴ Therefore if a sentenced offender is currently in a medical facility out on a temporary absence and they recover, the temporary absence is cancelled and they will return to the correctional facility.

5.7 Conclusion

This chapter compared the South African and Canadian approaches with regards to the medical release of sentenced offenders. In South Africa we have the term medical parole that is associated with the medical release of sentenced offenders. It is a ground for parole that is granted to sentenced offenders if they are suffering from terminal illnesses or are incapacitated because of their condition. The sentenced offender is allowed to serve out the remainder of their sentence in their own private residence. This was compared to the Canadian approach of granting sentenced offenders temporary absences for medical purposes. They still return to the correctional facility after receiving the needed treatment.

The criteria that needs to be met in the two jurisdictions were compared. In both the most important aspect that needs to be met is the fact that the sentenced offender is not likely to reoffend once they are not in the correctional facility. Furthermore the decision makers were investigated. In South Africa a Medical Parole Advisory Board decides whether or not the sentenced offender meets the criteria of suffering from a terminal illness or they are incapacitated because of their disease. The Parole Board will then decide if the risk of reoffending is low and if the environment they are released into is adequate. In Canada, the

²²³ Paragraph 3.3 Medical parole and the cancellation thereof; Section 79(7) of the Correctional Services Act 111 of 1998.

²²⁴ Paragraph 4.2.7 Cancellation; Human Services and Justice Coordinating Committee *Ontario Parole Board A General Presentation* Accessed on 25 October 2014 <http://www.hsicc.on.ca>

head or superintendent of the correctional facility grant temporary absences for medical purposes.

The procedure that the sentenced offenders have to follow was discussed and compared. In both jurisdictions it is a written application that has to be submitted. Lastly the cancellation of the release was compared. In South Africa medical parole can only be cancelled if the parolee does not adhere to any of the conditions set to them. Legislation expressly states that it cannot be cancelled merely because the parolee's health has improved. In Canada the temporary absences can be cancelled if the sentenced offender breaks any of the conditions set to him or her, the same as in South Africa, as well as if the ground it was based on has changed or no longer exists. Thus if the sentenced offender's health improves, the temporary absence is cancelled.

Chapter 6: Recommendations and conclusion

6.1 Introduction

In the previous chapters the situation surrounding medical parole in South Africa was discussed. The Canadian approach to treating sentenced offenders, temporary absences for medical purposes was also examined. This was compared to the South African approach. This chapter highlights certain recommendations on how to improve the framework regulating medical parole in South Africa.

6.2 Recommendations

Firstly, section 79(7) of the Correctional Services Act²²⁵ should be rewritten. Currently it states that a sentenced offender's medical parole cannot be cancelled just because the person's health has improved. As was mentioned earlier in the mini-dissertation, the ground for granting the medical parole was that the sentenced offender was suffering from a terminal disease, illness or condition and they were incapable of doing every day activities.²²⁶ Therefore if the ground for the medical parole does no longer exist, or it has changed in such a way that the person is now able to do every day activities the medical parole should be cancelled. In Canada, temporary absences are granted for sentenced offenders that need medical care that is not available in the correctional facility itself.²²⁷ Temporary absences are also cancelled if the grounds it was based on no longer exist or have changed.²²⁸ It is recommended that South Africa follows a similar approach when it comes to the cancellation of medical parole. This

²²⁵ 111 of 1998.

²²⁶ Section 79(1) of the Correctional Services Act 111 of 1998; Chapter 3 paragraph 3.4 of this mini-dissertation.

²²⁷ Sections 17 and 116 of the Corrections and Conditional Release Act (S.C. 1992, c. 20); Regulation 9 of the Corrections and Conditional Release Regulations (SOR/92-620).

²²⁸ Section 118 of the Corrections and Conditional Release Act (S.C. 1992, c. 20); Correctional Services Canada *Temporary Absences* Accessed on 25 October 2014 <http://www.csc-scc.gc.ca>; Human Services and Justice Coordinating Committee *Ontario Parole Board A General Presentation* Accessed on 25 October 2014 <http://www.hsjcc.on.ca>.

will also eliminate the current Schabir Shaik and Jackie Selebi situation we are experiencing in our country currently.²²⁹

The second recommendation is that the criteria set out in section 79(1)(c) of the Correctional Services Act²³⁰ be repealed. The section currently states “that there are appropriate arrangements for the inmate’s supervision, care and treatment within the community to which the inmate is to be released”. This creates an inequality between sentenced offenders applying for medical parole based on their socio-economic status.²³¹ If the sentenced offender’s family is not in the financial and emotional situation to support and care for them once they are released on medical parole, it will not be granted. But if their family can care for them, or afford to get someone to care for them, the medical parole will be granted. Recently in South Africa the sentenced offender Xolile Mngeni died in the correctional facility he was serving his sentence in.²³² He had brain surgery in 2011 to remove a brain tumour and applied for medical parole on 11 June 2014.²³³ The current minister of Correctional Services Adv. Michael Masutha has been quoted as saying that the medical parole application has been denied “on the grounds that there were no appropriate arrangements for Mngeni’s supervision, care and treatment in the community into which he would be released.”²³⁴ But the affluent Jackie Selebi was granted medical parole because he and his family are able to create an appropriate environment to look after his medical needs.

Thirdly, it is recommended that a similar approach to the one in Canada should be followed. Terminally ill sentenced offenders should only be granted temporary absences to receive medical treatment. With the recent amendments to the legislation regulating medical parole, the words “to die a dignified death” were dropped from the section. Thus, the reason for granting medical parole is no longer that the sentenced offender should die dignified amongst his friends and family. Section 79(1)(c) amplifies this, because if the environment the sentenced offender is released into is not adequate, they will not be released on medical

²²⁹ This was mentioned and explained in Chapter 3 paragraph 3.4 of this mini-dissertation.

²³⁰ 111 of 1998.

²³¹ Maravanyika EO “Prison-breakers: Medical Parole in South Africa” Monash University South Africa Accessed 25 October 2014 <http://www.monash.ac.za>.

²³² “Anni Dewani’s honeymoon hitman dies” *eNCA* 18 October 2014 (<http://www.enca.com/>).

²³³ “Selebi, Shaik got medical parole - why not a dying Mngeni?” *eNCA* 19 October 2014 (<http://www.enca.com/>).

²³⁴ *Ibid.*

parole. Thus they cannot die surrounded by friends and family. Therefore there is no logic in releasing sentenced offenders on medical parole anymore, they can simply be released on a temporary absence and then return to the correctional facility if the treatment is completed or their health has improved.

Fourthly, there should be more transparency in the process, especially with regards to the reasons why medical parole is granted or denied. Clive Derby-Lewis is such an example. He was initially sentenced to death for his participation in the murder of Chris Hani, this was commuted to life imprisonment in 1995 when the death penalty was abolished.²³⁵ He has been diagnosed with terminal lung cancer and was recently stabbed in prison.²³⁶ His application for medical parole has been denied in 2011, 2013 and again in May 2014. James Smalberger who is the Chief Deputy Commissioner of Correctional Services said in 2013 that he is unable to give medical detail about the prisoner. In 2014 when his application was denied, the Medical Parole Advisory Board was upset that there was no report from a doctor or nurse of the correctional facility he is serving his sentence in, instead there were reports from his doctor and two medical specialists.²³⁷ The report from a doctor or nurse from the correctional facility is not a requirement according to legislation. He has also served 20 years of his 25 year sentence and is currently 78 years of age. Without the necessary transparency it would seem that he is eligible for medical parole, he is suffering from a terminal illness, and his family would be able to care for him and the chances of re-offending at his age is slim.

Finally, the legislation should be amended so that all sentenced offenders that want to apply for medical parole has to make use of state doctors. This way they would all be treated equally and cut out the inequality suffered by different socio-economic classes. Everyone would then have reports from doctors that give their services for free.

Final Word Count: 14818

²³⁵ "Lawyer to approach high court over Derby-Lewis's parole application" *Mail and Guardian* 21 June 2014 (<http://mg.co.za>).

²³⁶ "Derby-Lewis diagnosed with terminal lung cancer" *Mail and Guardian* 17 April 2014 (<http://mg.co.za>).

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