



For attention: Mr Nelson Matibe; Dr Jacob Buti Skosana; Advocate Charlie Eric Mhlari

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Dear Mr Matibe, Dr Skosana, and Adv Mhlari

The Helen Suzman Foundation is an NGO that advocates for constitutional democracy and human rights in South Africa. We attach our written submission in response to the invitation for comments on the [Discussion Paper 174: The Right to a Fair Trial – The Need to Obviate Delays](#).

Should you have any queries, it would be appreciated if you could contact me at the following email address: naseema@hsf.org.za

Yours Sincerely

A handwritten signature in black ink, appearing to read 'Naseema Fakir', with a horizontal line extending to the right.

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1. **Introduction**

- 1.1. The Helen Suzman Foundation (HSF) welcomes the opportunity to comment on Discussion Paper 174 concerning the right to a fair trial and the need to obviate delays in criminal proceedings. HSF advocates for constitutional democracy and the rule of law, both of which depend upon an effective and functioning criminal justice system.
- 1.2. This submission proceeds from the premise that unreasonable delay in criminal proceedings does not merely prejudice accused persons - it also undermines the rule of law, weakens public confidence in the administration of justice, and compromises the integrity of the criminal justice system itself.
- 1.3. While the Commission correctly identifies both systemic and litigant-driven causes of delay, certain aspects of the analysis and recommendations require further development. In particular, HSF submits that greater attention should be given to:
 - 1.3.1. Closer engagement with institutional capacity;
 - 1.3.2. The role of judicial enforcement; and
 - 1.3.3. The coherence between proposed reforms and existing constitutional and legislative frameworks.
- 1.4. This submission therefore seeks to supplement the Discussion Paper by identifying key gaps, refining aspects of the recommendations, and proposing additional mechanisms that may strengthen the Commission's objective of ensuring the expeditious and fair resolution of criminal proceedings.

2. **Comparative models and the Question of Delay Ceilings**

- 2.1. The Commission compares South Africa's position with comparative jurisdictions, including Namibia and Canada, and examines how these jurisdictions address delay while safeguarding the rights of accused persons.¹
- 2.2. HSF supports the Commission's comparison with Namibia. Similar to South Africa, the Namibian constitutional framework recognises that criminal trials must occur within a reasonable time. Importantly, release due to unreasonable delay does not amount to an acquittal. This comparison appropriately

¹ Paras 1.6 – 1.10 of the Discussion Paper at pages 2 – 3.

highlights the need to protect both the liberty interests of accused persons and the administration of justice. This incentivises the prosecution to ensure that they enrol matters that have a strong case that can be prosecuted and where convictions can be secured.²

- 2.3. The Canadian Supreme Court's development of presumptive delay ceilings similarly represents an important intervention. These ceilings provide clearer content to the constitutional requirement of trial within a reasonable time, being:
 - 2.3.1. 18 months for matters proceeding without a preliminary hearing; and
 - 2.3.2. 30 months for matters involving a preliminary hearing.
- 2.4. Such ceilings create accountability across the criminal justice system by requiring role players to ensure that matters proceed efficiently and are finalised within defined periods.
- 2.5. HSF submits that the Commission undertake an assessment to consider whether possibly combining delay ceilings with existing judicial norms and standards, may better align with South Africa's constitutional framework and context-specific approach to fairness.³

3. **Abuse of Court Process and the Limits of Existing Sanctions**

- 3.1. Chapter Two addresses litigation strategies commonly referred to as "Stalingrad tactics" and the effect these delays have on both courts and litigants.⁶
- 3.2. HSF supports the measures introduced by the Commission, particularly the imposition of punitive costs orders and *costs de bonis propriis*.

² An example of this is with the *Omotoso* matter (*S v Omotoso* [2025] ZAECQBHC 8) where the Shoeman J, in paras 42 – 63, criticized the case of the state and the handling of the cross-examination which effectively led to the matter being dismissed and drawing the attention of Parliament on the state of the National Prosecuting Authority.

³ Paras 3.1 – 3.6 of the Discussion Paper at 10-11. Also see, Staff Writer "A shameful judicial record", *Ground Up*, 24 April 2026, available here: <https://groundup.org.za/article/a-shameful-judicial-record/>; Report of the Committee on the Rationalisation of Areas under the Jurisdiction of the Divisions of the High Court of South Africa and Judicial Establishments – Recommendations on Areas under the Jurisdiction of the Divisions of the High Court, 2023 at 23 – 205, particularly caseloads and access to justice and how this impacts the work of the courts, particularly the criminal justice system, available here:

⁶ Chapter 2: The Employment of Stalingard Tactics as a Form of Delaying Tactics of the Discussion Paper at pages 5 - 9.

- 3.3. HSF submits that underutilisation of judicial powers in regard to use of punitive cost orders raises an important institutional question on whether legislative reform is required to compel greater use of existing powers, or whether the problem lies in judicial practice, institutional culture, and inconsistent implementation.
- 3.4. HSF notes that the awarding of cost orders is judicial discretion done on a case-by-case basis. However, targeted guidance may nevertheless assist in promoting greater consistency in the utilisation and application of punitive measures.
- 3.5. The Discussion Paper recommends the insertion of section 342H and notes the possibility of reporting legal practitioners to professional bodies or initiating contempt proceedings. HSF welcomes these proposals. However, additional engagement is required regarding whether mandatory or presumptive sanctions in cases of abusive litigation conduct would provide greater consistency across courts.
- 3.6. Courts have long possessed common-law authority to issue punitive cost orders where litigation is frivolous, vexatious, or constitutes an abuse of process. In addition, superior courts derive inherent powers from the Constitution to regulate their own affairs and protect the administration of justice.
- 3.7. The abuse of court processes falls squarely within these powers. Courts are empowered to strike matters from the roll, refuse improper applications, and issue punitive orders where proceedings are manipulated for improper purposes.⁷
- 3.8. Absent clearer standards, there is a risk that judicial responses will differ significantly across courts, particularly in lower courts where institutional pressures and resource constraints may already affect consistency.

⁷ See section 173 of the Constitution for inherent jurisdiction for superior courts. In *Commissioner for South African Revenue Service v Richards Bay Coal Terminal (Pty) Limited* [2025] ZACC 3 at paras 79 – 83, the Constitutional Court touches on the inherent power of recognized in section 173 of the Constitution which permits superior courts to regulate and protect their own process and, in appropriate circumstances, to refuse to exercise jurisdiction or refuse to entertain proceedings where litigation is abusive, disruptive to the administration of justice, or pursued through an inappropriate procedural mechanisms.

- 3.9. HSF therefore recommends that the Commission consider developing a non-exhaustive framework to guide judicial officers in determining when litigation conduct constitutes an abuse of process. Such guidance could include factors relating to:
- 3.9.1. Repeated or unnecessary interlocutory applications;
 - 3.9.2. Patterns of postponements without reasonable justification;
 - 3.9.3. Conduct designed primarily to delay proceedings;
 - 3.9.4. Prejudice caused to other litigants and court administration; and
 - 3.9.5. The broader interests of justice.

4. Rationalisation of Judicial Establishments

- 4.1. HSF's contention is on the omission of rationalisation of judicial establishment as this raises broader structural concerns regarding the relationship between procedural reform and institutional capacity. This is particularly relevant given that the Discussion Paper itself identifies infrastructure failures, resource constraints, and institutional inefficiencies as contributors to delay. Challenges such as power failures, inadequate infrastructure, staffing shortages, and uneven court capacity may directly affect whether proposed reforms can realistically succeed.
- 4.2. The rationalisation process is intended to address precisely these institutional considerations. It raises important questions regarding how judicial resources are distributed, whether courts are appropriately configured to deal with demand, and how systemic failures affecting the administration of justice may be addressed.
- 4.3. HSF therefore submits that closer engagement with the rationalisation process would strengthen the Commission's analysis and ensure that recommendations addressing delay are aligned with broader institutional reform processes.⁸

⁸ See *Rationalisation Report* above n 8 at paras 242 – 260 where the Committee dealt with the systemic issues burdening the Free State Division, particularly the performance of the circuit courts with the Committee recommending that there needs to be a local seat to be established to deal with the issue of travelling and balance out the workload of the Division.

5. **Accountability of Legal Practitioners and Professional Bodies**

5.1. Distinction between accused person and representation

5.1.1. Sanction on the accused person's conduct

5.1.1.1. While there are limited mechanisms available to directly sanction an accused person for causing delays in criminal proceedings, particularly where the accused remains in custody pending trial, certain measures may still be considered. A legal practitioner may apply to withdraw from representing an accused where the accused has failed to cooperate, has not been forthcoming during consultations, or has otherwise frustrated the effective conduct of the defence.

5.1.1.2. In appropriate circumstances, persistent abuse of court process and deliberate attempts to frustrate criminal proceedings may also be considered during sentencing as an aggravating factor, particularly where the conduct has undermined the administration of justice, prejudiced complainants or witnesses, or resulted in unnecessary delays in finalising proceedings.

5.1.1.3. In relation to accused persons released on bail, courts may consider stricter bail conditions, reconsideration of bail, or contempt of court proceedings where the conduct amounts to deliberate obstruction of the administration of justice. Care should however be taken to ensure that these measures do not infringe the accused person's constitutional rights, including the right to legal representation and the right to adequately prepare a defence.

5.1.2. Sanction on the Legal Representative's Conduct

5.1.2.1. Section 3(c) of the Legal Practice Act states that the Legal Practice Council ("LPC") was established as a single unified statutory body to regulate the affairs of all legal practitioners. While this submission does not engage extensively with the definition of "legal practitioner", the Act now regulates both attorneys and advocates under a unified institutional framework.⁹

⁹ The LPC Act in the definitions of legal practitioners explains that this means "an advocate or attorney admitted and enrolled in terms of sections 24 and 30, respectively". Before the enact of this Act, the

- 5.1.2.2. Chapter 4 of the Act deals with professional conduct and the establishment of disciplinary bodies. Nothing in the Act prevents a judicial officer from referring the conduct of a legal practitioner to the LPC for investigation of misconduct through its disciplinary structures.
- 5.1.2.3. Further, section 44 of the Act expressly provides that the Act does not derogate from the powers of a High Court to adjudicate upon and make orders concerning the conduct of legal practitioners. This provision bolsters the existing powers of judicial officers to regulate court processes, including the awarding of punitive costs orders against legal practitioners whose conduct undermines the administration of justice. In addition, Part VI of the Code of Conduct regulates the professional conduct of legal practitioners. Article 60 specifically requires legal practitioners to uphold the effective functioning of court processes and discourages the abuse of court procedures.
- 5.1.2.4. As mentioned in this submission, courts are empowered to order a costs *de bonis propriis* on the account of the legal practitioner, charge the legal practitioner of contempt of court or refer the conduct of the legal practitioner to be investigated and sanctioned by the LPC. Section 40(3) of the Act states that a fine can be imposed on the legal practitioner, if they are found guilty of misconduct, payable to the Council. The sanction of the conduct of either attorney or advocate is dealt with by the Council as determined by the Act.

6. **Pre- and Post-Conviction Delay: A Necessary Constitutional Distinction**

- 6.1. HSF submits that the treatment of pre- and post-conviction delay is conceptually underdeveloped.
- 6.2. These categories engage distinct constitutional interests. Pre-conviction delay implicates liberty interests and the presumption of innocence, while post-conviction delay engages dignity, procedural fairness, and the proper administration of justice.

- 6.3. Treating both as a single category risks obscuring the different constitutional standards applicable to each.
- 6.4. HSF recommends that the Commission move Chapter 3 on pre- and post-conviction to Chapters 4 and 6. In particular, to Chapter 4 as it touches on interlocutory applications before the commencement of the trial and during the trial which is an important procedural mechanism to ensure that the right to a fair trial is preserved but also can cause significant delays to a matter if the judicial officer does not carefully weed out abuse of court processes.

7. **Language Rights and the Potential for Procedural Abuse**

- 7.1. The Discussion Paper correctly recognises the importance of interpretation and language assistance where litigants are unable to understand proceedings.¹⁰ HSF submits that the discussion paper inappropriately places the burden upon the accused to “prove” need for an interpreter, rather than addressing the ongoing shortage of interpreters that affect South African and foreign language speakers.
- 7.2. It has been documented in 2016 that an average of 54.2% of applicants in criminal cases were found to have limited knowledge of English.¹¹
- 7.3. In September 2025, it was reported that the number of court interpreters in the country was 1824, and 20 sign language interpreters.¹² Minister Kubayi acknowledged that the affected languages are mainly South African languages, with a need for Mandarin and Portuguese interpreters in Kwa-Zulu Natal.¹³
- 7.4. HSF submits that regardless of an assessment concerning capability of understanding English court proceedings, there will continue to be a need for court interpreters which may only be met through appropriate appointments of interpreters.

¹⁰ Section H: Foreign Languages at page 16 of the Discussion Paper.

¹¹ R Kaschula, Z Docrat and A de Vries “Why using just one language in South Africa’s courts is a problem”, 17 April 2020, available here: https://www.ru.ac.za/latestnews/archives/2020/why_using_just_one_language_in_south_africas_courts_is_a_problem.html.

¹² <https://iol.co.za/news/politics/2025-09-27-minister-kubayi-reveals-alarming-shortage-of-court-interpreters-across-south-africa/>

¹³ As above.

- 7.5. In the 2025 – 2023 Strategic Plan for the Department of Justice, the Department notes that policy changes will be “effected to address the provision of foreign language interpreters in the courts” – however no details have been provided. The discussion paper similarly refers to the need for interpreters, however does not expand on details of the policy and focuses its attention on a vague standard to prove language need.
- 7.6. HSF recommends that the SALRC:
- 7.6.1. Remove the burden of proving need for an interpreter as it creates additional obstacles without providing a framework of assessment;
 - 7.6.2. Make appropriate reference to court interpreter shortages; and
 - 7.6.3. Make practical recommendations where gaps exist in the Department's current interpretation policy and strategy.

8. **Conclusion**

- 8.1. The Discussion Paper makes an important contribution to ongoing efforts aimed at addressing delays within South Africa's criminal justice system. Its identification of both systemic inefficiencies and abusive litigation practices provides a useful foundation for reform.
- 8.2. However, as this submission has sought to demonstrate, the effectiveness of the proposed interventions will depend on a more integrated and institutionally grounded approach. Delays in criminal proceedings are not solely the product of procedural abuse or deficiencies in legislative design. They are also shaped by broader structural realities, including institutional capacity constraints, uneven implementation of existing powers, infrastructure failures, and challenges affecting the administration of justice more broadly.
- 8.3. HSF submits that legislative reform alone is unlikely to provide a complete solution. While statutory amendments may strengthen available mechanisms, their success will ultimately depend on judicial enforcement, effective case management, institutional coordination, and accountability across all actors within the criminal justice system.
- 8.4. Accordingly, HSF recommends that particular attention be given to:
- 8.4.1. Improving consistency in judicial responses to abusive litigation conduct;

- 8.4.2. Ensuring stronger coordination between courts and professional regulatory bodies;
 - 8.4.3. Engaging broader institutional reforms, including judicial rationalisation processes; and
 - 8.4.4. Developing practical procedural safeguards capable of addressing delays without undermining fair trial rights.
- 8.5. Ultimately, the objective of obviating delay is not simply to expedite criminal proceedings. It is to ensure that the criminal justice system functions in a manner that is fair, efficient, constitutionally compliant, and capable of maintaining public confidence. If these reforms are implemented within a coherent institutional framework, the existing legal architecture, including section 342A, has the potential to operate as a meaningful safeguard of both the rights of accused persons and the integrity of the administration of justice.