

## CHAPTER 2

### GUIDING PRINCIPLES

#### 2.1 Proposals in Discussion Paper 102

In Discussion Paper 102 a set of guiding principles had been considered imperative for the formulation of both the substantive and procedural law with regard to sexual offences. In keeping with the modern trend towards including principles in a number of recent statutes, it was recommended that a set of guiding principles for the management of sexual offences be included in the proposed Bill as a substantive clause. The following clause was proposed:

#### **Guiding principles**

**2.** In the adjudication of any proceedings which are instituted in terms of or under this Act, the following principles shall apply:

- (a) Victims may not be discriminated against, either directly or indirectly, on the grounds of race, colour, ethnic or social origin, gender, sexual orientation, age and developmental level, physical or mental disability, religion, conscience, belief, culture or language.
- (b) Victims must be treated with compassion and respect for their dignity.
- (c) Victims must be ensured access to the mechanisms of justice.
- (d) Victims must be informed of their rights and the procedures within the criminal justice system which affect them.
- (e) Victims have the right to express an opinion, to be involved in all decisions, and to have their opinion taken seriously in any matter affecting them.
- (f) In addition to all due process and constitutional rights, victims have the following rights-
  - (i) to have present at all decisions affecting them a person or persons important to their lives;
  - (ii) to have matters explained to them in a clear, understandable manner appropriate to their age and in a language which they understand;
  - (iii) to remain in the family during the investigation and whilst awaiting a final resolution of the matter and, if a child is removed from the family, to have the placement periodically removed;
  - (iv) to have procedures dealt with expeditiously in time frames appropriate to the victim and the offence.
- (g) Victims have the right to confidentiality and privacy and to protection from publicity about the offence.
- (h) Victims and their families are entitled to receive such therapeutic assistance as is necessary to promote healthy functioning. Where possible the offender should make a financial or material contribution to such assistance.
- (i) Where a child is involved, the best interests of the child shall be paramount in all matters concerning that child.
- (j) The vulnerability of children entitles them to speedy and special protection and provision of services by all disciplines and involved parties during all phases of the investigation, the court process, and thereafter, including the implementation and implications of sentencing of the sexual offender.
- (k) Since the family and the community are central to the well-being of a child,

- consideration should be given, in any decisions affecting a child, to -
- (i) ensuring that the child's family, community and other significant role-players are consulted;
  - (ii) the extent to which decisions affecting the offender will affect a child, his or her family and community;
  - (iii) the particular relationship between the offender and the child;
  - (iv) keeping disruptive intervention into child, family and community life to a minimum in order to avoid secondary victimisation of the child.
- (l) Restorative and rehabilitative alternatives must be prioritized and applied unless the safety of the victim and community requires otherwise.
- (m) A person who commits a sexual offence must be held accountable for his or her actions and should be encouraged to accept full responsibility for his or her behaviour.
- (n) In determining appropriate sanctions for a person who has been found guilty of committing a sexual offence -
- (i) the sanctions applied must ensure the safety and security of the victim, the family of the victim and the community;
  - (ii) the sanctions must promote the restoration of the victim, the family of the victim and the community;
  - (iii) where appropriate, offenders must make restitution which may include material, medical or therapeutic assistance, to victims and their families or dependents;
  - (iv) the child sexual offender should bear special consideration in respect of sanctions and rehabilitation;
  - (v) the possibility of rehabilitating the sexual offender must be taken into account in considering the long-term goal of safety and security of victims, their families and communities,
  - (vi) the interests of the victim must be considered in any decision regarding sanctions.
- (o) In order to avoid systemic secondary victimisation of victims of sexual offences, binding inter-sectoral protocols following an inter-disciplinary approach must be followed.
- (p) All professionals and role-players involved in the management of sexual offences must be properly and continuously trained after going through a proper selection and screening process.
- (q) Cultural diversity must be taken into account in all matters pertaining to the victim, the offender and to their communities. The existence of cultural differences is no justification for or licence to commit a sexual offence or to exclude a criminal justice process.

## 2.2 Evaluation of comment

A number of participants at the Gordon's Bay Expert Conference expressed the view that the principles have been expressed in language that is too peremptory, and suggested, in order to prevent arguments that there is no sanction for disobedience of the guidelines, that the clause should be couched more in terms of exhortation (ie *should* as opposed to *must*). The Commission agrees with this proposal and has adapted the clause accordingly.

In addition, some participants suggested that the clause should be reformulated to establish *objectives* as opposed to *principles*, as it can then assist with the interpretation of the proposed legislation. Again the Commission found this to be a valuable observation as such an adaptation will eliminate concerns about the enforceability of the clause if it is to be retained as a body of principles. The suggestion also harmonises with the first proposal, namely that the wording should be adjusted to be less peremptory. In the Commission's view the objectives, in conjunction with the preamble, contain the normative values that underpin the draft Bill and serve as indicators as to how, and in which context, the Bill should be interpreted and applied. If it is found that the Bill has been applied without due regard to these values, it should be possible to have such misapplication judicially reviewed.

A number of respondents suggested alternative wording and reformulation of certain provisions contained in the original clause. The extent to which the Commission has heeded these proposals is evident from the reformulated clause reflected under the heading "Recommendation" below. Words and phrases in square brackets and in bold indicate omissions from the original clause, and underlined words and phrases indicate insertions.

In a joint submission by the Children's Rights Project (Community Law Centre, University of the Western Cape); the Department of Forensics and Toxicology (University of Cape Town); Gender, Law and Development Project (Institute of Criminology, University of Cape Town); Gender Project (Community Law Centre, University of the Western Cape) and the Women's Legal Centre,<sup>1</sup> it was proposed that a distinction should be drawn between those provisions contained in the original clause that imposes a positive duty on the State and those merely intended to serve as guidelines. It is argued that the former should be elevated to substantive clauses in the Bill while the latter could be contained in the preamble or in *National Instructions for Sexual Offenders* which are to be issued as part of a proposed multi-disciplinary approach. The respondents also called for the rights to privacy and dignity to be included in the preamble.

It must be noted that the Western Cape joint respondents submitted their comment on the basis that the Commission would retain a clause on *guiding principles* in its

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<sup>1</sup> Hereinafter the Western Cape joint submission.

proposed legislation. As pointed out above, the Commission concurs with views expressed that the guiding principles should be transformed into objectives. This (new) approach obviates the need to distinguish between the restatement of constitutional imperatives, an expansion of already entrenched constitutional rights or the establishment of positive duties to be placed on the state.<sup>2</sup> In the Commission's view the inclusion of a clause on objectives can be seen as supplementing that which is stated in the preamble, with the former emphasising the aims to be achieved by the legislation and the latter stating the purpose of the legislation in general terms.

Respondents<sup>3</sup> were generally in favour of the Commission's recommendation that a national strategy for multi-disciplinary intervention relating to sexual offences should be agreed upon by incumbent government departments and non-governmental organisations working in the field of sexual offences, in partnership with civil society. This endorsement was strengthened by a call that positive duties should be placed on government officials dealing with sexual offences to act in a prescribed way.

The Western Cape joint submission calls upon the Commission to encapsulate these positive duties in a code of good practice or regulations so as to allow for flexibility in the management process and regular review and amendment where necessary. They opine that this would form part of the national strategy for multi-disciplinary intervention relating to sexual offences to be agreed upon by government departments and NGO's. On the other hand the same submission also argues that the positive duties resting on state officials should be clearly set out in national legislation (as opposed to regulations or 'internal' or departmental directives or guidelines).

The Commission has taken cognizance of the above recommendations and recent judgements such as the matter between the **Minister of Safety & Security and Dirk van Duivenboden**, delivered on 22 August 2002. In this matter Judge Nugent is

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<sup>2</sup> The respondents recommended, for instance, the inclusion of the following positive duty in the proposed legislation: "In order to give effect to this Act the National Director of Public Prosecutions shall be obliged to determine prosecution policy and issue policy directives for the conduct of sexual offence trials."

<sup>3</sup> Lulama Nongogo and Teboho Maitse; Commission on Gender Equality; the Western Cape joint submission; Mollie Kemp, School Social Worker, Department of Education and Culture, KwaZulu Natal.

quoted in an article<sup>4</sup> in ***Business Day*** by Michael Hart, chairman of Deneys Reitz, as stating that “while private citizens might be entitled to remain passive when the constitutional rights of other citizens are under threat in this country the state has a positive constitutional duty to act in the protection of the rights in the Bill of Rights”.

The Commission endorses the above viewpoint and recommends that positive duties be visibly imposed on public office bearers responsible for the investigation of sexual offence matters by way of the multi-disciplinary protocols. It thereby also endorses the reason given above that by including positive duties in the protocols the duties will remain flexible and open to amendment as the need arises. The Commission further recommends that any duties imposed should be reinforced by the allocation of sufficient resources and support to enable officials to comply with their duties. The Commission consequently recommends that an empowering provision be included in the Bill that places a statutory obligation on government departments and relevant NGO’s to compile an inter-sectoral, national policy framework to guide the implementation, enforcement and administration of the Sexual Offences Act. This framework must provide for the compilation of internal accountability mechanisms within each of these structures.

While adopting a victim centred approach, the Commission recognises that the term “victim” embodies a value judgement in instances where the alleged offender has not been found guilty in a court of law of the alleged (sexual) offence. To balance the scale and to give effect to the presumption of innocence, the Commission has decided to avoid using the term “victim” where the alleged offender is yet to be found guilty beyond a reasonable doubt. In such instance the term “complainant” is rather used.

### **2.3 Recommendation**

It is recommended that the previously proposed guiding principles be included in the proposed Bill as objectives and that this clause be inserted after the preamble to the Bill as the first substantive clause, preceding the definitions clause. The Commission recommends that the clause be worded as follows:

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[Http://www.bday.co.za/bday/content/direct/1,3523,1178778-6096-0,00.html](http://www.bday.co.za/bday/content/direct/1,3523,1178778-6096-0,00.html).

**[Guiding principles] Objectives**

1. In the [adjudication of any proceedings which are instituted in terms of or under] application of the provisions of this Act, the following [principles shall apply] objectives must be considered:

- (a) Complainants [Victims may] should not be discriminated against, either directly or indirectly, on the grounds of race, colour, ethnic or social origin, birth status, sex, gender, sexual orientation, age and developmental level, [physical or mental] disability, religion, conscience, belief, culture or language.
- (b) Complainants [Victims may] should be treated with [compassion and respect for their] dignity and respect.
- (c) Complainants [Victims may] should be ensured access to the mechanisms of justice.
- (d) Complainants [Victims may] should be informed of their rights and the procedures within the criminal justice system which affect them.
- (e) Complainants [Victims may] have the right to express an opinion, to be [involved in] informed of all decisions, and to have their opinion taken seriously in any matter affecting them.
- (f) In addition to all due process and constitutional rights, complainants [victims] should have the following rights-
  - (i) to have present at all decisions affecting them a person or persons important to their lives;
  - (ii) to have matters explained to them in a clear, understandable manner appropriate to their age and in a language and manner which they understand;
  - (iii) to remain in the family, where appropriate, during the investigation and whilst awaiting a final resolution of the matter and, if a child is removed from the family, to have the placement periodically [removed] reviewed;
  - (iv) to have procedures dealt with expeditiously in time frames appropriate to the complainant [victim] and the offence.
- (g) Complainants [Victims] should have the right to confidentiality and privacy and to protection from publicity about the offence.
- (h) Complainants [Victims] and their families [are] should be entitled to receive such therapeutic assistance as is necessary to promote healthy functioning.

Where possible the offender should make a financial or material contribution to such assistance.

**[(i) Where a child is involved, the best interests of the child shall be paramount in all matters concerning that child.]**

(i) The vulnerability of children **[entitles]** should entitle them to speedy and special protection and provision of services by all **[disciplines and involved parties]** role-players during all phases of the investigation, the court process and thereafter **[including the implementation and implications of sentencing of the sexual offender]**.

(j) Since the family and the community are central to the well-being of a child, consideration should be given, in any decisions affecting a child, to -

- (i) ensuring that, in addition to the child, his or her **[the child's]** family, community and other significant role-players are consulted;
- (ii) the extent to which decisions affecting the offender will affect a child, his or her family and community;
- (iii) the particular relationship between the offender and a child;
- (iv) keeping disruptive intervention into child, family and community life to a minimum in order to avoid secondary victimisation of the child.

(k) Restorative and rehabilitative alternatives **[must]** should be **[prioritised]** considered and applied unless the safety of the complainant **[victim]** and the interests of the community requires otherwise.

(l) A person who commits a sexual offence **[must]** should be held accountable for his or her actions and should be encouraged to accept full responsibility for his or her behaviour.

(m) In determining appropriate sanctions for a person who has been found guilty of committing a sexual offence -

- (i) the sanctions applied **[must]** should ensure the safety and security of the victim, the family of the victim and the community;
- (ii) the sanctions **[must]** should promote the **[restoration]** recovery of the victim and the restoration of the family of the victim and the community;
- (iii) where appropriate, offenders **[must]** should make restitution which may include material, medical or therapeutic assistance, to victims and their families or dependents;
- (iv) the child sexual offender should **[bear]** receive special consideration in respect of sanctions and rehabilitation;

- (v) the possibility of rehabilitating the sexual offender [**must**] should be taken into account in considering the long-term goal of safety and security of victims, their families and communities;
  - (vi) the interests of the victim [**must**] should be considered in any decision regarding sanctions.
- (n) In order to avoid systemic secondary victimisation of victims of sexual offences, binding inter-sectoral protocols following an inter-disciplinary approach [**must**] should be followed.
- (o) All professionals and role-players involved in the management of sexual offences [**must**] should be properly and continuously trained after going through a proper selection and screening process.
- (p) Cultural diversity [**must**] should be taken into account in all matters pertaining to the victim, the offender and to their communities. The existence of cultural differences [**is**] should be no justification for or licence to commit a sexual offence or to exclude a criminal justice process.

The empowering provision to create a national policy framework reads as follows:

#### **Implementation of this Act**

**27.** This Act must be implemented by organs of state in the national, provincial and local spheres of government subject to –

- (a) any specific section of this Act and regulations allocating roles and responsibilities; and
- (b) the national policy framework published in terms of section 28.

#### **National policy framework**

**28.** (1) The Minister for Justice and Constitutional Development must

- (a) prepare a national policy framework to guide the implementation, enforcement and administration of this Act in order to secure acceptable and uniform treatment of all sexual offence matters;
- (b) review the policy framework at least once every five years; and
- (c) when required, amend the policy framework.

(2) The Minister must publish the national policy framework and each amendment of the framework by notice in the Government Gazette.

(3) The national policy framework binds –

- (a) all organs of state in the national, provincial and local spheres of government; and
- (b) any other organisations involved in programmes or projects concerning sexual offence matters.

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**29.** (1) The national policy framework must –

- (a) be a coherent policy directive appropriate for the Republic as a whole to guide the apprehension and prosecution of offenders, and the protection of complainants and victims of sexual offences;
- (b) provide for an integrated, co-ordinated and uniform approach by organs of state in all spheres of government and other organisations on which it is binding; and
- (c) be consistent with the provisions of this Act.

(2) The national policy framework must reflect the following core components:

- (a) national objectives to ensure a uniform approach on how sexual offence matters should be dealt with;
- (b) priorities and strategies to achieve those objectives;
- (c) performance indicators to measure progress with the achievement of those objectives;
- (d) provide for uniform accountability and disciplinary mechanisms for all functionaries involved;
- (e) a framework for co-operative governance on a cross-functional and multi-disciplinary basis in the implementation of this Act;
- (f) the allocation to the different spheres of government and to different organs of state of primary and supporting roles and responsibilities in this regard;
- (g) the engagement of non-governmental organisations in the implementation, enforcement and administration of this Act and in the development and implementation of programmes and projects giving effect to this Act; and

(h) measures to ensure adequate funds.

### **Consultative process**

**30.** (1) In developing and publishing the national policy framework or any amendment to the framework, the Minister must —

(a) generally follow a consultative process as may be appropriate in the circumstances;

(b) consult with —

(i) Cabinet members whose departments are affected by the framework or amendment; and

(ii) organs of state in other spheres of government in accordance with the principles of co-operative government as set out in Chapter 3 of the Constitution; and

(c) engage the participation of the public and non-governmental organisations in the process.

(2) The Minister may not publish the national framework, or any amendment to the framework, except with the concurrence of the Cabinet members whose departments are directly affected by the framework or amendment.

### **Regulations**

**31.** The Minister for Justice and Constitutional Development, in consultation with the Ministers of Safety and Security, Correctional Services, Social Development and Health, may make regulations regarding —

(a) any matter which is required or permitted by this Act to be prescribed by regulation;

(b) the inter-sectoral implementation of this Act; and

(c) any other matter which is necessary or expedient to prescribe in order to achieve or promote the objects of this Act.