CHAPTER ONE
GUIDING PRINCIPLES

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This chapter is divided into two parts to reflect the views of the two author organisations. The first section has been prepared by Nikki Naylor, and the second by Jacqui Gallinetti.

1. INTRODUCTION

Section 2 of the Act, directly follows the Preamble and contains “Guiding Principles”. Before analysing the said “Guiding Principles” regard should be had to the general structure of statutes in relation to its preamble, objectives and purpose.

Whilst the principles enunciated in the “Guiding Principles” are laudable one needs to determine whether in fact they are necessary in the body of the Act and if so, to what extent they should be included. Furthermore, regard should be had to the status of the provisions and their enforceability.

For purposes hereof, I will be considering the purpose of the provision, the rules of statutory interpretation in relation thereto and my recommendation in relation to a reformulation of the contents thereof.

2. THE PURPOSE OF THE SECTION

According to the Discussion Paper[1], the Guiding principles were deemed to be imperative for the formulation of both the substantive and procedural law with regard to sexual offences. The Law Commission therefore proposes that the principles be included as a substantive clause in the Act.

A reading of the principles indicate that there has been a recognition on the part of the Law Commission in relation to the secondary victimisation of rape survivors which in turn discourages the reporting of sexual offences. It is also based on the constitutional frame-work of equality and non-discrimination with a specific focus on victim empowerment and victim rights. Yet again the purpose would be to encourage reporting and to dispel the notion as it exists in communities that the law only protects sexual offenders as opposed to victims of violent crimes.

Bearing in mind the aforegoing purpose one should now consider whether the "Guiding Principles" in fact give effect to this laudable purpose and the extent to which it does.

3. RULES OF STATUTORY INTERPRETATION

A statute as a structurally distinctive entity interacts with its environment: text and context can in other words never be divorced. Thus, a statute can only be fully and properly interpreted once the contextual structure has been duly recognised.[2]

It should further be borne in mind that any specific enactment is operative alongside and in co-operation with other enactment's, which constitute the whole body of South African statutory law. The Constitution[3] serves as the foundation or "umbrella" of all statutes. This means that the Sexual Offences Act will operate alongside other legislation and will be bound to by the principles enunciated in the Bill of Rights.[4]

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[1] Executive Summary, page 2
[2] Du Plessis L M: "The Interpretation of Statutes"
[3] Act 108 of 1996
[4] The Preamble of the Final Constitution states that the Constitution will be the "supreme law of the land" and any act which is inconsistent with its principles will be of no force or effect.

Logically, therefore the principles in the Constitution do not need to be repeated in every piece of legislation enacted since the coming into effect of the Constitution, unless the Act itself expands the Constitutional right (an example here would be the Consent to Termination of Pregnancy Act, which expands on the Constitutional right in relation to reproductive choice).

The fact that the principles set out in other legislation and the Constitution need not be repeated does not however detract from the fact that the Sexual Offences Act will have its very own unique:

- purpose;
- historical context; and
- objective.

In turn, these will be subject to the Constitutional principles of equality and non-discrimination. In any event, one of the rules of interpretation is to the effect that statutes are presumed not to sanction discrimination or inequality.

Notwithstanding the aforegoing, an Act does need to set out its purpose and objects and often affirms constitutional principles in doing so. This is usually set forth in the Preamble and long title of the Act. It is trite law that the preamble to an Act may be consulted in order to shed light on the meaning of the Act and its purpose. It is considered to be an essential interpretation tool. It is often referred to as the "declaration of intent" clause, setting out the historical context of the Act and its aims and objectives.[5]

Based on the aforegoing it is clear that placing positive duties on the state or any other body would not appropriately be placed in the Preamble but rather as a substantive clause in the body of the Act. This in turn has an effect on the enforceability of the provision and the sanction to be applied in relation thereto. On

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[5] The Domestic Violence Act 116 of 1998 is an example of such a contexualised Preamble.

the other hand an affirmation of Constitutional principles and historical contexts would be better placed in the Preamble of the Act.

Some acts have two separate sections namely, the “Preamble” and a separate section dealing with the “Objects of the Act.” Both these sections do not place any positive duty on the state, and are generally not enforceable but rather seen as the guiding principles for the interpretation of the entire Act.

4. THE LAW COMMISSION’S PROPOSAL

In the Discussion Paper[6] the Commission deals with the various options in order to deal with the insertion of “Guiding Principles.”

Option 1: Incorporate into the Preamble

The advantage of this approach is that it places the Act into context. The disadvantage is that it has a minimal legal effect. For this reason the Commission does not adopt this option.

Option 2: Include as substantive provision

The advantage of this provision is that non-compliance will lead to enforceable criminal sanctions and will place positive duties on the state. However, the disadvantage here relates to a repetition of Constitutional principles and the enforceability thereof.

Option 3: Memorandum / Code of Conduct to embody principles

The advantage of a Memorandum/Code of Conduct would be that it would be in line with the multi-disciplinary approach and could be framed as instructions. Non-compliance would then entail serious consequences.

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[6] Volume 1 Page 17, para 2.4.3

<u>Option 4: Charter for the Management of Sexual Offences</u>

This option is also considered as a means of entrenching victim's rights.

The Commission concludes that the most viable option would be Option 2 and as a result the "Guiding Principles" had been included in its current form as Clause 2 of the Act.

5. RECOMMENDATION

The writer disagrees with the conclusion reached by the Law Commission.

Bearing in mind the advantages and the disadvantages and the rules of statutory interpretation it is recommended that a *via media* approach be adopted in relation to Options 1-3.

It is recommended that considering a *via media* would be the most viable way of dealing with the "Guiding Principles." This would mean that where principles are merely an affirmation of the Constitutional right to equality these should form part of the Preamble. Where it is envisaged that a positive duty should be imposed on the state this should form part of the body of the Act and should <u>**not**</u> be termed "Guiding Principles". The terminology is problematic, as, in its current form, it does not place any positive duty on the state. Instead it is framed as "feel-good" provisions with no clear duty being imposed. The finer details in relation to the positive duties should be encapsulated 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. 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.

These recommendations are not to be interpreted as an exclusion of the principles set forth by the Commission. It is agreed that a framework should exist and the underlying idea is one which is important. However, same needs to be reformulated.

In this regard Clause 2(a)-(d) should not form part of the body of the Act but should instead be part of the Preamble as it merely affirms the Constitutional imperative and re-states the current legal position. This is covered by the first and fifth paragraph of the Preamble and if necessary these paragraphs of the Preamble may be expanded upon.

However, there has been a new insertion in Clause 2(a) in relation to non-discrimination on the basis of "developmental level, physical or mental disability". These are not included in the Bill of Rights and it is agreed that this needs to be taken into consideration. However, same should be dealt with by including a definition of "age" in the "Definition" section which deals with developmental, chronological and mental age and a sub-clause should prohibit discrimination on the basis of age.[7]

Clause 2(e)-(f) should be incorporated as National Instructions for dealing with Sexual Offenders as part of the multi-disciplinary approach. Importantly they should not be framed as "guidelines" but as instructions with penalties imposed for non-compliance. A section should appear in the main body of the Act imposing a duty on the state, as per section 18, of the Domestic Violence Act.

Clause 2(1)(g) should also form part of the Preamble as it is simply an affirmation of the Constitutional imperative. However, the first paragraph of the Preamble may have to be amended to include "privacy and dignity." As it currently stands the Preamble deals with equality and freedom from violence. The other rights should be included and thus the first paragraph of the Preamble should be amended to read as follows:

"WHEREAS the Bill of Rights in the Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996) enshrines the rights of all people of the Republic of South Africa including the right to equality, <u>privacy, dignity</u>[8] and the right to freedom and security of the person which incorporates the right to be free from all forms of violence from either public or private sources;"

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[7] This may prove to be unnecessary as age is a prohibited ground in the Constitution.

[8] My insertion

Clause 2(h) should be incorporated into Clause 22 of the Draft Bill by adding it as a further sub-section to Clause 22. It should also form part of and be taken into account in the Sentencing Framework.

Clause 2(i) is already incorporated in the Preamble and need not be included in the main body of the Act.

Clause 2(j) and (k) needs to be considered in relation to the Instructions and Directives to be issued and possibly it could be incorporated into the other provisions dealing with child witnesses.

Clause 2(l)(m) and (n) should also be part of the sentencing framework.

Clause 2(o) and (p) should form part of the positive duties to be placed on the State and also be incorporated into a new Clause 2 to read as follows:

2. Interpretation and Application of the Act

1) **In interpreting and applying this Act due regard shall at all times be had to the rights of victims of sexual offences with specific regard to:**
    a) **victim empowerment and victim involvement in decisions affecting them;**
    b) **the vulnerability of both children and adult victims of sexual offences;**
    c) **the avoidance of systemic secondary victimisation of victims.**

2) **In order to give effect to this Act the State shall be obliged to put in place mechanisms to ensure that binding inter-sectoral protocols be followed.**

3) **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.**

4) **In order to give effect to this Act the National Commissioner of South African Police Service shall be obliged to issue national instructions to the police relating to the treatment and management of the victims of sexual offences.**

5) **The State shall ensure that all professionals and role-players involved in the management of sexual offences are properly and continuously trained after going through a proper selection and screening process.**

Insofar as clause 2(q) is concerned it is recommended that this be inserted after sub-clause (7) of Clause 3, which deals with the definition of rape. Subsection (7) provides that marriage shall not be a defence to a charge of rape. Likewise a subsection should be inserted prohibiting the use of "cultural practices" as a justification ground.

Furthermore, in the event of "sound medical practices" being retained in the definition (it is submitted that it should not be retained) something along the lines of the fact that certain cultural and traditional practices, which cause and perpetuate violence against women and children are not to be deemed to be "sound medical practices."

7. ADDITIONAL COMMENTS IN RELATION TO THE PREAMBLE

Paragraph four should be amended to include women as a particularly vulnerable group.

After paragraph 5 an additional paragraph should be inserted to read:

AND WHEREAS the South African common-law and statutory law has failed to ensure that all complainants are afforded access to justice and treated with respect and dignity;

In relation to the final paragraph dealing with the purpose this should be amended to read as follows:

IT IS THE PURPOSE of this Act to afford complainants of sexual offences the maximum and least traumatising protection that the law can provide, to introduce measures which seek to enable the relevant organs of state to give full effect to the provisions of this Act, to place positive duties on the state[9] in relation hereto and to fortify the state's commitment to eradicate the pandemic of sexual offences committed in the Republic or elsewhere by its citizens.

8. CONCLUSION:

The use of "Guiding Principles" on the part of the Law Commission is to be commended as being laudable. However, upon closer scrutiny it is readily apparent that the mischief it aims to remedy is clearly not being remedied.

A reformulation as suggested would clarify the duties and enforceability of the rights contained therein and hopefully contribute in a meaningful way to the accessibility of justice.

The following section has been prepared by Jacqui Gallinetti.

1. GUIDING PRINCIPLES

The Project Committee has made numerous recommendations for guiding principles to be included in the proposed legislation. We support the inclusion of these principles as they provide a frame of reference from which the legislation then proceeds to provide substance, however propose that they are restated as objectives or positive duties on the relevant roleplayers. We wish to make the following specific submissions:

[9] My insertion

(a) Section 2 (o) of the Bill: " In order to avoid systemic secondary victimisation of victims of sexual offences, binding inter-sectoral protocols following an inter-disciplinary approach must be followed".

There are a number of services that a child who has been sexually abused comes into contact with. These include government and civil society services. As far as State involvement is concerned, a child will be exposed to SAPS, health authorities, social welfare officials and department of justice officials. Further to this a number of NGOs offer counseling and support services within and outside of the formal justice system.

The effect of this is a range of services provided to sexually abused children, however it appears to be common cause that there is little, if any, co-ordination of these services. There is no systemic handling of a particular child's case from initial reporting to the finalisation of the case.

There are a few protocols in place that attempt to provide some framework within which a child should be treated once a case has been reported, however these are not binding or consistently applied.

The Project Committee notes the lack of co-ordinated approach and makes extensive recommendations for a strategy on multi-disciplinary interventions for sexual offences. The Commission's recommendations include the establishment of a memorandum of good practice that takes the form of an inter-sectoral binding agreement. The recommendations go further and discuss the establishment of case-management techniques, appropriate appointment and training of SAPS officials dealing with sex abuse victims, improving the relationship and co-operation between SAPS and medico-legal services and the roll-out of specialised sexual offence courts. The Children's Rights Project supports these recommendations.

However, we submit that while the stated purpose of this guiding principle is to "avoid systemic secondary victimistion of victims of sexual abuse", this does not go far enough and actually state the implied purpose, namely, of ensuring the more efficient and co-ordinated prosecution of sexual offences. The lack of a multi-disciplinary

approach makes the prosecution of sex offences that much more difficult and an inter-sectoral approach will support a more efficient criminal justice process. If the guiding principles are included in the proposed legislation in order to guide those persons involved in the management of sexual offences, then such a purpose should be expressly stated in such principles. We therefore propose that section 2(o) read as follows:

"In order to avoid systemic secondary victimisation of victims of sexual offences and to support the efficient prosecution of sexual offences, binding inter-sectoral protocols following an inter-disciplinary approach must be followed".

Furthermore, the Project Committee does not propose that an inter-sectoral agreement itself be embodied in legislation as this could lead to non-flexibility and rigidity, but rather that the legislation only provide for the development of such a framework for agreement[10]. However, it is our opinion that there is a strong need to hold all officials working with child victims accountable to such an agreement. We submit that past practice with protocols has been highly unsatisfactory – as highlighted by the Project Committee itself[11] - and the most effective way of ensuring compliance with a particular set of rules or guidelines is to make same binding on the parties to the agreement.

Furthermore if this agreement is to serve the purpose of preventing secondary victimisation and ensuring greater efficacy in the prosecution of crimes, the necessity of being able to hold the parties accountable to deliver in terms of the agreement is of paramount importance otherwise the risk is run that this very integral objective is rendered null and void.

So we propose that once an agreement or memorandum of good practice has been developed, it be incorporated in secondary legislation (the regulations) and can be

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[10] p. 3 of the Executive Summary of the Sexual Offences Discussion Paper and paragraph 2.5.9 of the discussion paper.

[11] Paragraph 2.5.8 of the discussion paper

changed from time to time when necessary by the relevant Minister. This would provide for both flexibility and accountability.

(b) Co-operation of role-players

Although it may be implicit from section 2(o) of the proposed legislation, we are of the opinion it would be important to include a clause that encourages co-operation between all government departments and other organisations and agencies involved in the management of sexual offences. It is all very well to have an agreement forcing a multi-disciplinary approach to sexual offences but the willingness of the parties to co-operate must also inform this process. Our justice system is very fragmented and the various departments basically operate in a vacuum separate from one another. We submit that it is common cause that there is very little communication or engagement between the various departments in the management of a sexual offence and that this must necessarily change for a new system of management to work. To state at the outset that co-operation between all role-players is encouraged will set the tone for that approach to be adopted.

We therefore propose an additional clause (or sub clause to section 2(o)) to read:

" Co-operation between all government departments and other organisations and agencies must be promoted and encouraged in the management of sexual offence matters".

We further propose that this clause also be placed in regulations in order to ensure co-operation and accountability among departments.