

CHAPTER TWO

POSITIVE DUTIES OF STATE OFFICIALS TOWARDS VICTIMS OF SEXUAL ASSAULT

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1. INTRODUCTION

It has now become accepted in South African law that the 1996 Constitution, read with international human rights law, imposes certain duties on the South African state to address violence against women, including sexual assault.¹ These duties apply to the state in the general sense (for example, the obligations to enact appropriate legislation to address sexual assault and to allocate sufficient state resources to ensure proper implementation of such legislation).² In addition, the recognition of these duties of necessity also entails certain obligations for individual state officials. This was again confirmed by the Constitutional Court (per Ackermann and Goldstone JJ) in the *Carmichele*³ matter, where the court found positive obligations on members of the police both in the interim Constitution⁴ and the Police Act, and made the following statement:

'In addressing these obligations in relation to dignity and the freedom and security of the person, few things can be more important to women than freedom from the threat of sexual violence.'⁵

¹ See *S v Baloyi* 2000 1 SACR 81 (CC).

² Pithey et al *Legal Aspects of Rape* (1999) at 156.

³ *Carmichele v Minister of Safety and Security* [2001] JOL 8613 (CC).

⁴ Constitution of the Republic of South Africa Act 200 of 1993.

⁵ At Par 62.

2. PROPOSALS BY LAW COMMISSION:

In Chapter 3 of the Discussion Paper, the Commission discusses the role of different state agencies or service providers, and analyse the documents that currently provide guidance to these agencies on the nature of their duties towards victims of sexual offences.⁶ While the Commission recommends the amplification and strengthening of existing instructions, directives and guidelines, it stops short of a consideration of the inclusion of these duties in the proposed legislation.

3. DISCUSSION:

Why should positive state duties be set out in legislation?

We have argued consistently 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).⁷ This argument is based on the following considerations:

- One of the major concerns regarding the existing guideline documents is that many state officials are simply unaware of the existence of these documents, let alone of the nature of their contents.⁸ The inclusion of state duties in national legislation may address this concern.
- Secondly, the inclusion of duties in legislation also serves the important function of informing victims and service providing NGO’s of what is expected from state officials. Policy documents setting out ‘directives’ or ‘guidelines’, such as the SAPS National Instructions, are generally not accessible to members of the public. While it may be possible for a victim to eventually gain access to such documents by invoking the Promotion of Access to Information Act, this may be a laborious and time-consuming endeavour. The cornerstone of claiming the constitutional protection of one’s rights is an awareness of those rights, and the exposition of the nature and extent of state duties in sexual offence legislation will go a long way towards informing victims of what their rights are.

⁶ . See Discussion Paper at 34–81.

⁷ . Pithey et al at 162.

⁸ . See e.g. Discussion Paper at Par 3.2.6.1, 3.3.2.17.

- A further concern about guideline documents is the prevailing uncertainty of the legal status of these documents,⁹ which also impacts on the question of failure to comply with positive duties.¹⁰
- On a more fundamental level, it should also be noted that statutory duties carry the force of legislative injunction. The response of state officials to sexual offence victims is unfortunately often still dismissive and disrespectful. The enumeration of statutory duties would serve to convey that the legislature takes sexual offences seriously, and expects state officials to do so as well.

Failure to comply with statutory duties

The counterpoint of the recognition of positive duties is the question of what the sanction for failure to comply with these duties should be. Two options may be considered:¹¹

- Imposition of criminal liability for individual officials who fail to comply with prescribed duties; or
- Institution of internal disciplinary proceedings against individual officials.

In the document entitled *The Legal Aspects of Rape*, we argued for the imposition of criminal liability for failure to comply with prescribed duties. We wish to again draw the Commission's attention to the arguments set out there.¹²

Lessons from the Domestic Violence Act

The Domestic Violence Act 116 of 1998 sets a precedent for the imposition of statutory duties on state officials. Due to the relatively recent commencement of this Act,¹³ the impact of this formulation is still a matter for ongoing evaluation. However, an important lesson to be

⁹ . The scope of this submission does not permit an extensive examination of the legal nature of such policy guideline documents.

¹⁰ . This question is discussed below.

¹¹ . This submission does not address the possibility of a claim against the state based on delict or on constitutional grounds. We are of the opinion that whatever the form of sanctions imposed by the state on its officials for failure to comply with their duties, the right of the victim to seek redress through civil law exists independently.

¹² . Please see Pithey et al at 163– 66.

¹³ . The Act came into operation on 15 December 1999.

drawn from a recent study on the implementation of the Act is the fact that it is not sufficient for the legislature to enumerate the duties of state officials and to set out the sanction for non-compliance.¹⁴ Statutory duties should be reinforced by the allocation of sufficient resources and support to enable officials to comply with their duties.

'Both police and court personnel expressed a sense of being expected to fulfil the requirements of the Act without the necessary guidance, support or resources to do so. Not only does this set people up for failure, but it creates an environment which becomes hostile to work in, due to unmet expectations both on the part of law enforcement agents and helpless complainants, feelings of disempowerment, and feelings of being implicated in a system that is not performing. It seems obvious to note that an environment such as this is not conducive towards ensuring that law enforcement agents are functional, enthusiastic and caring in carrying out their assigned duties under the Act.'¹⁵

¹⁴ . Parenzee et al *Monitoring the Implementation of the Domestic Violence Act: First Report* (2001) at 86, 114.

¹⁵ . Parenzee et al at 86.