
GENERAL NOTICES

NOTICE 1539 OF 2008

DEPARTMENT OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT

EXHUMATION POLICY: CASES OF MISSING PERSONS REPORTED TO THE TRUTH AND RECONCILIATION COMMISSION (TRC)

1. INVITATION TO SUBMIT COMMENTS ON PROPOSED EXHUMATION POLICY ON CASES OF MISSING PERSONS REPORTED TO THE TRC

1.1 Interested parties are hereby invited to submit to the Director-General: Justice and Constitutional Development in writing on or before Friday 20 February 2009, comments on the proposed Exhumation Policy, set out in the Annexure hereto. Comments must be marked for the attention of Dr MJ Seekoe, Chief Director: TRC Unit; and –

- (a) if forwarded by post, be addressed to –
The Director-General: Justice and Constitutional Development
Private Bag X81
PRETORIA
0001
- (b) if delivered by hand, be delivered at –
Momentum Building, Room 1439, East Tower
c/o Pretorius Street and Prinsloo Street
PRETORIA
- (c) if faxed, be faxed to 012 – 357 8570.

(d) if sent by e-mail, be sent to vijacobs@justice.gov.za
mseekoe@justice.gov.za.

1.2 This invitation and the attached Exhumation Policy will also be published in the *Gazette* in isiZulu and Sesotho towards the end of January 2009.

2. BACKGROUND INFORMATION

The following background information is hereby furnished in order to assist interested parties to comment on the proposed Exhumation Policy.

The Promotion of National Unity and Reconciliation Act, 1995 (Act No. 34 of 1995), mandated the TRC to make recommendations to the President. The TRC recommended, among others, the establishment of a task team to investigate the nearly 500 cases of missing persons that were reported to the TRC, but remained unsolved. The President endorsed this recommendation in April 2003, upon tabling the TRC's Final Report in Parliament.

A Missing Persons Task Team was established in the Priority Crimes Litigation Unit (PCLU) in the National Prosecuting Authority (NPA) in 2004. The Task Team has since been conducting investigations into cases of missing persons who disappeared in political circumstances between 1 March 1960 and 10 May 1994. To date 54 exhumations have taken place.

The need was identified to develop a policy to ensure that the exhumation process in respect of the cases of missing persons reported to the TRC, is conducted in a coordinated, regulated manner within the framework of the service providers' mandates and the relevant legislation.

DR MJ SEEKOE
CHIEF DIRECTOR: TRC UNIT
DEPARTMENT OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT

ANNEXURE**EXHUMATION POLICY:
CASES OF MISSING PERSONS REPORTED TO THE
TRUTH AND RECONCILIATION COMMISSION****1. GLOSSARY**

cases of missing persons means the cases of persons reported to the Truth and Reconciliation Commission (TRC) as disappeared or missing;

DNA means the deoxyribonucleic acid or deoxyribose nucleic acid that carries the genetic information in a cell and which is a widely used investigative tool in the field of forensics;

forensic anthropology means the application of the science of physical anthropology to the legal process and includes the identification of skeletal, badly decomposed, or otherwise unidentified human remains;

forensic archaeology means the application of archaeological techniques and approaches in the legal field, particularly the enforcement of criminal law;

Freedom Park Trust means the body charged with the development of Freedom Park, a National Legacy Project legislated by the National Heritage Resources Act, 1999 (Act No. 25 of 1999), with the vision to articulate an overall, multi-faceted heritage, which will be brought together to represent, in a visible, experiential and interactive manner, South Africa's developing national consciousness and identity;

National Director of Public Prosecutions (NDPP) means the National Director of Public Prosecutions appointed in terms of section 179(1)(a) of the Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996) (the Constitution);

National Intelligence Agency (NIA) means the National Intelligence Agency, the establishment of which is regulated by the Intelligence Services Act, 2002 (Act No. 65 of 2002);

National Prosecuting Authority (NPA) means the National Prosecuting Authority established in terms of section 179 of the Constitution and regulated by the National Prosecuting Authority Act, 1998 (Act No. 32 of 1998);

National Treasury means the National Treasury established and regulated by the Public Finance Management Act, 1999 (Act No. 1 of 1999) (as amended);

Priority Crimes Litigation Unit (PCLU) means the Priority Crimes Litigation Unit established in the Office of the NDPP and headed by a Special Director in terms of Proclamation No. 46 of 23 May 2003 in *Government Gazette* No. 24876;

South African Heritage Resources Agency (SAHRA) means the organisation established by section 11 of the National Heritage Resources Act, 1999 (Act No. 25 of 1999) to coordinate the identification and management of the national heritage resources;

South African National Defence Force (SANDF) means the single Defence Force that was established by section 224(1) of the Constitution of the Republic of South Africa, 1993 (Act No. 200 of 1993) and regulated by the Defence Act, 2002 (Act No. 42 of 2002);

South African Police Service (SAPS) means the single Police Service established as provided for in section 199(1) of the Constitution. The Service is regulated by the South African Police Service Act, 1995 (Act No. 68 of 1995);

Truth and Reconciliation Commission (TRC) means the Commission that was established in terms of the Promotion of National Unity and Reconciliation Act, 1995 (Act No. 34 of 1995), with the specific purpose of promoting national unity and reconciliation in a spirit of understanding, which goes beyond the conflicts and divisions of the past.

2. PURPOSE

- 2.1 The purpose of this policy is to ensure that the exhumation process in respect of the cases of missing persons reported to the TRC, is conducted in a coordinated, regulated manner within the framework of the service providers' mandates and the relevant legislation.

- 2.2 The absence of proper, clear policy to guide the exhumation process resulted in a number of problems and challenges arising, including:
- (a) Uncertainty surrounding the roles/mandates of the NPA and the SAPS in respect of:
 - (i) managing and directing the investigation into the cases of missing persons and the exhumation of mortal remains; and
 - (ii) the actual conducting of the investigation into the cases of missing persons and the actual exhumation of mortal remains.
 - (b) A lack of clarity surrounding the roles of the various departments/bodies whose services are required at specific phases of the exhumation process.
 - (c) Unclear delegations in respect of financial responsibility regarding specific services.
 - (c) A lack of coordination of the activities of the service providers, resulting in practical and logistical difficulties.
- 2.3 The Minister for Justice and Constitutional Development (the Minister), as political head of the department mandated to monitor the implementation of the TRC recommendations and report to Cabinet and Parliament on an ongoing basis, consequently set in motion a process to develop proper, clear policy to guide the process.
- 2.4 Under the guidance of the Minister, a series of consultative meetings were held between the DoJ and CD and the relevant role-players. This policy is the result of this process.

3. BACKGROUND

- 3.1 In terms of section 4(f), (g) and (h) of the Promotion of National Unity and Reconciliation Act, 1995 (Act No. 34 of 1995) the TRC was mandated to make recommendations to the President. On 21 March 2003, the TRC handed over to the President the Codicil to its interim report and thereby brought finality to its specific processes. On 15 April 2003, the President tabled the report in the Joint Sitting of Parliament, stating, amongst other things, that the Department of Justice and Constitutional Development (DoJ and CD) will monitor the implementation of all these programmes, and that it will report to Cabinet on an ongoing basis.
- 3.2 The President also stated that the NDPP and relevant departments will be requested to deal with matters relating to people who are unaccounted for, *post mortem* records and policy with regard to the burial of unidentified persons.
- 3.3 On 23 May 2003 a Special Director was appointed by Proclamation to head the PCLU and to manage and direct the investigation and prosecution of crimes against humanity, genocide and war crimes, as contemplated in the Implementation of the Rome Statute of the International Criminal Court Act, 2002 (Act No. 27 of 2002), and serious national and international crimes, which include acts of terrorism and sabotage, high treason, sedition, foreign military crimes committed by mercenaries, or such other priority crimes to be determined by the NDPP.
- 3.4 In terms of the Prosecution Policy (as amended) of the NPA, the PCLU shall be responsible for overseeing investigations and instituting prosecutions in respect of crimes arising from conflicts of the past. The PCLU shall be assisted in the execution of its duties by a senior designated official of the following state departments:

- (a) The NIA
- (b) The Detective Division of the SAPS
- (c) The DoJ and CD

3.5 The PCLU commenced its work in respect of the cases of missing persons in late 2004. Upon locating the burial sites and obtaining the necessary permits from the SAHRA, the exhumations of the remains were conducted. Thereafter forensic testing, including DNA-testing, was conducted by local and international forensic anthropologists/archaeologists to identify the remains. Following this process the mortal remains were handed over to the families for reburial.

4. **OBJECTIVES OF THE POLICY**

The objectives of the policy are to -

- (a) provide an all-encompassing, inclusive framework within which the exhumation process must take place;
- (b) identify service providers in the exhumation process and clarify duties to ensure that the service providers operate within the ambit of their particular mandates;
- (c) coordinate the activities and responsibilities of all service providers;
- (d) provide for the establishment of an Exhumation Committee, comprising the key service providers, to coordinate the exhumation process;
- (e) ensure that sound heritage principles are promoted, through various forms of memorialisation of exhumed mortal remains;
- (f) ensure that the dignity of mortal remains is preserved throughout the exhumation process, in line with international best practice guidelines.
- (g) ensure that the families involved are interacted with throughout the exhumation process;

- (h) facilitate healing and closure for the families involved through appropriate handing over of the remains and any other assistance identified by the Exhumation Committee;
- (i) ensure that the exhumation process, including identification and actual exhumation, is conducted in accordance with international best practices and all relevant legislation; and
- (j) regulate expenditure in respect of the exhumation process.

5. SCOPE OF APPLICATION

5.1 The policy covers the exhumation process in respect of the remains of the disappeared and missing persons whose cases were reported to the TRC but remained unsolved.

5.2 The TRC divided these cases of missing persons into five categories. For purposes of this policy, the following four are applicable:

- (a) Enforced disappearances.
- (b) Missing in exile.
- (c) Missing during periods of unrest.
- (d) Cases of indeterminate cause.

6. THE EXHUMATION PROCESS

The exhumation process comprises the following main phases:

- (a) Investigation into the circumstances surrounding the disappearance of the missing person.
- (b) Location of the burial site.
- (c) Pre-digging preparations.
- (d) Conducting of the actual exhumation.
- (e) Identification of the mortal remains through forensic testing.
- (f) Handing over of the mortal remains to the families concerned.

- (g) Reburial of the mortal remains by the families.
- (h) Memorialisation of the old and new burial sites and ongoing conservation.
- (i) Referral of cases to the relevant prosecution committee to make decisions regarding prosecution.

7. IDENTIFIED SERVICE PROVIDERS

7.1 The service providers identified and recorded in this policy do not constitute a closed list, as the services of other service providers shall be requested if and when necessary.

7.2 The Exhumation Committee

7.2.1 The Exhumation Committee shall support and assist the *ad hoc* service providers in the carrying out of their activities.

7.2.2 The Exhumation Committee (the Committee) shall comprise the following key service providers:

- (a) The DoJ and CD.
- (b) The PCLU of the NPA.
- (c) The SAPS.
- (d) The Department of Arts and Culture.
- (e) The SAHRA.
- (f) The Freedom Park Trust.

7.2.3 The Committee shall be chaired by the DoJ and CD, as the department mandated to monitor the implementation of the TRC recommendations and report to Cabinet and Parliament on an ongoing basis.

7.2.4 The duties of the Committee are to -

- (a) coordinate, monitor and support activities carried out in respect of the exhumation process;
- (b) convene regular meetings between the Committee members, as well as between the Committee and the *ad hoc* service providers, with a view -
 - (i) to facilitate dialogue between the various service providers;
 - (ii) to provide the platform for problems to be discussed and solved.
- (c) intervene where necessary to ensure procedures and roles identified are adhered to;
- (d) identify problem areas and recommend solutions timely to ensure smooth running of the process;
- (e) monitor the implementation of said solutions;
- (f) make decisions in respect of matters in dispute;
- (g) receive progress reports from service providers;
- (h) compile submissions to the Minister for Justice and Constitutional Development (the Minister) with a view to obtain direction in respect of sensitive/problematic cases;
- (i) report to the Minister on an ongoing basis regarding progress on implementation of the policy; and
- (j) report to the Minister on his or her request, on specific matters related to the exhumation process.

7.3 **The *ad hoc* service providers**

7.3.1 The *ad hoc* service providers shall render the necessary services at the relevant phases of the exhumation process.

7.3.2 The *ad hoc* service providers are -

- (a) The Department of Social Development.
- (b) The Department of Home Affairs.
- (c) The Department of Health.
- (d) The National Treasury.
- (e) The NIA.
- (f) The Department of Foreign Affairs (in cases where burial sites of missing persons are in a foreign country).
- (g) The SANDF.

8. AREAS OF RESPONSIBILITY OF THE SERVICE PROVIDERS

8.1 The relationship between the service providers should be one of efficient and close cooperation, with mutual respect for the distinct functions and operational independence of each profession.

8.2 Each service provider shall present a progress report in respect of its areas of responsibility to the Chairperson of the Exhumation Committee, on a time schedule as determined by the Committee.

8.3 The **DoJ and CD** shall:-

- (a) ensure that reparations in the form of a once-off individual grant are paid from the President's Fund to the families, where applicable;
- (b) liaise with the families of the missing persons;
- (c) monitor the progress on the implementation of the policy and report to the Minister; and
- (d) report annually through the Minister to Cabinet and Parliament on the implementation of the TRC recommendations.

8.4 The **PCLU of the NPA** shall manage and direct the investigation into the cases of missing persons and institute prosecutions, where appropriate in terms of its prosecution policy.

8.5 **The SAPS** shall -

- (a) under the management and direction of the PCLU -
 - (i) conduct investigations into the cases of missing persons;
 - (ii) conduct the exhumations through the appropriate forensic specialists; and
 - (iii) facilitate the forensic testing and identification of the mortal remains by the appropriate forensic specialists;
- (b) following identification and the conclusion of further forensic testing for crime investigation purposes, prepare the mortal remains for transfer to the Department of Arts and Culture;
- (c) liaise with the Department of Arts and Culture to facilitate the handing over of the remains to the families for reburial;
- (d) facilitate the issuing of death certificates by the Department of Home Affairs;
- (e) in the instance that investigations reveal the location of burial sites of missing persons in a foreign country, follow the mandated course of action in conjunction with the NPA, the Department of Foreign Affairs and SAHRA; and
- (f) ensure that all involved in the exhumation process respect the relevant legislation, professional ethics and best international practices that are applicable to the management, exhumation and identification of mortal remains.

8.6 The **Department of Arts and Culture** shall organise and conduct the handover of the mortal remains to the families, which includes facilitating the provision of associated undertaker services.

8.7 The **SAHRA** shall -

- (a) receive and process applications for exhumations;
- (b) issue permits for exhumations in terms of their mandate;
- (c) inspect the exhumed site with a view to memorialisation, in consultation with the Freedom Park Trust;
- (d) consider providing and erecting a memorial marker on both the old and new burial sites in consultation with the Freedom Park Trust;
- (e) conserve the burial site(s); and
- (f) in instances of exhumations of missing persons in a foreign country, the SAHRA shall follow the mandated course of action in conjunction with the NPA, the Department of Foreign Affairs and the SAPS.

8.8 The **Freedom Park Trust** shall -

- (a) inspect the exhumed site with a view to memorialisation, in consultation with the SAHRA;
- (b) provide an appropriate venue for the handover of remains to bereaved families;
- (c) facilitate the handover ceremony in a dignified manner;
- (d) consider providing and erecting a memorial marker on both the old and new burial sites in consultation with the SAHRA;
- (e) ensure memorialisation of the missing person in keeping with the mandate of the Freedom Park Trust, where applicable;
- (f) assist the Department of Social Development in providing grief or trauma counseling throughout the exhumation process; and
- (g) make recommendations with regard to the conservation of artifacts/objects found during the exhumation process.

8.9 The **Department of Social Development** shall -

- (a) provide grief or trauma counseling services throughout the exhumation process, to the bereaved family of a missing person whose remains are to be exhumed;
- (b) provide any other social benefits appropriate under the circumstances; and
- (c) provide support and post-trauma counseling services to the bereaved family to ensure a complete healing process.

8.10 The **Department of Home Affairs** shall –

- (a) assist during the investigation process in respect of, e.g. the tracing of any movements of persons and the provision of ID photographs; and
- (b) issue death certificates in respect of the exhumed mortal remains upon positive identification thereof.

8.11 The **Department of Health** shall -

- (a) provide an environmental health practitioner to attend the exhumation, if necessary; and
- (b) provide the necessary services and facilities in respect of exhumed mortal remains, if necessary.

8.12 The **National Treasury** shall receive and process the applications for Special Pension benefits by the surviving spouse or, if there is no surviving spouse, the surviving dependant of the missing person; on condition that these benefits are only payable if a person qualifies in terms of the Special Pensions Act, 1996 (Act No. 69 of 1996).

8.13 The **NIA** shall provide access to the PCLU and the SAPS to any records that may assist in the investigation into the cases of missing persons.

8.14 The **Department of Foreign Affairs** shall make the necessary consular intervention in cases where burial sites are located outside South Africa's borders.

8.15 The **SANDF** shall provide the necessary assistance and services in relevant cases, i.e. where a military burial is warranted.

9. **FUNDING**

All activities or duties shall be funded from the relevant service providers' budgets.