



UNIVERSITEIT VAN PRETORIA
UNIVERSITY OF PRETORIA
YUNIBESITHI YA PRETORIA

The National Register for Sexual Offenders: The Solution to
Protecting Children in South Africa?

By

Zubaida Jooma

Submitted in partial fulfillment of the requirements
for the degree

LLM (Child law)

In the faculty of law

University of Pretoria

Supervisor: Dr AM Skelton

December 2010

ACKNOWLEDGEMENTS

I would like to thank the following people for their endless encouragement and support during the writing of this dissertation.

Firstly my supervisor Dr Ann Skelton, for her patience, guidance and advice throughout the writing of this dissertation.

Secondly to Shirely Gilmore, Liana Viljoen and Marie Theron of the Oliver Tambo law Library, University of Pretoria, for their assistance in research and providing me with the relevant source material in relation to my topic.

Lastly I would like to thank my friends and family who supported, encouraged and assisted with the editing of the dissertation.

THANK YOU AND GOD BLESS!

DECLARATION

I the undersigned,

Zubaida Jooma

Do hereby declare that the mini-dissertation, which I hereby submit for the degree of LLM (Child Law) at the University of Pretoria, is my own work and has not been submitted by me for a degree at another university. Where secondary material is used, this has been carefully acknowledged and referenced in accordance with the university requirements. I am aware of the university policy and implications regarding plagiarism.

Signed:.....

Date:.....

SUMMARY

On the 16 of June 2009 the South African government put into force the National Register for Sexual Offenders in an attempt to alleviate the problem of sexual crime. The aim of this dissertation was thus, to engage in a comparative study on how the National Register for Sexual Offenders will operate in South Africa compared to a similarly implemented register in the UK, with specific references being made to the US. The dissertation also sought to ask the question of whether the implementation of the register could be the solution to protecting children in South Africa.

After, an analysis into sexual offender registers abroad, the findings revealed that registers are not proactive, a crime must have already occurred and an offender must be listed on the register, before the register can be of any preventative value. Furthermore, they are expensive to maintain they are punitive and impede on any form of rehabilitation or reintegration of offenders into society.

As to whether the register could make South African communities safer, further research showed that the conviction rate of child sex abuse is very low as only one in nine children ever report such abuse and only 4% of these cases will result in conviction. Therefore because the provisions of the register require an offender to be convicted before they are registered, the consequence is that very few sex offenders will be listed on the register. Moreover the provisions of the register are narrow and seek to prevent registered offenders from being employed in positions where they may have access to children. Such an approach fails to recognise that in South Africa the majority of sexual offences involving children occur within the family environment and not at the work place.

The conclusion of the research is that the National Register for Sex Offenders is not the solution to protecting children in South Africa and it was recommended that the South African government should look into a more immediate, long term and preventative solution to curbing sexual crime.

LIST OF ABBREVIATIONS

ACRWC	African Charter on the Rights and Welfare of the Child
CPA	Criminal Procedure Act 51 of 1977
DOJCD	Department of Justice and Constitutional Development
ECHR	European Convention on Human Rights
FCS	Family Violence Child Protection and Sex Offences Unit
ICCPR	International Covenant on Political and Civil Rights
NCPR	National Child Protection Register
NRSO	National Register for Sex Offenders
NSPCC	National Society for the Prevention of Cruelty to Children
RSHO	Risk of Sexual Harm Orders
SA	South Africa
SACE	South African Council of Educators
SADTU	South African Democratic Teachers Union
SALRC	South African Law Reform Commission
SAPS	South African Police Service
SOPO	Sexual Offences Prevention Orders
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UNCRC	United Nations Convention on the Rights of the Child
US	United States
VCCLEA	Violent Crime Control and Enforcement Act of 1994
VISOR	Violent and Sex Offender Register

TABLE OF CONTENTS

CHAPTER 1 INTRODUCTION

1.1	Introduction	1
1.2	Discussion of legislative intention behind the National Register for Sexual Offenders	3
1.3	Content of the National Register for Sexual Offenders	5
1.4	Applicability of the National Register for Sexual Offenders	6

CHAPTER 2 CONCERNS RELATING TO THE REGISTER

2.1	Constitutionality of the National Register for Sexual Offenders	11
2.2	Constitutional Interpretation in terms of section 39(2)	13
2.3	Children on the Sexual Offenders Register	15
2.4	Infrastructural concerns relating to the Register	19

CHAPTER 3 FOREIGN LAW

3.1	History of the Sexual Offenders Register	22
3.2	Content of the UK Sexual Offenders Register	23
3.2.1	Sexual Offences Act (c.42)	24
3.3	UK Sexual Offenders Register in comparison with the SA Sexual Offenders Register	26
3.4	Tracking and monitoring systems in the UK	28

CHAPTER 4 NATIONAL CHILD PROTECTION REGISTER

4.1	Introduction	31
4.2	Contents and applicability of the National Child Protection Register	33
4.2.1	Part A of the Register	33
4.2.2	Part B of the Register	34
4.3	The National Child Protection Register in comparison with the National Register for Sexual Offenders	37



CHAPTER 5 CONCLUSION

5.1	Problem Areas	41
5.2	Recommendations	44
5.3	Conclusion	46

BIBLIOGRAPHY	48
---------------------	----

CHAPTER 1 INTRODUCTION

1.1 Introduction

One of the features of the past decade in South Africa has been the problem of crime.¹ According to the South African Police Services (SAPS) crime statistics for the period 1 April 2008 to 31 March 2009 revealed that sexual offences increased by 10.1 percent.² In addition a docket analysis by SAPS showed that rape and attempted rape are two of the most prominent types of crime committed against children in South Africa.³

While it is evident that the South African government now has to come to grips with finding a solution to sexual crime, it was during the 1990s that the US faced a similar situation.⁴ In a response to the high level of sexual crime being committed against children, the US government started enacting sex offender registration laws to enhance community safety. The concept of registration would require convicted sex offenders to provide valid contact information thus allowing government authorities to keep track of the residence and activities of sex offenders. Furthermore it was envisaged that a sexual offender register would not only assist law enforcement with investigations but would also deter sex offenders from committing new offences.⁵

Today the idea of maintaining a centralised listing of convicted sex offenders has become a common practice worldwide.⁶ However critics argue that research into the effectiveness of offender registries generally indicates that offender registries do not contribute much to child protection and have become known as ‘feel good’ provisions.⁷

¹ Maepa *Beyond retribution: Prospects for restorative justice in South Africa* Pretoria: Institute for Security Studies (2005)15.

² ‘Sexual offences on the rise’ <[http:// www.buanews.gov.za](http://www.buanews.gov.za) (accessed 22 September 2009).

³ Hasselink – Louw ‘Treatment of incarcerated sex offenders in South Africa: An analytical perspective’ 2003 *Acta Criminologica* 158 at 158.

⁴ Yung ‘One of these laws is not like the others: Why the Federal sex offenders registration and Notification Act raises new constitutional questions’ 2009 *Harvard Journal on Legislation* 369 at 370.

⁵ *Ibid.*

⁶ Tewksbury ‘Collateral consequences of sex offender registration’ 2005 *Journal of Contemporary Criminal Justice* 67 at 69.

⁷ ‘Children’s Bill: Hearings 11 October 2005’ <[http:// www.pmg.org.za](http://www.pmg.org.za) (accessed 15 October 2010).

The purpose of this dissertation is to engage in a (comparative study) on how the National Register for Sexual Offenders (NRSO) will operate in South Africa compared with the system of the United Kingdom.⁸ Specific references will be made to the United States where relevant. The decision to engage in a comparative study with the UK can be attributed to the fact that English law has throughout history exerted its influence into South African law, especially through legislation and precedents.⁹ In addition to the above, the concept of sexual offender registration is not new in the UK and has since the late 1990s played a pivotal role in the UK government's aims to curb sexual offending by monitoring and managing previously convicted sex offenders upon their release into society.

Since the NRSO is still a relatively new provision introduced by the Criminal Law (Sexual Offenders and Related Matters) Amendment Act,¹⁰ the study will critically analyse the legislation of the UK so as to establish an arena in which we can learn about how registers operate. Following on this, consideration can be given to whether - and how - the law should be adapted.

The central question to this dissertation is whether the National Register for Sexual Offenders is a comprehensive and effective solution for the protection of child victims of sexual offences in SA. It is made up of a number of subsidiary questions. The subsidiary questions are as follows.

- 1) What are the some of the constitutional impediments facing the implementation of the NRSO?
- 2) Should the names of child sexual offenders be included into the NRSO?
- 3) What are the infrastructural concerns relating to the NRSOs implementation?
- 4) Do sexual offender registers contribute to ensuring community safety?
- 5) Why did the SA government decide to have two separate registers the Child Protection Register and the National Register for Sexual Offenders?

⁸ The National Register for Sex Offenders was established under Chapter 6 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 and will hereafter be referred to as the 'NRSO'.

⁹ Kleyn & Viljoen *Beginners guide for law students* (2002) 36.-South African legislation such as the Insolvency Act 24 of 1936 which is based on the British equivalent. Moreover with regard to precedents the South African courts sometimes applied English doctrines in their judgements, this can be seen particularly in the areas of the law of contract and delict.

¹⁰ Hereafter referred to as the 'Sexual Offences Act'.

In answering the above mentioned questions. The research methodology used in this dissertation comprised of using academic literature on sexual offender registers obtained from the Oliver Tambo Law Library at the University of Pretoria. The source material used included books, journals (with specific reference to West law and Heinonline for international journals), legislation, case law and the internet. Before commencing with the comparative study I will first give a brief history into the origins of the register, the contents thereof and the concerns relating to the register.

1.2 Discussion of legislative intention behind the National Register for Sexual Offenders

In 1997 the South African Law Commission was requested to investigate sexual offences by and against children and to make recommendations to the Minister of Justice for the reform of this particular branch of law.¹¹ A project committee was appointed and an issue paper on sexual offences against children was published for general comment in May 1997. The project committee then prepared a draft discussion paper and draft legislation on the substantive law relating to sexual offences, taking into account the written and oral submissions received in response to the issue paper.¹² However it became clear during the course of the investigation that any proposed changes to the law relating to sexual offences will have far reaching effects on the position not only for children but adults as well. The commission thus decided to expand the scope of the investigation to include sexual offences against adults. The investigation was subsequently renamed ‘sexual offences’.¹³

In December 2002 the SALRC published a report which included a proposed sexual offences Bill and contained a range of progressive recommendations.¹⁴ The report with its draft Bill was handed to the Minister of Justice and Constitutional Development in January 2003. In July 2003, after considering the report, the Minister together with other cabinet members proposed the draft

¹¹The Judicial Matters Amendment Act 55 of 2003 amended the name of the South African Law Commission to the South African Law Reform Commission. Hereafter referred to as the ‘SALRC’.

¹² South African Law Commission Project 107: *Sexual Offences: The substantive law* discussion paper 85 August (1999) 4.

¹³ *Ibid.*

¹⁴ Centre for the Study of Violence and Reconciliation (CSV): *The promulgation of the Criminal Law (Sexual Offences and Related Matters) Amendment Bill Report* October (2007) 8.

Bill to the National Assembly. The Bill was then referred for further consideration by the Justice Portfolio Committee at parliament. Between December 2003 and February 2004 the Justice Portfolio Committee considered changes to the Bill but recessed for national elections.¹⁵ Nothing more was said about the Bill until May 2006 when the draft Bill again appeared before cabinet for approval but was again referred back to the Justice Portfolio Committee. The Bill then lingered with the parliamentary and Department of Justice law advisors before it was passed by the National Assembly on the 22 May 2007.¹⁶

Since the focus of my dissertation will be on the NRSO, attention must be drawn to the fact that the original report and draft Bill which was compiled by the SALRC in December 2002 did not make provision for the inclusion of a sex offenders register. In 2003 the provision of the NRSO was introduced at the behest of Jonny De Lange as chairperson of the South African Parliamentary Portfolio Committee on Justice and Constitutional Development. De Lange wanted to see a black list or sexual offenders register in South Africa and did not agree with the argument proposed by the SALRC that a register created a false sense of security.¹⁷ De Lange then directed the Department of Justice legal drafters to explore the issue of introducing a register. This is how the concept of the NRSO found its way into the Sexual Offences Bill immediately prior to it being passed by the National Assembly.¹⁸ On the 16 of December 2007 certain sections of the Sexual Offences Act were promulgated.¹⁹ The primary aim of the Act would be to help intensify South Africa's efforts to fight sexual crimes against all persons and especially sexual offences being committed against vulnerable groups such as women, children and people who are mentally disabled.²⁰ According to the Department of Justice and Constitutional Development (DOJCD), the Sexual Offences Act is expected to allow for an increased number of reported cases relating to sexual violations; ordinarily an increase in the

¹⁵ CSV (2007) 9.

¹⁶ *Ibid.*

¹⁷ CSV (2007) 16.

¹⁸ *Ibid.*

¹⁹ Section 72 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 provides for the implementation of chapters 1 to 4 and 7, which mainly deal with the creation of statutory sexual offences, special protection measures for children and persons who are mentally disabled, certain transitional arrangements and evidence related matters.

²⁰ Vetten 'New crimes and old procedures: Can the new Sexual Offences Bill deliver on its promises?' 2007 SA *Crime Quarterly* 21 at 22.

number of reported cases will enable prosecutors to effectively prosecute a wider range of sexual offences.²¹

The wording of Article 19(1) of the United Nations Convention on the Rights of the Child (UNCRC) makes it clear that state parties are required to do more than enact laws to protect children from violence and abuse they must ensure a holistic and substantive system is in place to prevent sexual abuse of children.²² As will be indicated in the following chapters, it is uncertain whether a sex offender register can act as a deterrent against sexual offending against children. In any event it may be argued that the Justice Portfolio Committee was indeed trying to ensure they comply with the standards as laid down in the UNCRC and their efforts are apparent through the inclusion of a provision for the creation of a NRSO in chapter 6 of the Act.

1.3 Content of the National Register for Sexual Offenders

The NRSO came into operation on 16 June 2009. In terms of the Sexual Offences Act persons who are convicted of sexual offences against a child or a person who is mentally disabled may not work with, supervise or have access to a child or a person with a mental disability in the course of his/her employment.

The object of the NRSO is firstly, to keep record of all those persons who have been convicted of sexual offences against children or mentally ill persons whether committed before or after the commencement of the chapter and whether the offence was committed in or outside the republic.²³ Secondly, the NRSO has been established in order to inform an employer, licensing authority or relevant authorities dealing with fostering, kinship, care, temporary safe-care, adoption or curatorship applying for a certificate in respect of a particular employee or applicant whether that person's details appear on the NRSO.²⁴ It must be noted that only a limited class of persons as mentioned in section 44 of the Act are allowed to apply for such a certificate. These

²¹ *Ibid*

²² Article 19(1) of the UNCRC states as follows: States parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

²³ Section 41 of Act 32 of 2007.

²⁴ Section 44 of Act 32 of 2007 – An application for a prescribed certificate means a certificate stating whether or not the particulars of a person mentioned in the application are recorded in the register.

include an employer in respect of an employee, a licencing authority in respect of an applicant, an employee in respect of his or her own particulars, a person applying for a licence or approval to manage or operate an entity, business concern or trade in relation to the supervision over or care of children or persons who are mentally disabled, a person applying to become a foster parent, kinship care-giver, temporary safe care-giver or adoptive parent in respect of his or her own particulars or any person whose particulars appear on the register in respect of his or her own particulars.

Prior to the commencement of chapter six, announcements were made by the South African Council of Educators (SACE) that they intended to post names of serial sex offender teachers on their website.²⁵ However the South African democratic teachers union (SADTU) found such a decision to be in violation of teachers' rights to dignity and further that it was aimed at destroying their careers.²⁶ The approach of SADTU was in line with the wording of the Sexual Offences Act, which provides that the register is a completely confidential record to be accessed only by employers in respect of their employees, and employees in respect of their own particulars.²⁷ The Act further states that any person who wilfully discloses or publishes any information to any other person which he or she has acquired as a result of the application for a section 44 certificate is guilty of an offence and is liable on conviction to a fine or to imprisonment for a period not exceeding three years or to both a fine and such imprisonment.²⁸

1.4 Applicability of the National Register for Sexual Offenders

The provisions of chapter six place certain obligations on employers, employees, and persons who conduct licence applications for the operation of any entity, business concern or trade in relation to the supervision over or care of a child or applications for fostering, kinship care, temporary safe care, adoption of children or curatorship.

²⁵ Commencement date of Chapter 6 -16 June 2009.

²⁶ 'Sadtu unhappy with plan to name and shame sex offender teachers' <<http://www.sabcnews.co.za/portal/site/SABCNEWS/menuitem> (accessed 23 April 2009).

²⁷ Section 52 of Act 32 of 2007.

²⁸ See fn 26 above.

In terms of section 45, an **employer** who already has in his or her employment an employee, **may** from the date of establishment of the register apply for a section 44 certificate.²⁹ However where an employer intends employing an employee after the establishment of the register the employer **must** apply for the section 44 certificate.³⁰

An **employer** is obliged to terminate the employment of any employee whose details appear on the register, irrespective of whether the offence was committed during the course of employment or not. An employer is further required to immediately terminate the employment of an employee who fails to disclose a conviction of a sexual offence against him.³¹ An employer who fails to adhere to the obligations placed upon him is guilty of an offence and is liable on conviction to a fine or imprisonment of seven years or to both.³²

An **employee** is merely required to disclose to his employer (if he is already employed) of his conviction, however such disclosure must be done without delay. As to what is considered to be a delay has not been mentioned in the Act. Where an employee applies for employment disclosure of his conviction must be made in the employment application.³³

In the case where a person applies for a licence to manage or operate any entity, business concern or trade in relation to the supervision over or care of a child. The obligations placed on these licence authorities are twofold. Firstly licence authorities may not grant a licence unless they apply for a section 44 certificate to check if the applicants name appears on the register and secondly they have a duty to ensure that all applicants who have a previous conviction of a sexual nature against a child are disclosed.³⁴

Being on the NRSO is not a sentence in itself. The duration of time that a person's name remains on the NRSO is determined by the sentence they receive. The harsher the sentence the longer the

²⁹ Section 45(1) (a) of Act 32 of 2007.

³⁰ Section 45(1) (b) of Act of 32 of 2007.

³¹ Section 45 (b) and (c) of Act 32 of 2007.

³² Section 45(3) of Act 32 of 2007.

³³ Section 46(2) of Act 32 of 2007.

³⁴ Section 47(1) and 47 (2) of Act 32 of 2007.

time they will appear on the NRSO.³⁵ At present the maximum time which a person's name will appear on the NRSO is 10 years and the minimum time is five years.³⁶ Removal from the NRSO is not automatic and a person must apply to the registrar for removal. There are only two categories of persons who may never be removed from the NRSO. These include persons who have-

- (a) been sentenced for a conviction of a sexual offence against a child or a person who is mentally disabled to a term of imprisonment, periodical imprisonment, correctional supervision or to imprisonment as contemplated in section 276 (1) (i) of the Criminal Procedure Act (CPA) 1977, without the option of a fine for a period exceeding eighteen months, whether the sentence was suspended or not; or
- (b) Two or more convictions of a sexual offence against a child or a person who is mentally disabled.³⁷

From a review of the above paragraphs it can be inferred that the implementation of the provisions of the NRSO is labour intensive and is characterised by the obligations which it places on employers, employees and respective licence authorities.

An analysis of the above provisions also exposes various problem areas.

Firstly, the Act does not mention any prescribed dates for which to allow the registrar to respond to an application for a prescribed certificate in terms of section 44 or a licence application in terms of section 47 and 48 of the Act.

Secondly the use of the words **may** and **must** in section 45(1)(a) and (b) result in contradictory provisions. By using the word '**may**' in section 45(1)(a) an employer is given discretion to apply for a certificate if he has an employee in his employment at the date of establishment of the register. On the contrary, by using the word **must** in section 45(1)(b) the Act requires all employers to do a **mandatory** check on all potential employees after the establishment of the

³⁵ Section 51(1) of Act 32 of 2007.

³⁶ *Ibid.*

³⁷ Section 51(2) of Act 32 of 2007.

register. Surely it could not have been the intention of the Justice Portfolio Committee to include a provision which only authorises a mandatory check on potential employees, but not on those who are permanently employed. Such a provision easily presents an avenue for sexual offenders who are permanently employed to escape being checked against a register.

Thirdly it is uncertain why a sentence category is used to determine if a person should remain on the NRSO for an indefinite period. The drafters of the Bill could have opted for a more liberal approach such as judicial discretion which would allow the presiding officer to be more subjective in deciding if a person should be on the register or not. This approach would certainly be more beneficial for child sexual offenders who often engage in sexual experimentation and find themselves in trouble with the law. However it seems that the approach used in the NRSO is to apply a consistent form of punishment when similarly placed offenders commit similar crimes.

It is also quite surprising to see that correctional supervision was included in part of the sentence category. While correctional supervision is not a soft alternative to punishment, it is used when an offender is capable of taking care of himself and can be rehabilitated within the society.³⁸ The inclusion of the words correctional supervision in section 51(a) of the Sexual Offences Act seems to be an error. On the one hand by allowing correctional supervision the perception is given that the offender is able to take care of himself and it is safe enough for him to be rehabilitated within the community but on the other hand by requiring him to stay on the register for life, the offender is stigmatised as being a dangerous offender whose prospects of rehabilitation are low and who is likely to reoffend.

Lastly, the Act does not differentiate between child offender or adult offenders and merely states that all persons who have been convicted, alleged to have committed but of whom a court has made a finding and given direction in terms of section 77(6) or 78(6) of the CPA or is serving a sentence of imprisonment as a result of committing a sexual offence against a child will appear on the NRSO. This raises certain constitutional questions and will be investigated later in Chapter 2.

³⁸ Terblanche *Guide to sentencing in South Africa* (2007) 283.

It is interesting to note that whereas in the UK the idea of promulgating a register is to assist law enforcement to solve crimes and to prevent them; this is not the case in South Africa. According to the working draft the primary purpose of the NRSO would be to have a record of people who are unsuitable to work with children as a result of a sexual conviction.³⁹ Although the drafting changed as the details of the system were worked out, as indicated at the beginning of this chapter these objectives were essentially preserved in the Sexual Offences Act.⁴⁰ Thus the provisions of the NRSO do not aim to assist police in crime investigation nor do they seek to deter offenders from committing further crime.

This dissertation has been divided into five chapters. In the subsequent chapters the following matters pertaining to the NRSO will be addressed. Chapter two discusses some of the concerns relating to the register and addresses the constitutionality of section 41(1) of the Sexual Offences Act and the inclusion of child sexual offenders names in the NRSO.⁴¹ This chapter also looks at the infrastructural concerns relating to the implementation of the NRSO. Chapter three concerns itself with foreign law and provides a brief history into sexual offender registers, followed by an in-depth look into the legislation and monitoring systems governing sexual offender registration in the UK and compares this position with that of the NRSO. Chapter four investigates the provisions of the National Child Protection Register, compares it with the NRSO and investigates whether or not these registers amount to duplication. Finally chapter five addresses some of the problem areas inherent within the register, makes recommendations on how child protection services can be strengthened in SA and answers the question as to whether the NRSO is a comprehensive and effective solution for the protection of child victims of sexual offences in SA.

³⁹ Artz & Smyth *Should we consent: Rape law reform in South Africa* (2008) 255.

⁴⁰ Section 43 of Act 32 of 2007.

⁴¹ Please note that while the constitutionality of the register is a research topic on its own. This dissertation only looks at the constitutionality of section 41(1) of the Sexual Offences Act and the inclusion of child sexual offenders names into the register, in order to highlight some of the concerns of the NRSO.

CHAPTER 2 CONCERNS RELATING TO THE REGISTER

2.1 Constitutionality of the National Register for Sexual Offenders

Prior to 1948 the concept of children having rights was unrealistic and children were not accorded special protection in international human rights instruments or in domestic constitutions. Nevertheless a number of international instruments have since been promulgated to give effect to children's rights, these include the United Nations Convention on the Rights of the Child (UNCRC), the African Charter on the Rights and Welfare of the Child (ACRWC), the International Covenant on Civil and Political Rights (ICCPR) and the Universal Declaration of Human Rights (UDHR).⁴² This has been regarded as a major break-through for children rights activists as more countries have started to embrace provisions relating expressly to children in their constitutions.⁴³ South Africa has ratified the UNCRC, ACRWC and the ICCPR.⁴⁴ The ratification of these international instruments symbolises the country's commitment to the promotion and protection of the rights of a child at both an international and domestic level.⁴⁵

In South Africa the recognition and enthusiasm for children's rights can be traced back to 1993, when the drafting of the interim Constitution began.⁴⁶ Initially the section which would afford children protection started off as one line providing for the right of children not to be subject to neglect, abuse or forced labour.⁴⁷ This section proved to be rather thin. Child rights activists and woman negotiators then took it upon themselves to make arguments and submissions that the clause be expanded. As a result the clause was gradually developed to include among other things, the right to a name and nationality, basic nutrition and health care services and the principle that in all matters concerning a child his or her best interest shall be paramount.⁴⁸

⁴² United Nations Convention on the Rights of a Child 1989, African Charter on the Rights and Welfare of a Child 1990, International Covenant on Civil and Political Rights 1966 and the Universal Declaration of Human Rights 1948.

⁴³ Devinish *A commentary on the South African Bill of Rights* (1999) 371.

⁴⁴ The UNCRC was ratified by South Africa on 16 July 1995, the ACRW on 7 January 2000 and the ICCPR on 10 December 1998.

⁴⁵ Devinish (1999) 372 fn 8. The UDHR was never signed by South Africa.

⁴⁶ Skelton & Proudlock 'Interpretation, objects, application and implementation of the Children's Act' in Davel and Skelton (eds) *Commentary on the Children's Act* (2007) 1-8.

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*

During the 1996 Constitution drafting process the children's clause was again expanded, only this time it was not only from submissions made by child activists but included those from political parties and civil society. Some of the changes to the 1993 Interim Constitution provision for children included an amendment of 'the right not to be subject to neglect or abuse' which was expanded to read the right to be protected from maltreatment, neglect, abuse or degradation.⁴⁹ The right to a legal practitioner at state expense in civil proceedings affecting the child was also added.⁵⁰

On 4 February 1997 the Constitution of the Republic of South Africa came into operation. Section 28 sets out a range of rights that provide protection for children. Entrenched with a Bill of Rights, the Constitution further ensures that all fundamental rights and freedoms of all citizens are protected; this allows minors to have the same protection in the Bill of Rights as his or her adult counterpart except for a few restrictions such as the right to vote or the right to stand for public office.⁵¹

To date section 28 has been regarded as a charter for children's rights and is in accordance with a number of international instruments. In addition a number of Acts have been promulgated in South Africa in an attempt to give effect to the rights envisaged in section 28,⁵² however it is only upon scrutiny of these provisions that one can consider whether an act is in conformity with the Bill of Rights.

The promulgation of the Sexual Offences Act has not been without its pitfalls. Concerns relating to the register include firstly a vague interpretation of section 41(1) and secondly the constitutional implications of including child sexual offenders names into the NRSO In the following paragraphs an analysis into whether these concerns do not require a constitutional challenge in terms of section 28 and 39(2) of the Constitution will be made.

⁴⁹ Skelton & Proudlock 1-9.

⁵⁰ *Ibid.*

⁵¹ Boezaart *Child law in South Africa* (2009) 265.

⁵² Criminal Law (Sexual Offences and Related Matters) Amendment Act 41 of 2007; Children's Act 38 of 2005 and Child Justice Act 75 of 2008.

2.2 Constitutional Interpretation in terms of section 39(2)

The issue at hand concerns the interpretation of section 41(1) of the Sexual Offences Act. The provision states that a person who has been convicted of a sexual offence against a child or is alleged to have committed a sexual offence against a child whether ‘**committed before or after the commencement of this chapter**’, whether committed in or outside the Republic and whose particulars have been included in the NRSO will be prohibited from certain types of employment. The dissertation will now explore the extent of this retrospective provision by looking at the interpretation of the use of the words ‘before or after the commencement of this chapter’.

Section 39 is the provision in the Constitution which deals exclusively with the interpretation of the Bill of Rights. Whereas section 39 (1) is about establishing the context within which a particular constitutional provision must be given meaning. Section 39(2) deals with the interpretation of statutes and the development of common and customary law.⁵³ Section 8 of the Constitution, which provides for the indirect application of the Bill of Rights to law, must be read in conjunction with section 39(2) in order to establish if a legislative provision is in conformity with the Bill of Rights.⁵⁴

When it comes to statutory law, indirect application means that a court must first attempt to interpret legislation in conformity with the Bill of Rights before considering a declaration that the legislation is in conflict with the Bill of Rights and invalid.⁵⁵ In short what this means is that interpretation of statutes starts with the Constitution and not with the legislative text.⁵⁶

The case of **Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism** put this principle into the following words,⁵⁷

The starting point in interpreting any legislation is the Constitution, first the interpretation that is placed upon a statute must where possible be one that would advance at least an identifiable

⁵³ Section 39 of the Constitution of the Republic of South Africa.

⁵⁴ Currie & De Waal *The Bill of Rights Handbook* (2005) 161.

⁵⁵ Botha *Statutory interpretation: An introduction for students* (2005) 54.

⁵⁶ *Ibid.*

⁵⁷ *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 (4) SA 490 (CC) at para 72.,

value enshrined in the Bill of Rights and second the statute must be reasonably capable of such interpretation.

The principle was further illustrated in the case of **Matiso v Commanding Officer, Port Elizabeth Prison**, which held that the interpretation of the Constitution will be directed at ascertaining the foundational values inherent in the Constitution, the interpretation of the particular legislation will be directed at ascertaining whether that legislation is capable of an interpretation which conforms with the fundamental values or principles of the Constitution.⁵⁸

Section 39 (2) thus serves as a pre-emptory provision and forces all courts, tribunals or forums to review the aim and purpose of legislation in light of the Bill of Rights.⁵⁹

Since the Sexual Offences Act came into operation on the **16 December 2007** and Chapter 6 of this Act which deals with the Sexual Offences Register came into operation on the **16 of June 2009** it is possible to interpret the words **before or after** to mean the period between 16 December 2007 and 16 June 2009. If this narrow interpretation is to be excepted this would mean that all persons who have been convicted of a sexual offence against a child or mentally ill person during this period will be prohibited from procuring certain types of employment in terms of section 41 (1).

However if one accepts a wider interpretation that **'before'** means anytime before the commencement of chapter 6, this would mean that the retrospective nature of this clause is unlimited. This may result in persons being tried for an offence in respect of an act or omission in order for them to fall within the new definition of sexual offence in terms of the Sexual Offences Act. Surely such an interpretation will be regarded as unconstitutional in terms of section 35 (3) l and 35(3) m of the Constitution of the Republic of South Africa. Section 35(3) l makes provision for the right not to be convicted for an act or omission that was not an offence under either national or international law at the time it was committed and section 35(3) m

⁵⁸ *Matiso v Commanding Officer, Port Elizabeth Prison* 1994(4) SA 592(SE) at para 597F.

⁵⁹ Op cit.

provides for the right not to be tried for an offence in respect of an act or omission for which that person has previously been either acquitted or tried.

Given the fact a broad interpretation of section 41(1) of the Sexual Offences Act can give rise to a constitutional challenge, it is suggested that in order to promote the objective of section 39(2), it would seem that the courts in interpreting the words before or after in section 41 (1) would have to follow the proposed narrow interpretation.

2.3 Children on the Sexual Offenders Register

Children's rights campaigners have long expressed their concern that children and young people are being placed on sex offender registers to the same extent as adults.⁶⁰ Despite this concern, it appears that there is a developing trend to place child sex offender's names on a sex offender register.⁶¹ For instance in the US and the UK children as young as 14 may be required to submit to register as a sex offender and submit to community notification for the rest of their lives.⁶²

While this may be the position in the UK, it has only recently been decided in the landmark case of **R(on the application of F) v Secretary of the State for Justice**,⁶³ that children whose names have been included on the sex offenders for an indefinite period of time be allowed to apply for a review of their registration, by an independent tribunal that should determine the need for continued registration. The facts of the case are as follows.

In 2005, F had been placed on the register at the age of 11, as a result of being convicted of two offences of rape of a child under the age of 13 and three offences of other sexual activity with a

⁶⁰ Thomas 'Children and young people on the sex offender register' 2009 *Childright* 18.

⁶¹ *Ibid.*

⁶² Bowater 'Adam Walsh Child Protection and Safety Act 2006: Is there a better way to tailor sentences of juvenile sex offenders?' 2008 *Catholic University Law Review* 817 at 820.

⁶³ *The Queen on the application of F and Aubrey Thompson v Secretary of State for the Justice Department* [2008] EWCH 3170 (the case of F was heard jointly with the case of Thompson – an adult).

child under 13.⁶⁴ He was thus sentenced to 30 months detention and would be required to register as a sex offender on the Sex Offender Register for the rest of his life.⁶⁵

In 2008, F then brought application to the High Court that his lifetime inclusion on the sex offender register without the possibility of review was incompatible with Article 8, the right to privacy and family life in terms of the European Convention on Human Rights (ECHR).⁶⁶

Lawyers on behalf of F argued that the imposition of notification requirements, relating to the sixteen year old was heavy and disproportionate in that it lasted indefinitely. They argued that the travel notification requirements compelled him to first notify the police before any intended travel arrangements and affected him in relation to a proposed family holiday in Spain. Furthermore F had wished to play rugby league football, but once the rugby football league discovered that he had been placed on the Sex Offender Register, and because of the offence for which he had been convicted, they made a temporary suspension order precluding him from attending any training or matches involving any person under the age of 18.

Lord Latham of the High Court thus accepted these arguments and held that:

‘It may well be that any right of review should be tightly circumscribed in the public interest, both in relation to the burden and standard of proof and maybe the length of time that should pass before any application can be made. But I am satisfied that the absence of any such right of review amounts to in the case of a young offender to a breach of Article 8’.

The Secretary of the State for the Justice Department then sought to appeal this decision in the Court of Appeal by arguing that the requirement to register for an indefinite period was a legitimate interference of article 8 rights, in that it pursued a legitimate aim namely the prevention of crime and the protection of rights and freedoms of others. However the court of Appeal simply dismissed this argument and upheld the decision of the previous court.

⁶⁴ *Ibid.*

⁶⁵ Section 82 of the UK Sexual Offences Act of 2003 (c 42).

⁶⁶ Article 8 of the European Convention on Human Rights states that everyone has the right to respect for his private and family life, his home and his correspondence.

The Court of Appeal made the following remark in its judgement:

'A scheme which obliged offenders who had been sentenced to 30 months detention or more to remain on the register for the rest of their lives without any possibility of review, even if they could clearly demonstrate that they were no longer a risk, did nothing to promote the legitimate objective and was disproportionate for that reason'.⁶⁷

The Secretary of State then approached the Supreme Court of Appeal;⁶⁸ here they argued that the nature of sexual offence was such that it was never possible to be sure that someone who had been guilty of a serious sexual offence posed no significant risk of re-offending. The judges of the Supreme Court once again rejected the appeal saying there was no evidence to show it was impossible to identify which sex offenders had reformed.⁶⁹

Lord Phillips, the Supreme Court president held: *It is obvious that there must be some circumstances in which an appropriate tribunal could reliably conclude that the risk of an individual carrying out further sexual offence could be discounted to the extent that the continuance of notification requirements was unjustified. It was open to the legislature to impose an appropriately high threshold for review.*⁷⁰

The Supreme Court thus upheld the findings of the Divisional Court and the Court of Appeal.

In South Africa there has been much debate about whether the provisions of the NRSO include child offenders. This stems from the fact that the provisions of the chapter do not make use of the term 'child offender' but consistently refer to the term 'person' throughout the chapter. However an attempt to clarify this uncertainty was soon made in the case of **S v RB; S v DK and Another**, taken before the Northern Cape High Court. Here the court ruled that the dictionary meaning of the word person did include minors and if the legislature intended to create the register for adult offenders only, it would have stated so in clear and unambiguous terms.⁷¹

⁶⁷ *R (on the application of F) v Secretary of State for the Justice Department* [2009] EWCA Civ 792.

⁶⁸ *R (F (A child)) v Secretary of State for the Home Department; R (Thompson) v Same* [2010] UKSC 17.

⁶⁹ *The Guardian* (22-04-2010) 9.

⁷⁰ *R (F (A child)) v Secretary of State for the Home Department (Thompson) v Same* [2010] UKSC at para 57.

⁷¹ *S v RB; S v DK and Another* 2010 (1) SACR 447 (NCK) at para 11.

It must be noted that the provisions of the NRSO are not lenient towards child offenders. The provisions as they appear do not take into account the age of a convicted child sexual offender nor do they allow for registration periods to be halved for child sex offenders. Therefore if one has to accept the findings of the above mentioned court, child sex offenders may find themselves being registered on the NRSO for life without prospects of removal. Surely such an interpretation cannot be a justifiable limitation to the best interests of a child.

It is apparent that the retributive approach taken by both South Africa together with the US and UK fail to consider the negative aspects of placing children on registers. Reports have long shown that children who commit sexual offences have been exposed to various forms of abuse and violence throughout their childhood and that they have little understanding of sexual behaviour and its impact on others.⁷² Research also indicates that registration does not play a useful role in getting the help that some young people need,⁷³ while prevention efforts targeted at young offenders has shown to have a significant impact on breaking the cycle of re-offending. Furthermore studies show that that majority of young people's behaviour is less entrenched and more open to change.

Article 40(1) of the UNCRC places a duty on South Africa to recognise the right of every child alleged as, accused of or recognised as having infringed the penal law to be treated in a manner consistent with the promotion of the child's dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others which takes into account the child's age and desirability of promoting the child's reintegration and the child's assuming a constructive role in society.⁷⁴

This provision has been echoed in the newly operational Child Justice Act which recognises the present realities of crime in the country and the need to be proactive in crime prevention by placing increases emphasis on the effect of rehabilitation and reintegration of children in order to minimise the potential of re-offending.⁷⁵

⁷² 'Overview of the 2007 version of the Child Justice Bill' *Article 40* 3-5.

⁷³ Thomas 'The sex offenders register' 2003 *Childright* 10.

⁷⁴ Article 40 of the United Nations Convention on the Rights of a Child.

⁷⁵ Preamble to the Child Justice Act 75 of 2008.

Although South Africa has come a long way and strives to be progressive in its aims to promote the rights of children, the inclusion of children in the NRSO (as indicated above) fails to deter children from re-offending and does not promote their rehabilitation or smooth their reintegration back into society. It would seem that the drafters of this provision failed to consider promoting a child's right to dignity and worth guaranteed in terms of both the UNCRC and the Constitution of the Republic of South Africa. Accordingly it must be said that the provision to include children in the NRSO is most definitely a step backwards for the promotion of child rights in South Africa.

2.4 Infrastructural concerns relating to the Register

Despite the provisions of the NRSO coming into operation on the 16 June 2009, a number of challenges face the DOJCD in implementing these provisions as the register is not fully functional.⁷⁶

In 2009 reports indicated that the NRSO would come into operation in phases, phase one which would deal with capturing of court orders made regarding the sexual offences and phase two which would deal with updating of historical convictions due to commence only once the initial phase one was complete.⁷⁷ Although phase one was underway it was manifesting to be quite a drawn out process. Reports revealed that while court orders had been captured from 30 June 2009, this had been done manually and in some instances had not yet been updated on to a computerised register due to outdated interface automatisations across departments.

This inactive method of data capturing placed a halt to implementing some of the provisions of the Act. For instance section 45 which places certain obligations on employers to ascertain if an employee appears on the registrar was appearing hard to implement. In a response by the Minister of Department of Basic Education as to why their department had not applied for

⁷⁶ 'Sex offenders register operational, but not yet useful' <<http://www.defenceweb.co.za> (accessed 19 July 2010).

⁷⁷ *Ibid.*

clearance certificates yet, she answered by stating she could do so only once the court orders have been processed and captured.⁷⁸

Most recently the challenge posed against the DOJCD came about approximately six months after the provisions of the NRSO came into operation and concerned the application of section 48 of the Sexual Offences Act. It appeared that because the NRSO was not fully functional some magistrates in the children's courts refused to place children in care and thus faced a sanction of up to 7 years for failure to comply with the section.⁷⁹ Since magistrates cannot be directed to ignore provisions of an Act, unless ordered to do so by a superior court, Child Welfare South Africa with the legal assistance from the Centre for Child Law at the University of Pretoria, obtained an order from the North Gauteng High Court to suspend any relevant authorities complying with section 48 of the Act unless and until the NRSO is fully operational for purposes of section 48(1).⁸⁰ A declaration to this effect was published in the Government Gazette on the 29 of December 2009.⁸¹

With the current challenges facing the DOJCD in implementing the NRSO it is uncertain when employers will actually be able to check if an employee's name appears on the NRSO. We just hope that in due course, the Justice Portfolio Committee's decision to include the NRSO in the Sexual Offences Act will be fruitful and they will not have to give an explanation into the reasons why they have not been able to implement an effective sexual offender's register as planned.

Conclusion

The NRSO is embedded with a number of concerns. Firstly, due to poor legislative drafting section 41(1) of the Sexual Offences Act is ambiguous, making it difficult to interpret who is required to register on the NRSO and giving rise to a potential constitutional challenge in terms of section 35(3)l and 35(3)m. Secondly, the inclusion of the names of child sexual offenders in the NRSO is not only contrary to international and local statutes which emphasise the need to

⁷⁸ *Ibid.*

⁷⁹ Centre for Child Law: *Child Law Matters* Annual Report (2009) 12.

⁸⁰ GN 1670 in GG 32850 of 29 December 2009.

⁸¹ *Ibid.*

rehabilitate and reintegrate child sex offenders into society but it also infringes on a number of constitutional rights, such as the best interests of a child, right to human dignity and right to be protected from maltreatment, neglect, abuse or degradation.⁸² Lastly, lack of preparation or research into establishing an appropriate infrastructure to accommodate the NRSO was not done by the DOJCD. Reports showed that due to a lack of infrastructure, data capturing had to take place manually and as a result put a halt to implementing some of the provisions of the NRSO. What the DOJCD failed to consider is that without the necessary infrastructure very little can be done to enforce the provisions of the NRSO. It is uncertain when the necessary infrastructure will be in place to give effect to a fully functional NRSO as this is a process which may take a number of years to implement. In the interim the provisions of the NRSO will continue to be a challenge to enforce.

⁸² Section 28(2), section 10 and section 28(d) of the Constitution of the Republic of South Africa.

CHAPTER 3 FOREIGN LAW

3.1 History of the Sexual Offenders Register

Sex offender registration has its origins in the United States. It is reported that from 1944 the US started enacting laws requiring convicted sex offenders to register their names and addresses with local police.⁸³ However (as I have already mentioned in the introductory chapter), it was as a result of an increase in cases involving child molestation, rape and murder during the early 1990s which prompted both state and federal governments to enact more laws pertaining to sexual offender registration.⁸⁴

At state level approximately 30 states passed legislation between 1994 and 1996,⁸⁵ while at federal level it was the promulgation of the Jacob Wetterling Crimes Against Children and Sexually Violent Registration Program, within the Violent Crime Control and Law Enforcement Act of 1994 (VCCLEA), which marked the beginning of federally required registration of sex offenders.⁸⁶ This highlight in US federal laws was soon amended in 1996 when Congress added 'Megan's Law' to the VCCLEA, as a response to the brutal killing of a seven year old by a previously registered sex offender. Megan's law thus amended the 1994 Act to mandate states to disclose information where it is relevant and necessary for public protection.⁸⁷ At present it is the Adam Walsh Child and Safety Act of 2006 which governs all notification and registration requirements for convicted sexual offenders in the US.⁸⁸

US practice in offender registration has served as a model for many jurisdictions considering community notification and non public schemes.⁸⁹ Registers of this nature have now found application in the UK, Canada, and most recently South Africa.⁹⁰

⁸³ McAlinden *The shaming of sex offenders: Risk, retribution and reintegration* (2007) 98.

⁸⁴ Geer Justice Served? The high cost of juvenile sex offender registration' 2008 *Developments in Mental Health Law* 33 at 35.

⁸⁵ McAlinden 99.

⁸⁶ Bowater (2008) *Catholic University Law Review* 817 at 819.

⁸⁷ *Ibid.*

⁸⁸ In 2006 The Adam Walsh Child Protection and Safety Act was signed into law by President Bush. This federal law requires all states to adopt uniform sex offender registration and notification requirements.

⁸⁹ Tewsbury 'Collateral consequences of the sex offender registration' 2005 *Journal of Contemporary Criminal Justice* 67 at 70.

3.2 Content of the UK Sexual Offenders Register

A comprehensive list of all convicted and possibly of those suspected of sexual offences against children is not new in the UK. In fact there are already six national lists in existence, as well as lists held by voluntary bodies such as the scout association and National Society for the Prevention of Cruelty to Children (NSPCC).⁹¹ Attempts by private members' bills to introduce a national register failed, but in June 1996 the Home Office issued a consultation document on the sentencing and supervision of sex offenders which included a proposal that convicted sex offenders should be required to notify the police of any change in address.⁹² The consultation period ran from June to August 1996 with 87 % of those responding supporting the idea of a register. The idea of registration itself was premised on 3 arguments, it would help police identify suspects after a crime, it would help prevent crime and it might act as a deterrent.⁹³

The Sex Offenders Bill was published on 18 December 1996 and consisted of two parts. Part 1 was concerned with the registration arrangements and Part 2 with the commission of sexual offences outside the UK. The Bill received royal consent on 21 March 1997 which resulted in the Sex Offender Act of 1997.⁹⁴

However the 1997 Act contained a number of shortcomings. These included the fact that the offender did not have to register in person, and could register by post without proof of identity, further there was no power of arrest if an offender failed to register.⁹⁵ Notwithstanding this, it was not until the kidnapping and murdering of eight year old Sarah Payne in the summer of 2000 that moved government to strengthen registration requirements.⁹⁶ The provisions of the 1997 Act

⁹⁰ The UK Sexual Offences Act of 2003 (c.42), Canada's Sex Offender Information and Registration Act of 2004 and the South African Criminal Law (Sexual offences and Related Matters) Amendment Act 32 of 2007.

⁹¹ The police national computer list, the national identification service list, the National Criminal Intelligence List, Scotland Yard's national paedophile index list, List 99 of the Department of Health consultancy index list : Copley 'Keeping Track of sex offenders – part 1 of the sex offenders Act 1997' 1997 *Modern Law Review* 690 at 691.

⁹² *Ibid.*

⁹³ Thomas *Sex crime: Sex offending and society* (2000) 29.

⁹⁴ Sex Offenders Act 1997 (c.51).

⁹⁵ McAlinden 'Sex offenders and child protection' 1998 *Child Care in Practice* 250 at 254.

⁹⁶ Thomas 'When public protection becomes punishment? The UK use of civil measures to contain the sex offender' 2005 *European Journal on Criminal policy and Research* 337 at 341.

were thus amended by schedule 5 of the Criminal Justice and Court Services Act 2000 and as a result of a joint consultation exercise by the Home Office and Scottish executive; these provisions were since replaced by Part 2 of the Sexual Offences Act 2003.⁹⁷

3.2.1 *Sexual Offences Act 2003 (c.42)*

Part 2 of the Sexual Offences Act 2003 (c.42) is the statutory law which governs sexual offender registration and notification in the UK. Section 80 of this Act specifically sets out who is required to submit to these registration and notification requirements. This provision requires any person who has been convicted or cautioned for committing an offence in terms of the Act f, those found to be under a disability or those found not guilty by reason of insanity, but who have committed the relative offence a to submit to notification requirements a.⁹⁸

Registration must be done within three days after the offender has received a caution or has been released from prison.⁹⁹ Initial registration as well as any subsequent registration of changes to the offender's details is now required in person and confirmation of such details must take place on an annual basis. Registered offenders are further required to notify the police of foreign travel or if they spend more than 7 days at an address other than their home address.¹⁰⁰

The length of time which an offender is required to register is dependent on the type of offence and the length of the initial sentence imposed. The registration requirement now ranges from a period of two years, for those who receive a caution for a relevant offence, to a lifetime requirement.

⁹⁷ Thomas 'The sex offender register: A case study in function creep' 2008 *The Howard Journal* 227 at 230.

⁹⁸ *Persons* formerly subject to Part 1 of the Sex offenders Act 1997 are still required to submit to notification requirements in terms of Act 2003, where their notification period has not lapsed prior to the commencement of section 80.

⁹⁹ McAlinden 103.

¹⁰⁰ Section 83(7) of the Sexual Offences Act (c.42) Home Address- means, in relation to any person – the address of his sole or main address in the United Kingdom, or where he has no such residence, the address or location of a place in the United Kingdom where he can regularly be found and if there is more than one such place, such one of those places as the person may select.

The 2003 Act further widened the scope for registration by adding the following measures, to ensure the protection of the public from sexual harm. These include notification orders,¹⁰¹ foreign orders, sexual offences prevention orders (SOPOs) and Risk of Sexual Harm orders (RSHOs).¹⁰² If any one of the above orders is in force then the offender automatically becomes subject to the requirements of sex offender registration.

Failure to comply with notification requirements as required in terms of section 80 of the Act or as a result of any orders issued in terms of the Act is an offence punishable on indictment by a term of imprisonment of up to five years.

In addition to being allowed to photograph, finger print and obtain the insurance number of each offender upon every registration, the Act also permits the police to apply to a magistrate for a warrant to enter and search the house of a person on the sex offender register in order to assess the risk they might pose by way of re-offending. The application must be brought by an officer of at least a superintendent rank and it is irrelevant whether or not the offender is complying with registration requirements.¹⁰³

While the issue of when the community should be notified about the presence of sex offenders living in their area remains controversial in the UK, it seems the legislation itself remains silent as to the precise circumstances in which the police may lawfully disclose personal information about offenders.¹⁰⁴ Currently police are only entitled to make limited public disclosure of a sex offender's whereabouts only in exceptional circumstances where there is an immediate danger to the public, which is itself determined by assessed levels of risk.¹⁰⁵

¹⁰¹The notification orders requires offenders who have received convictions for sexual offences abroad to comply with the legislation. Whereas the foreign orders specifically prevent those offenders with convictions involving children from travelling abroad.

¹⁰² SOPOs are where an offender has a previous conviction or caution for a schedule 3 or 5 offence who poses a risk of sexual harm. Whereas RSHOs are used to protect children from the risk posed by individuals who have on at least two occasions engaged in explicit conduct or communication with a child or children and pose a risk of further harm.

¹⁰³ Thomas (2008) *The Howard Journal* 227 at 233.

¹⁰⁴ In the US section 16918 of the Adam Walsh Child Protection and Safety Act of 2006 provides that each jurisdiction shall make available on the internet, in a manner that is readily accessible to all jurisdictions and the public, all information about each sex offender in the registry.

¹⁰⁵ McAlinden 106.

In the Case of **R v Chief Constable of North Wales Police, ex parte Thorpe**,¹⁰⁶ the Court of Appeal upheld the decision of the Divisional Court and declared that although there should never be a policy of blanket disclosure, the police had a right to notify immediate neighbours that two individuals had moved in with a criminal record of child abuse since there was a specific risk of re offending.

It must be noted that whilst the provisions of the Act may be described as a ‘register’ the Act makes no provision for the creation of a separate register.¹⁰⁷ Instead the offender’s details are kept by the local police and fed into the police national computer.¹⁰⁸

3.3 UK Sexual Offenders Register in comparison with the SA Sexual Offenders Register

Although both the UK and South Africa have adopted laws pertaining to sexual offender registries, it seems that the approach used to implement these registers is quite different.

As mentioned in Chapter 1 one of the objects for establishing a register in South Africa is to inform an employer, licensing authority or relevant authority dealing with fostering, kinship, care, temporary safe-care, adoption or curatorship whether a person’s details appear on the register. The register also places an emphasis in protecting children and mentally disabled from persons who have been convicted/ alleged to be convicted of a sexual offence and prohibits such persons from procuring employment where they will be in a position of authority, supervision or care of a child or mentally disabled person.

The objective of the UK register is quite different in that it seeks to ensure that police are informed about the whereabouts of offenders in the community and the notification requirements do not bar offenders from certain types of employment.¹⁰⁹

¹⁰⁶ *R v Chief Constable of North Wales Police, ex parte Thorpe* [1999] QB 396 (CA).

¹⁰⁷ Cobley (1997) *Modern Law Review* 690 at 696.

¹⁰⁸ Mclaiden 102.

¹⁰⁹ ‘Section 21: Managing Individuals who pose a risk of harm to children’ <<http://www.blackburn.gov.uk/server>> (accessed 17 August 2010).

The South African register is also intended to be retrospective, but to what extent is still subject to debate.¹¹⁰ It is interesting to note that in the UK during the passage of the Bill through Parliament there was considerable debate over whether the notification requirement should be retrospective. The Home Office took the stance that the enormity of the task would be too burdensome.¹¹¹

As indicated above much weight is attached to the notification requirements for sexual offenders in the UK register. In contrast to this position the notification requirements in the South African register can be described as fairly narrow. The NRSO fails to indicate when initial registration is to take place and how often a listed offender will have to update his details. Section 50(8)(a) of Chapter 6 merely requires a person whose name is listed on the register to notify the registrar of any change in his name, sex, identity number, physical or postal address within 14 days after such change. The provision does not say whether the change should be made in person or by post.

It is interesting to note that both registers make provision for the inclusion of offenders who have received convictions for sexual offences in foreign jurisdictions to be listed on their respective register. However the SA register makes no provision for a listed offender to notify the registrar of any intended foreign travel. In the absence of such a provision it may be difficult to notify other countries as to who may be at risk and thereby trumps International efforts to ensure that sex offenders do not target children in other countries.

The sparse provisions relating to notification requirements in the SA register may be regarded as its biggest flaw. Lack of information as to when and how registration is to be conducted and updated, as well as failure to inform authorities of any intended foreign travel provides a broad base in which convicted offenders may avoid registration.

¹¹⁰ Section 41 of Act 32 of 2007.

¹¹¹ Cobley (1997) *Modern Law Review* 690 at 692.

3.4 Tracking and monitoring systems in the UK

Measures for regulating released sex offenders living in communities is not new in the UK and the Home Office has over the years had to formulate different innovative ways in ensuring that ex -convicts are not at liberty to re offend.¹¹²

In 1991 The Criminal Justice Act introduced a policy under which violent and sexual offenders could be given custodial sentences longer than their just deserts in order to protect the public.¹¹³ This was soon followed by supervision provisions which allowed local authorities to be notified of the expected date of release of the offender at the start of a period of custody, during custody, if there is likely to be home leave or temporary release and towards the end of the period of custody. Other methods of tracking sex offenders included a national sex offender treatment programme and electronic tagging.¹¹⁴

These arrangements for monitoring sex offenders proved to be problematic. Firstly the practice of disclosing to other agencies appropriate information about offenders varied considerably. Secondly due to a lack of resources the treatment programme could only be offered to sex offenders serving sentences of over seven years. Thirdly the electronic tagging would only tell the police or probation services where the offender is at the material time and not what he is doing.¹¹⁵

To the surprise of the Home office, the sex offender register of 1997 was hailed as being a valuable tool in helping to protect the public. An evaluation of the register found that while the amount of police resources taken up in maintaining the register was greater than had been anticipated. The compliance rate was estimated at 94.7%, a figure rising to 97% by the year 2001.¹¹⁶

¹¹² Hebeton 'Tracking sex offenders' 1996 *The Howard Journal* 97 at 102.

¹¹³ Mclaiden (1998) *Child Care in Practice* 250 at 251.

¹¹⁴ *Ibid.*

¹¹⁵ Mclaiden (1998) *Child Care in Practice* 250 at 253.

¹¹⁶ Thomas (2008) *The Howard Journal* 227 at 229.

As a result of the positive response to the above mentioned register. In order to ensure public protection, crime detection and prevention, the police forces in England, Wales and Scotland officially launched the Violent and Sex Offender Register (VISOR) in August 2005. The register includes the details of sex offenders under the Sexual Offences Act 2003, violent offenders who have been sentenced for more than 12 months, as well as unmonitored individuals who have been assessed as posing a risk to the public. The VISOR register, like the sex offender register holds a range of detailed information on these individuals such as their modus operandi, details of convictions, orders in force against them, risk assessments and photographic details.¹¹⁷

VISOR also introduced a computer system which provides the police with a central searchable nationwide database, linked to the police national computer, to register, assess risk and manage offenders thus allowing agencies to share information easily and keep track of individuals as they move from area to area. It is envisaged that a photographic library of offenders in particular, which will be built up over time, including distinguishing marks or features, will make it easier to identify offenders and harder for them to change their physical appearance and emerge undetected in another part of the country.¹¹⁸

It is interesting to note that while the UK has placed much emphasis into sex offender registries as a measure to prevent sexual offending within communities, the question as to whether sexual offender registration and community notification laws guarantee community safety is unclear. Reports in the UK have shown that there have been no pilot schemes or any research to suggest that a sexual offender register could make a community safer.¹¹⁹ Furthermore these reports have indicated that police forces had no agreed way of measuring the contribution of sexual offender monitoring to improving community safety.¹²⁰

¹¹⁷ Mclaiden 104.

¹¹⁸ *Ibid.*

¹¹⁹ Thomas (2004) *European journal on Criminal Policy and Research* 337 at 334.

¹²⁰ *Ibid.* See also Logan 'Sex offender registration and community notification: Emerging legal and research issues' *2003 Annals New York Academy of Sciences* 337 at 338. Where it was stated that in the US the shortage of good research studies on the evaluation of registers as an investigative and preventative tool renders the usefulness of a sex offender register as unproven.

Conclusion

At this point it seems that the UK has failed to furnish an answer as to the effectiveness of registries and community notification. It seems that research must now be conducted across a broad spectrum of countries which have adopted sexual offender registries and community notification laws for conclusive results – a task that is beyond the scope of this dissertation.

Unfortunately the provisions regarding notification requirements in the NRSO are narrow and its contribution to the above mentioned study would be minimal. The provisions of the NRSO fail to indicate when initial registration is to take place and how often a listed offender will have to update his details. Moreover there is no provision for a listed offender to notify the registrar of an intended foreign travel. In order to have an effective register more emphasis would need to be placed on registration and notification requirements within the NRSO. Only once this is done will the DOJCD be able to assess the NRSOs contribution to enhancing community safety. At present the provisions of the NRSO are vague and offer very little to ensuring community safety.

CHAPTER 4 NATIONAL CHILD PROTECTION REGISTER

4.1 Introduction

In chapter one I indicated that it was in 1997 when the SALRC was requested to investigate sexual offences by and against children and to make recommendations to the Minister of Justice. However during this time the SALRC was also requested to investigate and review the Child Care Act 74 of 1983 and to make recommendations to the Minister for Social Development for the reform of this particular branch of law.¹²¹ As part of its vision to enhance the protection of children in South Africa the SALRC proposed the establishment of a National Child Protection Register (NCPR) as part of the Children's Act.¹²²

In conducting an international survey on child abuse registers, the SALRC found that such registers had gained currency since 1970's and were well established in a number of first world countries. It was further found that countries which legislated for such registers did so for purposes such as ensuring help for abused children, monitoring the safety and progress of such children and gathering data for planning of prevention programmes and intervention services.¹²³

Although there was strong support for South Africa to include provisions relating to mandatory reporting and registration in our statute books, the SALRC noted that the promulgation of such registers was increasingly controversial.¹²⁴ Some of the contentions raised pertained to the fact that the standards required for effective reporting and registration were imported from contexts in which the basic survival needs of children are met and where a highly developed service infrastructure is in place.¹²⁵ Further arguments suggest that child protection resources can become skewed towards reporting, registration and investigative processes at the expense of preventative and long – term treatment and care for abused children.¹²⁶

¹²¹ SALRC: *Review of the Child Care Act: Part 1 Report* December (2002) 1.

¹²² Sloth-Nielsen 'Protection of children' in Davel and Skelton (eds) *Commentary on the Children's Act* (2007) 7-9.

¹²³ SALRC (2002) 127.

¹²⁴ *Ibid.*

¹²⁵ Sloth-Nielsen 7-9.

¹²⁶ SALRC (2002) 128.

Despite these controversies, in March 1998 the legislature in its attempts to modernise our child protection system, introduced the concept of a Child Protection Register into our law. The provisions of which found application under the auspices of the new regulations promulgated under the Child Care Act.¹²⁷

However the provisions of the register proved to be inadequate as they did not provide for procedures relating to the removal of a name from the register even in the case of erroneous inclusion. Furthermore there was no obligation upon employers or managers to ascertain whether or not a person was named in the register.¹²⁸ In a meeting dated 15 February 2005 the SALRC briefed the Social Development Parliamentary Portfolio Committee on the proposed provisions in the Children's Bill. It is here where the SALRC sought to rectify some of the provisions in the regulations which had up until this point appeared to be flimsy.¹²⁹

On the 1st of April 2010 the Children's Act repealed the Child Care Act in its entirety and put into force the provisions for a NCPR in Chapter 7 of the Act.¹³⁰ The register consists of two parts and thus serves to ensure that victims of abuse / neglect are guarded against further maltreatment as well as to prevent perpetrators from having access to children.

In the following paragraphs I will explore the contents of the NCPR as they appear in the Children's Act. Following thereon I will engage in a comparison of the above mentioned register with the NRSO will investigate any potential areas of overlap between the two pieces of legislation.

¹²⁷ *Ibid.*

¹²⁸ Sloth-Nielsen 7-10.

¹²⁹ 'Amendments to Children's Bill: SA Law Reform Commission briefing 15 February 2005' <<http://www.pmg.org.za> (accessed 30 June 2010).

¹³⁰ Proc R13 in GG 33076 of 26 March 2010.

4.2 Contents and applicability of the National Child Protection Register

4.2.1 *Part A of the Register*

The NCPR is formulated into two distinct parts. Part A of the register is referred to informally as the child- register.¹³¹ The purpose of this part of the register is to have a record of abuse or deliberate neglect inflicted on *specific children* and the circumstances surrounding the abuse or deliberate neglect of *the child*.¹³² Part A of the register aims to protect these children from further abuse or neglect by monitoring cases and sharing information between professionals charged with child protection.¹³³

The contents of part A of the register must be a record of all *reports* of abuse or deliberate neglect of a child, *convictions* of all persons on charges involving the abuse or deliberate neglect of a child and findings by a *children's court* that a child is in need of care and protection because of abuse or deliberate neglect of a child.¹³⁴ Reports are received either by trained professionals listed in section 110 of the Children's Act or any person who believes that a child is experiencing abuse or deliberate neglect. As this part of the register serves to prevent the abuse and deliberate neglect of children, a comprehensive entry of all information relating to the child is also made in the register and protective measures have thus been taken to ensure the protection of the child's right to dignity and privacy.¹³⁵

The list of persons authorised to have access to the register is limited in accordance with the function of investigating and protecting children from further abuse and neglect. The emphasised need to regulate access to the register can be assigned to the fact that under the regulations,¹³⁶ the Director-General was afforded a wide discretion to disclose information contained in the register,

¹³¹ Sloth-Nielsen 7-12.

¹³² Section 113 of Act 38 of 2005.

¹³³ *Ibid.*

¹³⁴ Section 114 of Act 38 of 2005.

¹³⁵ Section 115(d) states that a child's name, surname physical address and identification number must be excluded when research is conducted on Part A of the register; Section 116(d) further provides for disclosure of any information in the register if it is in the child's best interest.

¹³⁶ Sloth-Nielsen 7-10.

and many a time the disclosure would result in an infringement of a child's right to privacy as guaranteed in section 14 of the Constitution.

From the above it is evident that the goals envisaged by Part A of the register extend to both child protection service delivery as well as forming the basis of a national monitoring system for child victims of abuse and neglect.

4.2.2 Part B of the Register

Part B of the NCPR is informally referred to as the 'perpetrator' part.¹³⁷ The purpose of Part B is to have a record of persons who are unsuitable to work with children and to use the information in the register in order to protect children *against* abuse from these persons.¹³⁸

Before a perpetrator's name can be included in this part of the register he/she must be found to be unsuitable to work with children as provided for under section 120 of the NCPR. A finding that a person is unsuitable to work with children is made by a children's court, any other court in criminal or civil proceedings in which that person is involved, or any forum established or recognised in law in any disciplinary proceedings concerning the conduct of that person relating to a child.¹³⁹

Such a finding is made either on application to the above mentioned courts or of its own accord. However where a person is involved in criminal proceedings, a finding that a person is unsuitable to work with children is obligatory. This requirement arises in common-law crimes of murder, attempted murder, rape, indecent assault and assault with intent to do grievous bodily harm with regard to a child. The fact that a perpetrator is able to escape criminal liability through a defence of mental illness or insanity does not obviate the requirement that the court must make this finding.¹⁴⁰

¹³⁷ Sloth-Nielsen 7-17.

¹³⁸ Section 118 of Act 38 of 2005.

¹³⁹ Section 120 of Act 38 of 2005.

¹⁴⁰ *ibid.*

The provisions of the NCPR also find retrospective application and notwithstanding section 35 (3)(1) of the Constitution, a person convicted of the common law crimes mentioned above in the five years preceding the commencement date of chapter 7 will be found unsuitable to work with children. In addition, the provisions of the regulations under the Child Care Act which did not provide for procedures for appeal against the inclusion of a person's name in the register have been cured by section 121 of the act which allows a person to appeal or review a section 120 finding.

Once a finding has been made in terms of section 120, the registrar of the relevant court, administrative forum or the person who brought the application in terms of section 120 must notify the Director-General that a person is unsuitable to work with children and of any appeal or review lodged by such person.¹⁴¹ The Director-General must enter the name of a person found unsuitable to work with children in Part B of the register regardless of whether appeal proceedings have been instituted or not. Where such a finding is reversed by appeal or review proceedings, the Director-General must remove the name of the person from the register.¹⁴²

The consequences of being listed in Part B of the register not only prevents the registered person from becoming the foster or adoptive parent of a child but also prohibits such a person from engaging in any form of employment where they will manage, assist in management, be employed, volunteer or *in any other capacity* have access to any children. The words "*in work in any other capacity*" demonstrates that all staff working at a child care facility, ie kitchen staff and gardeners would also have to be screened for potential inclusion on the register.¹⁴³

The prohibition which bars a person from procuring employment in places where he/she may have access to children does not only apply to state run facilities or privately operated facilities but encapsulates employment within certain governmental organisations, such as the South African Police Service and within any facility in terms of the Public Service Act or Municipal Systems Act where such a person may have access to children.¹⁴⁴

¹⁴¹ Section 122 of Act 38 of 2005.

¹⁴² *Ibid.*

¹⁴³ Sloth-Nielsen 7-22.

¹⁴⁴ *Ibid.*

The NCPR like the NRSO places certain responsibilities on both employers and employees or prospective employees. Employers must ensure that all their employees do not appear in Part B of the register, where the employees may have access to children.¹⁴⁵ Employees on the other hand carry the duty to disclose the entry of their name in Part B of the register where their employment requires them to have access to children.¹⁴⁶

The general rule with regard to disclosure of any information in either Part A or B of the register must be in the best interest of a child. However access to information in Part A of the register lies within the sole discretion of the Director-General as opposed to Part B which lists the persons who will have access to register information.¹⁴⁷ The provisions of the Act also afford any person the opportunity to establish whether or not their name appears in either the register in part A or Part B.¹⁴⁸

It is apparent from the content of Chapter 7 of the Children's Act that the provisions inscribed in the NCPR cast a fairly wide net in preventing persons who may pose a threat to a child from having access to that child. However the provisions become questionable when our focus is drawn to the fact that the Sexual Offences Act provides for the NRSO which lists all persons who have committed / alleged to have committed a sexual offence against a child or mentally disabled person. It appears that these two pieces of legislation amount to an overlap in relation to care and protection of children in South Africa.

¹⁴⁵ Section 126 of Act 38 of 2005.

¹⁴⁶ Section 124 of Act 38 of 2005.

¹⁴⁷ Section 127 of Act 38 of 2005.

¹⁴⁸ Section 117 of Act 38 of 2005.

4.3 The National Child Protection Register in comparison with the National Register for Sexual Offenders

In the following paragraphs I will illustrate the similarities and differences between the two registers and will as well as to investigate whether the NCPR should not be expanded to include some of the provisions of the NRSO.

It must be said from the onset that the purposes sought to be achieved by the two separate registers are different. The NRSO is solely targeted at keeping a record of sexual offenders and informing employers and relevant authorities mentioned in the Act whether a person's details appear on the register.¹⁴⁹ The broad provisions of the NCPR on the other hand seek to have a record of abuse or deliberate neglect inflicted on specific children as well as to record persons who are unsuitable to work with children and to ultimately develop a system where information recorded in the register can be used by professionals to protect all children from abuse.

Another difference between the two registers is that the NRSO requires the sexual offence to be committed against a child or mentally disabled person within or outside the Republic.¹⁵⁰ The NCPR does not refer to mentally disabled persons and does not have extra territorial jurisdiction.

Although the provisions of the register appear to be similar, slight alteration in wording allows the one register to be more rigid in some provisions than the other. The following serve as examples.

Both registers bear a provision relating to the consequences of having a name entered into the register and both seek to prevent any person who appears as a perpetrator in their registers from working, operating an entity, having access or becoming a foster parent to a child. However the NRSO stipulates that no person who appears on the register may become the *foster parent, kinship care – giver, temporary safe care- giver or adoptive parent of the child*,¹⁵¹ whereas the NCPR merely prohibits the person from becoming the *foster parent or adoptive parent of the*

¹⁴⁹ Section 43 of Act 32 of 2007.

¹⁵⁰ Section 41 of Act 32 of 2007.

¹⁵¹ Section 41(b) of Act 32 of 2007.

child.¹⁵² Therefore it appears that the Sexual Offences Act casts a wider net in preventing registered sex offenders from being placed in a position of authority over a child.

Another similarity relates to the obligations placed on employers and persons who are employed or potentially seek employment where they may have access to children.

The NRSO *without specifying the type of employment* where an employee is required to disclose the entry of his name into a register merely, requires that an employee to disclose this fact to his employer irrespective of whether they will have access to children in their employment.¹⁵³ An employee must comply without delay and if they are applying for employment after conviction to do so in the application process. Failure to comply with these provisions by an employee will find him liable on conviction to a fine or to imprisonment not exceeding seven years or both.

The NCPR on the other hand only requires a person who is listed in Part B of the register and who is employed in a position where he/she is required to with or have access to children to disclose the fact to his/ her employer. This provision makes no mention as to the time frame in which disclosure should be made and does not mention whether disclosure is necessary on application. An employee who fails to disclose the entry of their name into the NCPR is guilty of misconduct and his/her services may be terminated as a result thereof.¹⁵⁴

The NCPR further *obliges* all employers to enquire if the names of their employees appear in Part B of the register (where such employee may have access to a child during the employment) and offers *no discretion* to the employer as provided in NRSO. Here an employer must check in the case of both *employees and potential employees* and the Director - General must respond in writing within 6 months to such an enquiry.¹⁵⁵ This is in contrast to the NRSO which does not specify a time when a register is to respond to the application of the prescribed certificate.

¹⁵² Section 123(c) of Act 38 of 2005.

¹⁵³ Section 46 of Act 32 of 2007.

¹⁵⁴ Section 124 of Act 38 of 2005.

¹⁵⁵ Section 126 of Act 38 of 2005.

The disclosure of any information in both registers is prohibited *except* where it is in the exercise of a person's powers, duties and functions assigned to them in terms of the NRSO or NCPR. Disclosure of information is also permitted if it is considered to be in the best interests of a child. However whereas the NRSO provides for criminal sanctions where a person wilfully discloses any information in the register,¹⁵⁶ the NCPR is silent in this respect.

It is also interesting to note that in both registers provision is made for the entry of a person's name pending an appeal or review,¹⁵⁷ but neither of the Acts provide for the entry of a person's name in respect of whom passing of sentence has been postponed.

Conclusion

Although great lengths must be taken to ensure the safety of children, the SALRC rejection of the NRSO is not surprising. The NRSO only captures those convicted of sexual offences whereas the NCPR captures those found by any forum to have committed any act or abuse against a child.¹⁵⁸ It is reported that the conviction rate of child sex abuse is very low as only one in nine children report abuse and only 4% of cases will result in conviction. Thus very few sex offenders will be listed on the register.¹⁵⁹ In addition the problem posed by having two registers is that employers are now burdened with having to screen staff against two registers.

It is uncertain why the Justice Portfolio Committee did not look into including the NRSO within the NCPR. As we have seen Part B of the NCPR seeks to fulfil the same objective as the NRSO. In addition the definition of abuse in the Children's Act is broad enough to include sexual offences as defined in the Sexual Offences Act.

Be that as it may, taking into consideration the fact that the registers are so closely related and the amount of human and financial resources required in maintaining two registers, the duplication is something that South Africa can ill-afford. In a country so short of resources that

¹⁵⁶ Section 52 of Act 32 of 2007.

¹⁵⁷ Section 50 (3) of Act 32 of 2007; Section 122(2) of Act 38 of 2005.

¹⁵⁸ *Sunday Independent* (28-03-2010) 7.

¹⁵⁹ *Cape Times* (10-06-2008) 6.

psycho-social care to majority of victims of sexual assault cannot be provided,¹⁶⁰ emphasis is being placed on registration, reporting and investigative processes at the expense of longer-term care and treatment for abused children. Moreover research indicates that registers in themselves contribute very little to child protection.¹⁶¹ Thus it must be said that the Justice Portfolio Committee should have explored the possibility of expanding the purpose and function of the NCPR in order to fulfil the purpose of the NRSO right from the start.

¹⁶⁰ Van Niekerk J 'The Sexual Offences Act: Implications for children'. Available at < <http://www.ngopulse.org> (accessed 11 February 2011).

¹⁶¹ *ibid.*

CHAPTER 5 CONCLUSION

Throughout this dissertation I have sought to provide a brief overview into the contents and application of the NRSO. Chapter one introduced the concept of the NRSO by discussing the legislative intention behind the NRSO as well as the content and applicability of the NRSO. Chapter two highlighted some of the concerns relating to the register. The constitutionality of section 41(1) of the Sexual Offences Act was discussed and the issues pertaining to the inclusion of the names of child sexual offenders into the NRSO was addressed. This chapter also looked at the infrastructural concerns regarding the implementation of the NRSO. Chapter three brought into perspective the foreign law by giving a brief history into sexual offender registers, followed by a comparative study of the legislation and monitoring systems governing the UK Sexual Offenders Register in relation to the NRSO. Lastly chapter four looked into the provisions of the NCPR and compared it with the NRSO. This chapter also sought to determine if the NRSO was not an unnecessary duplication of the NCPR. After an analysis into the above chapters it was discovered that a number of impediments face the proper implementation of the provisions of the NRSO.

In this concluding chapter I will give a summary into the problem areas which I have identified, make recommendations on how child protection in SA can be strengthened and finally answer the question as to whether the NRSO is a comprehensive and effective solution for the protection of child victims of sexual offences in SA.

5.1 Problem Areas

As indicated above a number of impediments face the proper implementation of the provisions of the Sexual Offences Act. The following subparagraphs serve to give a summary into the problem areas of the sex offenders register.

Provisions of the register

The most important rule of interpretation is to establish the purpose of the legislation and give effect to it,¹⁶² this has not been easy to apply to when interpreting the provisions of the register. It appears that due to poor legislative drafting a number of provisions are ambiguous, leaving them

¹⁶² Botha (2005) 66.

open for interpretation and in some cases allowing for a constitutional challenge To illustrate this section 41(1) of the Sexual Offences Act makes provision for the retrospective application of the NRSO, however it is uncertain how the words ‘before’ or ‘after’ should be interpreted. This gives rise to difficulties in implementing the NRSO as it is uncertain whose details must be included on the NRSO. Moreover the provision gives rise to a constitutional challenge in terms of section 35(3)(l) and 35(3)(m) of the Constitution, since the word ‘before could mean anytime before the commencement of chapter 6 and would result in the retrospective nature of the clause being unlimited. The NRSO is also limited in its application. Regardless of the fact that only 4 per cent of child abuse cases will result in conviction. The provisions of the register only allow persons who have been convicted of a sexual offence to be registered.

Omissions

After comparing the provisions of the NRSO with the Sexual Offenders Register in the UK it was seen that the provision regarding registration and notification in the NRSO are narrow and consist of a number of omissions. The current provisions of the NRSO do not state when initial registration is to take place, how it is supposed to be conducted or updated. In addition, while the NRSO aims to have territorial jurisdiction it also makes no provision for a listed offender to inform law authorities of any intended foreign travel. Such omissions do not only provide an opportunity for convicted sex offenders to avoid registration but they also hinder any prospects of establishing and maintaining a fully operational register as envisaged in section 43 of the Sexual Offences Act.

Infrastructural concerns

Another point of concern is the infrastructure in place to accommodate the register. As indicated in the previous chapter, when the concept of registers were first considered by the SALRC during their review of the Child Care Act, one of their biggest concerns was the cost involved in maintaining a register and the infrastructure needed to give effect to it.¹⁶³ Despite this it appears that the approach of the Justice Portfolio Committee was simply, to get the sexual offences Bill passed as soon as possible and to deal with the questions about infrastructure at a later stage.

¹⁶³ SALRC (2002) 127.

Unfortunately as a result of the poor infrastructure currently in place, a number of provisions of the register have been put to a halt.

Constitutional and rights based concerns

As indicated above section 41(1) gives rise to a potential constitutional challenge in terms of section 35(3)(l) and 35(3)m of the Constitution. Another provision which gives rise to a constitutional challenge pertains to the inclusion of children's names on the NRSO. The provisions of the NRSO require children's names to be placed on the register to the same extent as adults. Moreover in cases where these child offenders are required to register for an indefinite period, they are not afforded the opportunity to review this position. Such a provision is not only contrary to international and local statutes which emphasise the need to rehabilitate and reintegrate child offenders into society. It also conflicts with the principle that the best interests of a child is of paramount importance in all matters concerning a child. It may also be argued that due to the stigma associated with being labelled a sexual offender, the inclusion of children's names on the register is an infringement of a child's right to dignity and right to be protected from maltreatment, neglect, abuse or degradation as guaranteed in terms of the Constitution.

Notwithstanding attempts made by the Justice Portfolio Committee to restrict the violation of privacy inherent within the register, by permitting only a limited category of people to access the information in the NRSO. As was seen in the UK case of **F v Secretary for State for the Justice Department**, the consequences of registration has an impact on a large proportion of a child's life. In the case of F, registration meant he could not play for the schools rugby team and affected the families planned holiday in Spain. Therefore, his right to privacy and family life was infringed.

In addition to the above, proponents for the inclusion of children on the register may argue that the state has a duty to protect children and vulnerable groups from sexual offenders and thus, the inclusion of children in the NRSO is a justifiable limitation of their constitutional rights in terms of section 36 of the Constitution. However the purpose of the NRSO is direct in that it seeks to ensure that sexual offenders are not to be employed where they may have access to children or be placed in a position of authority over a child.

As I have indicated in chapter two of this dissertation, what the Justice Portfolio Committee failed to consider when enacting the provision to include children in the NRSO, is that majority of children whose names will appear on the NRSO are either themselves victims of sexual abuse or were engaged in sexual experimentation. Most importantly these children are probably still in school and are not looking to victimise other children within the workplace. Therefore the purpose sought to be achieved by the NRSO is not fulfilled by including children in the NRSO. Taking the above into account, a constitutional challenge against the inclusion of children in the NRSO is likely to be heard in the Constitutional Court.

Considering the above, the following can be said with regard to the NRSO. The NRSO is not proactive. A crime must have already occurred and the offender must be listed before it is of any value. Furthermore the provisions are narrow and do not recognise that in South Africa the majority of sexual offences involving children occur within the family and not at the workplace.¹⁶⁴ Also it may take years before amendments are effected to strengthen the register or the necessary infrastructure is in place to effectively monitor the activities of any of the listed offenders. With the current high levels of sexual crime being committed against children a more immediate, preventative and long term solution is needed to curb this problem. The following recommendations are made.

5.2 Recommendations

Firstly, steps should be taken to strengthen sexual offender treatment in South Africa. In 2006 the SALRC recommended that s276A of the CPA be amended to provide specifically with respect to sexual offenders, that correctional supervision should be increased from three to five years and should include treatment at either the offender's or the state's expense, depending upon financial means.¹⁶⁵ However the Justice Portfolio Committee was unwilling to see the state bear the expense of treatment required under this provision and the proposal was declined.¹⁶⁶ What the Justice Portfolio Committee seemed to ignore is that although treatment has been found to reduce the rate of recidivism, the length of time an offender spends in treatment is also an

¹⁶⁴ 'Reform of Sexual Offences Act: SA Law Reform Commission briefing: 16 November 1999' <<http://www.pmg.org.za> (accessed 2 November 2010).

¹⁶⁵ Artz & Smythe (2008) 253.

¹⁶⁶ *Ibid.*

important factor in the effectiveness of treatment.¹⁶⁷ Moreover the expense of a treatment programme is likely to be less than the cost of the criminal justice process that would entail should the offender re-offend.¹⁶⁸

Secondly research should be conducted into how restorative justice programmes can be utilised to help rehabilitate and reintegrate sex offenders back into society. For example in Canada, one of the most established programmes to deal with the reintegration of sex offenders is the circles of support and accountability programme.¹⁶⁹ The programme is based on the twin philosophies of safety and support concerning reintegration and operates as a means of addressing public concerns and also the offender's needs.¹⁷⁰ Most recently, these circles programmes have been extended to other jurisdictions such as England and Wales on a pilot basis.¹⁷¹

Thirdly more emphasis should be placed on reintroducing the Family Violence, Child Protection and Sexual Offences Unit (FCS). The FCS,¹⁷² was originally established as part of the South African Police Service to provide expert investigation by specially trained members in matters where children were the victims of, among other things, sexual crime.¹⁷³ After being phased out in 2006 and 2007, recent reports have since indicated that these units are being reinstated in some of the provinces in South Africa.¹⁷⁴ This is a decision to be welcomed. Firstly with a unit solely dedicated to investigating sexual offences committed against children and women, this will speed up the process of apprehending sexual offenders and bringing them to court. Secondly

¹⁶⁷ Hanson et al 'First report of the collaborative outcome data project on the effectiveness of psychological treatment for sex offenders' 2002 *Sexual abuse: A Journal of Research and Treatment* 169 at 170.

¹⁶⁸ Artz & Smythe 254.

¹⁶⁹ Mclaiden 'Restorative justice as a response to sexual offending addressing the failings of current punitive approaches' 2008 *Sexual Offender Treatment* 1862 at 1865.

¹⁷⁰ Mclaiden (2008) *Sexual Offender Treatment* 1862 at 1866. In terms of this programme a previous sexual offender and the members of the circle enters into a signed covenant which specifies each members area of assistance. The previous sexual offender agrees to pursue treatment within the circles programme by agreeing to act responsibly in the community and contacting each member of the circle at least once a week where he or she is considered to be at a low risk of reoffending or every day where there is a higher risk of reoffending. The circle members are thus able to offer support, offer guidance and supervision over the previous offender.

¹⁷¹ *Ibid.*

¹⁷² Pienaar 'South African police service: Child protection Unit' 2000 *CARSA* 1 at 19 – The FCS was originally established as the Child protection Unit but was changed to the FCS to offer more protection to both children and women.

¹⁷³ The FCS also covered crimes relating to violations of the Child Care Act, child pornography, abduction, kidnapping, domestic violence, assault and attempted murder.

¹⁷⁴ The Herald (2010-06-04) 4.

because police members are trained to offer victim support to traumatised children and women, this may encourage other victims of sexual crime to report their abuse. Therefore it is recommended that more time, financial resources and management should go into establishing these units across all provinces.

Lastly an initiative by the Department of Education must be made to formally educate both children and parents regarding the dangers and characteristics of potential child molestation situations. Increasing children's awareness may be an effective way to decrease the number of child molestation or abuse.¹⁷⁵

5.3 Conclusion

In answering the question as to whether the NRSO is a comprehensive and effective solution for the protection of child victims of sexual offences in SA, the following can be said. The provisions of the NRSO are vague and present a number of difficulties in practically implementing the provisions of the NRSO. The retrospective clause in section 41(1) is ambiguous and does not give clarity into determining who should be listed on the NRSO. The notification requirements of the NRSO are also narrow. Lack of information as to when and how registration is to be conducted and updated, as well as failure to inform authorities of any intended foreign travel provides a broad base in which convicted offenders may avoid registration, thereby defeating the legislatures aims of enhancing child protection services in SA. The NRSO also only records those offenders who have been convicted of a sexual offence. With the conviction rate of child abuse cases in South Africa being estimated at 4 per cent this means that very few offenders will be listed on the NRSO. As a result the NRSO as preventative measure for sexual offences is limited in its application.

In addition to the above certain provisions of the NRSO are prone to a number of constitutional challenges. This can be seen in respective of section 41(1) of the Sexual Offences Act and with the inclusion of children's names into the NRSO. Furthermore both child and adult sexual offenders may be placed on the register for an indefinite period. Such a provision can be

¹⁷⁵ Silva 'Dial 1-900 Pervert and other statutory measures that provide public notification of sex offenders' 1995 *SMUL Review* 1961 at 1994.

regarded as a punitive measure to address crime. The provision for lifelong registration impedes any prospects of such an offenders' rehabilitation or reintegration into society, which in the long run may work against, rather than towards, the protection of children.

Another point of criticism against the NRSO is that the infrastructure in place to enforce the provisions of the NRSO is inadequate. It is uncertain when the necessary infrastructure will be in place to effectively implement the provisions of the NRSO and in the interim the provisions of the NRSO will continue to be a challenge to enforce and children will be afforded very little protection against sex offenders in SA. Moreover the provisions of the NRSO amount to a duplication of the NCPR. It is unclear why the Justice Portfolio Committee did not look into including the NRSO within the NCPR. As indicated in chapter four of this dissertation the definition of abuse in the Children's Act is broad enough to include sexual offences as defined in the Sexual Offences Act. Nonetheless the challenge now lies in having to implement these registers. Not only are these registers expensive to maintain but they present the practical difficulty of enforcement, since employers are now burdened with having to check their employees' names against two registers. Lastly research has shown that there is actually no proof that sex offender registries contribute to community safety.

It thus appears that the South African government has taken the wrong approach in alleviating the current problems of sexual crime. It seems that the Justice Portfolio Committee was not looking for a long term solution but an immediate answer to addressing this problem. Without a thorough research into the effects of registries they passed the NRSO and as a result have inherited the problems associated with implementing it. Sadly such decisions have negative consequences, such as funds being diverted away from treatment, investigation and victim support. For now it seems that children and vulnerable groups have been left with little protection and will continue to be victims of sexual crime until more long term and preventative measures are put in place. As a result it must be said that the NRSO is not a comprehensive and effective solution for the protection of child victims of sexual offences in SA.



BIBLIOGRAPHY

Acts

Canada

Sex Offender Information and Registration Act of 2004

South Africa

Children's Act 38 of 2005

Child Care Act 74 of 1983

Child Justice Act 75 of 2008

Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007

Criminal Procedure Act 51 of 1977

Insolvency Act 24 of 1936

The Constitution of the Republic of South Africa

United Kingdom

Criminal Justice Act 1991 c.53

Criminal Justice and Court Service Act 2000 c.43

Sex Offender Act 1997 c.51

Sexual Offences Act 2003 c.42

United States of America

Adam Walsh Child Protection and Safety Act of 2006

Violent Crime Control and Law Enforcement Act of 1994

International Instruments

African Charter on the Rights and Welfare of a Child 1990

European Convention on Human Rights 1950

International Covenant on Civil and Political Rights 1966

Universal Declaration of Human Rights 1948

United Nations Convention on the Rights of a Child 1989



Books and Chapters in books

- Artz L & Smyth D (eds) *Should we consent: Rape law reform in South Africa* Cape Town, Juta 2008
- Boezaart T (ed) *Child law in South Africa* Claremount, Juta 2009
- Botha C *Statutory interpretation: An introduction for students* Cape Town, Juta 2005
- Currie I & De Waal J *The Bill of Rights handbook* (5th ed) Cape Town, Juta 2005
- Devinish G *A commentary on the South African Bill of Rights* Durban, Butterworths 1999
- Kleyn D & Viljoen F *Beginner's guide for law students 3rd ed* Lansdowne, Juta 2002
- Maepa T (ed) *Beyond retribution: Prospects for restorative justice in South Africa* Pretoria, Institute for Security Studies 2005
- McAlinden A *The shaming of sexual offenders: Risk, retribution and reintegration* Oxford, Hart 2007
- Skelton A & Proudlock P 'Interpretation, objects, application and implementation of the Children's Act' in Davel and Skelton (eds) *Commentary on the Children's Act* Cape Town, Juta 2007
- Sloth- Nielsen J 'Protection of children' in Davel and Skelton (eds) *Commentary on the Children's Act* Cape Town, Juta 2007
- Terblanche S *A guide to sentencing in South Africa* Durban, LexisNexis 2007
- Thomas T *Sex crime: Sex offending and society* Devon, Willian 2000

Books authored by Institutions and Commissions

- Centre for Child Law: *Child Law Matters* Annual Report 2009
- Centre for the Study of Violence and Reconciliation: *Promulgation of the Criminal Law (Sexual Offences and Related Matters) Amendment Bill* Report October 2007
- South African Law Commission Project 107: *Sexual Offences: The substantive law* Discussion paper 85 August 1999
- South African Law Reform Commission: *Review of the Child Care Act: Part I* Report December 2002

Journals

- Anon 'Overview of the 2007 version of the Child Justice Bill' 2008 10 *Article 40* 3
- Bowater B 'Adam Walsh Child Protection and Safety Act 2006: Is there a better way to tailor sentences of juvenile sex offenders' 2008 57 *Catholic University Law Review* 817



- Colbey C 'Keeping track of sex offenders: Part 1 of the Sex Offenders Act 1997' 1997 60 *Modern Law Review* 690
- Geer P 'Justice served? The high cost of juvenile sex offenders registration' 2008 27 *Developments in Mental Health* 33
- Hanson *et al* 'First report of the collaborative outcome data project on the effectiveness of psychological treatment for sex offenders' 2002 14 *Sexual Abuse: A Journal of Research and Treatment* 169
- Hasselink – Louw A & Schoeman M 'Treatment of incarcerated sex offenders in South Africa: An analytical perspective' 2003 16(1) *Acta Criminologica* 158
- Hebenton B & Thomas T 'Tracking sex offenders' 1996 35(2) *The Howard Journal* 97
- Logan W 'Sex offender registration and community notification: Emerging legal and research issues' 2003 989 *Annals New York Academy of Sciences* 337
- McAlinden A 'Restorative Justice as a response to sexual offending: Addressing the failings of current punitive approaches' 2008 3 *Sexual Offender Treatment* 1862
- McAlinden A 'Sex offenders and child protection' 1998 4 *Child Care in Practice* 250
- Pieenar A 'South African police service: Child protection unit' 2001 1 *CARSA* 1
- Silva T 'Dial pervert and other statutory measures that provide public notification of sex offenders' 1995 48 *SMUL Review* 1961
- Tewksbury R 'Collateral consequences of sex offender registration' 2005 21(1) *Journal of Contemporary Criminal Justice* 67
- Thomas T 'Children and young people on the sex offender register' 2009 255 *Childright* 18
- Thomas T 'Sex offender community notification: Experiences from America' 2003 42(3) *The Howard Journal* 217
- Thomas T 'The sex offender register: A case study in function creep' 2008 47(3) *The Howard Journal* 227
- Thomas T 'The sex offender register: The registration of young people' 2003 194 *Childright* 10
- Thomas T 'When public protection becomes punishment? The UK use of civil measures to contain the sex offender' 2004 10 *European Journal on Criminal Policy and Research* 337
- Vetten L 'New crimes and old procedures: Can the new Sexual Offences Bill deliver on its promises?' 2007 22 *SA Crime Quarterly* 21



Yung C 'One of these laws is not like the others. Why the federal sex offenders registration and notification act raises new constitutional questions' 2009 46 *Harvard Journal on Legislation* 369

Case Law

South Africa

Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism 2004 (4) SA 490 (CC)

Matiso v Commanding Officer, Port Elizabeth Prison 1994 (4) SA 592 (SE)

S v RB; S v DK and Another 2010 (1) SACR 447 (NCK)

United Kingdom

R v Chief Constable of North Wales Police, ex parte Thorpe [1999] QB 396 (CA)

R (on the application of F) v Secretary of State for the Justice; R (Thompson) v Secretary of State for the Home Department [2009] EWCA Civ 792

R (F (A child)) v Secretary of State for the Home Department; R (Thompson) v Same [2010] UKSC 17

The Queen on the application of F and Aubrey Thompson v Secretary of State for the Justice Department [2008] EWCH 3170 (QB)

Government publications

South Africa

Government notice 1670 in Government Gazette 32850 of 29 December 2009

Proclamation R13 in Government Gazette 33076 of 26 March 2010

Newspaper articles

South African articles

Bamford H 'Sex offenders national register in place, but public can't access it' *Sunday Independent* 28 March 2010 7

Butler L 'Special police unit's return hailed' *The Herald* 4 June 2010 4

Joseph N 'New sex offenders register unnecessary duplication' *Cape Times* 10 June 2008 6

International articles

Goodnough A & Davey M 'Effort to track sex offenders draws resistance' *The New York Times* 9 February 2009 1

Travis A 'Sex offender wins appeal against indefinite inclusion on register' *The Guardian* 22 April 2010 6

Internet

'Amendments to Children's Bill: SA law reform Commission briefing 15 February 2005' <<http://www.pmg.org.za> (accessed 30 June 2010)

'Children's Bill: Hearings 11 October 2005' <<http://www.pmg.org.za> (accessed 15 October 2010)

'Reform of Sexual Offences Act: SA Law Reform Commission briefing 16 November 1999' <<http://www.pmg.org.za> (accessed 2 November 2010)

'Sadtu unhappy with plan to name and shame sex offender teachers' <<http://www.sabcnews.co.za/portal/site/SABCNews/menuitem> (accessed 23 April 2009)

'Section 21: Managing individuals who pose a risk of harm to children' <<http://www.blackburn.go.uk/server> (accessed 20 August 2010)

'Sex offender register operational, but not yet useful' <**Error! Hyperlink reference not valid.** (accessed 19 July 2010)

'Sexual Offences on the rise' <<http://www.buanews.gov.za> (accessed 22 September 2009)

Van Niekerk J 'The Sexual offences Amendment Act: Implications for children' <<http://www.ngopulse.org> (accessed 11 February 2011)'