

The Sexual Offences Act 31 of 2007 introduced a Register for Sex Offenders in Chapter 6 of the Act. The register is not yet operational, but indications are that it will be brought into operation sometime after June 2009. The Register aims to protect children and persons who are mentally disabled against sex offenders. The Register records details of persons convicted of sexual offences against a child or a mentally ill person. It also records details of findings made in terms of section 77(6) or 78(6) of the Criminal Procedure Act of 1977. In relation to Chapter 6 these are findings that persons alleged to have committed the sexual offence against a child or mentally ill person are incapable of defending the charge or a finding that a person is not criminally responsible for their actions due to mental illness or defect. The offender's details must be placed on the Register whether the offence was committed before or after the commencement of Chapter 6 or whether the offence was committed in a foreign jurisdiction or in SA. In this Issue we explore some provisions of Chapter 6 in order to understand the procedures and requirements created by this chapter.

The purpose of this Issue is to provide legal practitioners with a brief outline of what Chapter 6 requires in order to advise clients whose details may appear on the register or clients in the criminal justice system whose details may be entered into the Register upon conviction. It is also noteworthy that Chapter 6 places an obligation on the prosecuting authority and any person (which would include legal representatives) to remind a court to make an order placing details of a sex offender in the Register if a court failed to make an order to that effect. So for that reason too it is important to understand the workings of Chapter 6. However, the entire chapter is not dealt with here and a follow up Issue will be dedicated to a detailed comparison between the Register for Sex Offenders and the Child Protection Register contained in the Children's Act. Please note that in terms of the Judicial Matters Amendment Act 66 of 2008, the Minister has until June 2009 to establish the Sex Offender Register.

Persons whose particulars must be on the Sex Offender Register (section 50)

The section stipulated that details of the following persons must be included in the Register

- Persons convicted of sexual offence against child or person suffering from a mental disability. Also persons alleged to have committed a sexual offence against child or a mentally disabled person but was found incapable of understanding court proceedings in order to defend the charge or where a court found a person not responsible for his/her actions that amounted to a sexual offence due to mental illness.
- A person serving a sentence or who has served sentence of imprisonment as result of conviction of a sexual offence against a child or mentally disabled person.
- Persons who had a previous conviction of a sexual offence against a child or a mentally disabled person or who has not served a sentence of imprisonment for such an offence.
- Persons convicted of any offence equivalent to the commission of a sexual offence against a child or mentally ill person in a foreign court.
- Persons found by a foreign court to be mentally incapable of defending a charge on a sexual offence or found to be mentally unaccountable for his actions that resulted in a sexual offence.

- Persons whose particulars appear on an official register in a foreign country following a conviction of a sexual offence against a child or person suffering from mental disability.

When a court convicts a person of a sexual offence against a child or a mentally disabled person or where the court made a finding in terms of section 77(6) or 78(6) of the Criminal Procedure Act of 1977 in the context of a sexual offence, the court must make an order that the person's particulars must be forwarded to the Registrar responsible for the Register. Chapter 6 also obliges Correctional Services to forward information of persons serving sentences for sexual offences against children or mentally disabled persons to the Registrar. The Commissioner for SAPS must send information of previous convictions of sexual offences against a child or mentally disabled person to the Registrar.

Chapter 6 also provides for the removal of particulars from the Register. The requirements are found in section 51. The offender must apply to the Registrar for removal of his or her particulars from the Register. The Registrar will consider the application by reviewing the sentence imposed on the offender seeking removal of his details and also whether the application was made within the timeframes prescribed by the Act.

- A convicted sex offender sentenced to imprisonment or correctional supervision whether suspended or not, without an option of a fine for 6-18 months may apply for removal of particulars after 10 years since release from prison or since period of suspension lapsed.
- A person sentenced (whether suspended or not) for a sexual offence against a child or person with mental disability without option of fine for six months or less may apply for removal of particulars after 7 years lapsed since release or suspension period ended.
- Person alleged to have committed a sexual offence against person with a mental disability or defect and in respect of whom a finding was made that he/she could not understand the court proceedings in order to defend the case or that he/she cannot be held responsible for actions due to mental illness may apply to the Registrar for removal of details after 5 years lapsed since he/she recovered from the mental illness or defect in question and after being discharged from restrictions imposed in terms of the Mental Health Care Act of 2002.
- Person given a lesser form of punishment for sexual offence against child or mentally ill person may apply to remove details from register after 5 years since the particulars were included in the Register

There are instances where particulars will remain in the Register indefinitely. This is where a person was convicted of a sexual offence against a child or mentally disabled person on two or more occasions and where a person is sentenced for a sexual offence against a child or person with a mental disability to imprisonment for more than 18 months.

What are the general consequences of a client's particulars being placed on the Register?

- The person may not be employed in a position where he/she will have to work with children or where he/she will have access to children

- The person may not be granted a licence or be allowed to operate or manage a business or facility caring for or supervising children or where children are present or congregate; and
- The person may not be appointed as a foster parent, kinship care-giver, and temporary safe care-giver or become an adoptive parent.
- Legal obligations are placed on employers to find out whether current or prospective employees are on the Register and not to employ those whose details are on the Register unless the safety of children or mentally disabled persons can be secured. Employers must terminate employment if an employee's conviction relevant to chapter 6 has not been disclosed.

Conclusion

It is not clear how the Sex Offender Register will operate alongside the Child Protection Register and the need for two such registers has been questioned. However, the relevant departments remain decisive in keeping the two separate registers. The consequences of having one's particulars on the Sex Offender Register are quite severe and practitioners must be aware of procedures to remove details where a client was convicted or accused of a sexual offence and if the client is entitled to removal of details on the Register. The link between the sentence handed down to the offender and the Register is also noteworthy for legal representatives. Furthermore, practitioners should act in the public interest by ensuring that the names of sex offenders are placed on the Register in compliance with Chapter 6.