

CENTRE FOR CHILD LAW SUBMISSIONS
ON
THE CRIMINAL LAW (SEXUAL OFFENCES AND RELATED
MATTERS) AMENDMENT ACT AMENDMENT BILL, 2020



CENTRE FOR
CHILD LAW

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1. ABOUT THE CENTRE FOR CHILD LAW

The Centre for Child Law (“**CCL**”) is a public interest impact litigation organisation registered with the Legal Practice Counsel. The CCL contributes towards the establishment and promotion of the best interests of children in South African law, policy and practice through litigation, advocacy, research and education.

2. THE CENTRE’S EXPRESSION OF SUPPORT

The CCL welcomes and supports the measures put in place by the Department of Justice and Correctional Services (“**the Department**”) to protect vulnerable people and victims of sexual (and/or gender based-) violence. The CCL, moreover, acknowledges the important role that legislation plays in ensuring that the scourge of sexual violence in our society is addressed. We also acknowledge the need for the Department to articulate and formalise its stance against sexual (and gender based-) violence as well as the measures taken to tackle it.

That said, in the quest to ensure that perpetrators of sexual offences are held to account, sight should not be lost of the constitutional imperatives and considerations that must guide and inform the law, particularly in relation to **child offenders** (or offenders who were children at the time of the commission of the offence).

The submissions to follow aim to highlight, and provide recommendations, in relation to the systems that the Criminal Law (Sexual Offences and Related Matters) Amendment Act Amendment Bill, 2020 seek to create.

3. THE CENTRE FOR CHILD LAW’S SUBMISSIONS

The CCL’s submissions will address six issues, namely:

- a. The continued relevance of the National Register for Sex Offenders (NRSO).
- b. Difficulties experienced in obtaining information from the NRSO.
- c. Making particulars of persons convicted of sexual offences publicly available.
- d. Broader protection of ‘vulnerable people’.
- e. The retrospective effect of the proposed provisions.
- f. The duration that a child offender’s details will remain on the NRSO.

3.1 THE CONTINUED RELEVANCE OF THE NATIONAL REGISTER FOR SEX OFFENDERS

There can be no debate that the objectives of the NRSO are laudable. It will be recalled, in this regard, that its stated objectives are *inter alia* to improve the documentation of convicted sex offenders to prevent them from engaging in employment that would put them in close proximity with children and persons with mental disabilities, and now broader categories of vulnerable groups. However, and despite its laudable objectives, several questions arise, including –

- its effectiveness in protecting vulnerable people; and
- its impact on the rehabilitation and reintegration of child offenders.

The effectiveness of the NRSO may, first and foremost, be compromised by the insufficiency of State resources. The resources allocated to running such a register should ensure that the information obtained and retained will “assist police in speeding up investigations, establish further legal grounds for confining registered offenders, and act as a deterrent to existing or potential sex offenders”.¹ Maintaining and monitoring the NRSO in a useful manner is resource intensive.² Presently questions remain on whether sufficient resources are being allocated to the running of the NRSO. An illustrative example of how insufficient resources affects the output of the NRSO: in 2018/2019 it was reported that a total of 19 688 cases on the NRSO were validated (these are cases in the NRSO between 2009 and 2018/2019).³ This should be compared to the 24 387 reported sexual offences committed against children (not including persons with mental disabilities), that the South African Police Service (“SAPS”) reports on just for the 2018/2019 period.⁴ If one assumes that a large number of perpetrators committing sexual offences against children should have made it on the NRSO, then the NRSO is still a long way from obtaining all the information necessary to achieve its objectives.

A further concern raised about the effectiveness of the NRSO is that while the focus is on sexual offences and the use of the register is important, there may be persons who have committed equally serious crimes that should disqualify them from working with children and other vulnerable groups. Thus, the SAPS criminal records system (to be addressed further below) that records all convictions serves this purpose and the use of it provides a more comprehensive view in relation to a person who is applying for a job.

¹ N Mollema “The viability and constitutionality of the South African Register for Sex Offenders: A comparative study” *Potchefstroom Electronic Law Review* 2015(18) 7 at p. 2724.

² N Mollema at p.2725.

³ Department of Justice and Constitutional Development “Annual Report 2018/2019” (2019) 72 <accessed at <https://www.justice.gov.za/reportfiles/anr2018-19.pdf>>.

⁴ South African Police Service “Annual Report 2018/2019” (2019) 124 ,accessed at https://www.saps.gov.za/about/stratframework/annual_report/2018_2019/saps_annualreport2018_2019v2.pdf>.



Given the above, the CCL believes that the existence of the NRSO has not enhanced the protection of vulnerable groups; particularly given the fact that there is a system in place that has been functioning relatively well – the SAPS criminal record system (“**SAPS System**”). The SAPS System contains information on any person found guilty of any crime, sexual or otherwise, against children, persons with disabilities and other vulnerable groups. The SAPS System contains all the historic data necessary as up to most recently. Using the SAPS System would also ensure that limited resources are pooled into ensuring that only one system, that is already functioning, provides the information needed to identified stakeholders.

The SAPS system provides not just information on convictions of sexual offences but other convictions that may be relevant to a particular job that would place a person in contact with vulnerable persons. For example, a care worker or teacher who has a criminal record of physically (but not sexually) assaulting children. The SAPS System would be a single repository of information that would be relevant to particular employers.

3.2 DIFFICULTIES EXPERIENCED IN OBTAINING INFORMATION FROM THE NRSO

The CCL has first-hand experience in the difficulties experienced when attempts are made to access necessary information from the NRSO. The CCL attempted to make use of the information provided to it in order to comply with a judgment from the Constitutional Court. In 2014, the Constitutional Court found that it was unconstitutional to automatically include the details of child sex offenders in the NRSO without giving them an opportunity to make representation as to why they should be not be included on the NRSO. The Court declared section 50 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (“**the Act**”), invalid and gave Parliament time to remedy the defect. The Constitutional Court also directed the Registrar of the NRSO to make available to the court, information on children whose details were already on the NRSO at the time, in order for it to make the information available to persons or organisations seeking to assist the child offenders in vindicating their rights.

The Registrar made information available to the CCL and to Legal Aid South Africa, but it was not information that could be used to track down the affected children – much was missing. The most significant deficiency is the fact that the list provided did not contain any information about how long each person’s name must be on the NRSO. This could have been calculated from the sentence, but the sentence information was also not provided. The lack of this information made it is very difficult to formulate a plan to assist the children.

Various attempts have been made over the years by Legal Aid South Africa and the CCL (separately) to acquire more information from the Registrar in order to comply with the findings of the Constitutional Court judgment. All of these attempts have yielded nothing and 5 years later the offenders still remain on the



NRSO without attempts made to provide them with an opportunity to make representations before a court. These difficulties in the end violate the rights of the affected individuals to have access to courts in light of the declaration of unconstitutionality.

The experiences of the CCL bring up reasonable concerns about whether other stakeholders have trouble accessing information from the NRSO when applications are made. We accept that the CCL's situation is different, but continuously facing barriers in legitimate attempts to access information that would ensure access to court for many and compliance with principles set out in the Constitutional Court judgement, is cause for concern.

Recommendation

- Enhance mechanisms that have been put in place to record information comprehensively and also to make necessary information speedily available upon application and approval of such application.

3.3 MAKING PARTICULARS OF PERSONS CONVICTED OF SEXUAL OFFENCES PUBLICLY AVAILABLE

The CCL notes that proposed amendments to section 42 of the Act will, if adopted, grant the Registrar the power to make the full names, surnames, identity number and the sexual offence, of **every person** whose particulars have been included in the Register, available on the website of the Department. The CCL is particularly concerned about the reference to “*every person*” which includes child offenders or people who were children at the time of the commission of the offence.

The failure to limit the proposal to adults, with respect, is unconstitutional. In this regard, it is *trite* that our Constitution requires that children are to be treated differently from adults and in a manner that, in as far as is possible, promotes their rehabilitation and reintegration.

In **Centre for Child Law v Minister for Justice and Constitutional Development and Others [2009] ZACC 18** the Constitutional Court held that:

“Not only are children less physically and psychologically mature than adults: they are more vulnerable to influence and pressure from others. And, most vitally, they are generally more capable of rehabilitation than adults. These are the premises on which the Constitution requires the courts and Parliament to differentiate child offenders from adults. We distinguish them because we recognise that children’s crimes may stem from immature judgment, from as yet unformed character, from youthful vulnerability to error, to impulse, and to influence. We recognise that exacting full moral accountability for a



misdeed might be too harsh because they are not yet adults. Hence we afford children some leeway of hope and possibility. ... [S]ince the character and personality of children under 18 are not yet fully formed, child offenders may be uniquely capable of rehabilitation. Juveniles are still engaged in the process of defining their own identity.”

In **J v National Director of Public Prosecutions and Another [2014] ZACC 13** the Constitutional Court found that child offenders’ details should not automatically be placed on the NRSO (unlike their adult counterparts) but rather that they should be given an opportunity to argue why their details should not be placed on the NRSO. The Court held the following:

“The contemporary foundations of children’s rights and the best-interests principle encapsulate the idea that the child is a developing being, capable of change and in need of appropriate nurturing to enable her to determine herself to the fullest extent and to develop her moral compass. This Court has emphasised the developmental impetus of the best-interests principle in securing children’s right to ‘learn as they grow how they should conduct themselves and make choices in the wide and moral world of adulthood.’ In the context of criminal justice, the Child Justice Act affirms the moral malleability or reformability of the child offender.”

and

“A number of key principles arise from this approach to the best interests of the child offender. First, the law should generally distinguish between adults and children. ... A second important principle is that the law ought to make allowance for an individuated approach to child offenders. ... A third principle is that the child or her representatives must be afforded an appropriate and adequate opportunity to make representations and to be heard at every stage of the justice process, giving due weight to the age and maturity of the child.”

and

“The provision requires that registration follows automatically from conviction of and sentencing for the particular crimes. This infringes the best interests of the child. The opportunity for an individuated response to the particular child offender, taking into account the child’s representations and views, is excluded both at the point of registration and in the absence of an opportunity for review. The limited circumstances in which an offender can apply for his or her removal from the Register are insufficiently flexible to consider the particular child’s development or reform.”



The publishing of a child's (sex) offenders name detracts from these principles. It will forever label them and compromise their ability to be reintegrated and reformed.

The proposed publication, moreover, is not aligned with provisions in the proposed Bill that aims to treat child offenders differently from adults. Its provisions allow, for instance, children to make submissions to court on why their details should not be placed on the NRSO and to allow children to apply for their details to be removed from the NRSO before the prescribed period of time that their details are required to remain on the register. These special protections would be rendered redundant, particularly regarding the removal, since the community that they live in will be alive to the fact that they were convicted and will likely never allow the child to reintegrate despite him or her actively trying to correct their errant ways.

The proposed publication, lastly, and perhaps most importantly, is in complete contradiction with the finding of the Constitutional Court that the identities of child victims, witnesses and **offenders** should be protected and not revealed – before and after they turn 18 years – and the failure to do so would be unconstitutional. In **Centre for Child Law and Others v Media 24 Limited and Others [2019] ZACC 46**, it was held that such protection affirms children's right to dignity, privacy and their best interests. It further held that protection of children's identities promotes the implementation of restorative justice and guards against exposure to stigmatisation that would hinder rehabilitation and reintegration.

Recommendation:

- The provision, if adopted, must explicitly create an exception for children (or persons who were children at the time of the commission of the offence) from having their names made public.

3.4 VULNERABLE PERSONS

The proposed amendments broaden the type of perpetrators whose details will be placed on the NRSO. It no longer limits it to those who committed sexual offences against children and persons with mental disabilities, but persons who are convicted of committing a sexual offence against any vulnerable person. The proposed amendments further expand on who is considered to be vulnerable, in addition to children and persons with mental disabilities.

The CCL is not opposed to the general idea of providing protection to a broader group of vulnerable persons. That being said there is an argument that could be made for broadening the group of vulnerable persons even further considering the different members of society that are vulnerable to being victims of sexual offences, for example women, sex workers, members of the LGBTQI community.

The CCL, however, believes that the NRSO is not the right vehicle to provide this broader protection. We believe that using the SAPS Systems would yield better results. The Sexual Offences Act could refer



employers to the SAPS System. It could have a chapter on who can obtain information from the SAPS System, the conditions under which information could be obtained, what information could be sought (in order to protect dignity and privacy rights) and how the information could be utilised by employers or other relevant stakeholders.

Recommendations

- Consider broadening the category of vulnerable persons even further taking into account other members of society that are often vulnerable to being victims of sexual offences.
- Make use of the SAPS System – instead of the NRSO – to determine which persons are unsuitable to work with vulnerable persons based on conditions of use set out in the Act.
- Currently the NRSO on its own is nothing more than a repository of information. It on its own does nothing. It is the supporting provisions that give it “teeth”. For instance, section 41 prohibits certain employment for those whose names are on the register. If the SAPS System were to be used this provision (and other supporting provisions) would need to be amended.

3.5 INCLUSION ON THE NRSO AND RETROSPECTIVITY

The proposed amendments open the door, yet again, to drastically increasing the amount of historical data that will have to be sourced and placed on the NRSO. The scope of data to be sourced will be expanded to include sexual offences generally and not just those committed against children and persons with mental disabilities. It is doubtful whether there is the necessary capacity and resources to carry this out. The 2013/2014 report on the implementation of the Sexual Offences Act⁵ indicates that even though progress had been made on the registration of offenders between 2011/2012 and 2013/2014 (2 340 vs 15 452) about 12 000 cases of historic data from SAPS could not be captured due to missing information.⁶ A data verification project had to be initiated to manually trace and verify the cases.⁷ It would be quite reasonable to raise concerns as to whether a repeat of such a challenge, and others, would be highly likely and exacerbated by the increase in required information.

There are serious concerns arising out of such a possibility. These include, because of the inconsistency in the collection of mainly historical data there will be some persons included on the register and others (who should be) who will not be included due to practical difficulties such as that which was highlighted above in the 2013/2014 report. This would result in possible claims of discrimination. There is a heightened

⁵ This is the only report available on the Department’s website on the implementation of the Sexual Offences Act.

⁶ Department of Justice and Constitutional Development, Department of Correctional Services, South African Police Service and the National Prosecuting Authority “Report on the Implementation of Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007: 01 April 2013 to 31 March 2014” (2014) 56.

⁷ Department of Justice and Constitutional Development 58.



risk that persons who were children at the time the offences were committed will be added to the NRSO without the opportunity to make necessary representation on why they should not be on the NRSO. Lastly, there is the real risk of people who have rehabilitated and reintegrated into society having their lives thrown into turmoil on account of this historic collection. A one size fits all approach is not recommended.

The use of the SAPS System could potentially prevent the occurrence of or worsening of the abovementioned challenges. As mentioned earlier, the SAPS System already contains the historical data necessary. The Sexual Offences Act could grant an employer access to the SAPS System on application. The impact that this information would have on an individual could be determined through the use of a graded system that takes into account, inter alia, relevance of the requested information to the job in question, when the conviction was made, age of the offender at the time of the commission of the offence, whether the individual has been rehabilitated and so on. This would require amendments to section 41, and other provisions, in the Act to ensure that the prohibitions on certain types of employment are aligned with the use the SAPS system.

The Centre further submits that child offenders, or individuals who were children at the time of the commission of the offence, should not be subject to retrospective inclusion. There should be special protections afforded to them that take into account children's potential for rehabilitation as acknowledged by the Constitutional Court.

Recommendation

- Make use of the SAPS System instead of the NRSO to avoid legal challenges around the impact of retrospective inclusion on the NRSO.
- Provide special protections to child offenders or persons who were children at the time of the commission of the offence.

3.6 DURATION THAT SOMEONE'S DETAILS REMAIN ON THE REGISTER

The proposed amendments seek to increase the duration of time that an individual's details remain on the NRSO. The CCL submits that this should not be the case for children (or persons who were children at the time of the commission of the offence). We accept that section 51(2A) of the Act allows for children (or persons who were children when they committed offences) to apply for the removal of their details at any time before the expiry of such a time period. The exception, however, erroneously assumes that children have the capacity and resources to do this (with or without the assistance of their families). They by all accounts do not. The exception, accordingly, is no real exception at all insofar as children are concerned.



Taking into account principles articulated above of children's malleability and potential for rehabilitation and reintegration we believe that if the NRSO is to be retained, the duration of time that a child's details stay on the NRSO should remain as currently set out in the Act and not increase.

If the SAPS System was to be used the same principle would apply. If the duration of time currently set out in the Act should expire (or an application for earlier expungement is successful) then an individual's criminal record should not include offences committed as a child.

Recommendation

- The duration of time that an individual's information on the NRSO or SAPS system should not increase if that person is a child offender or was a child at the time of the commission of the offence.

4. CONCLUSION

The CCL expresses its thanks for the opportunity to make written submissions and requests the opportunity to make oral submissions.

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