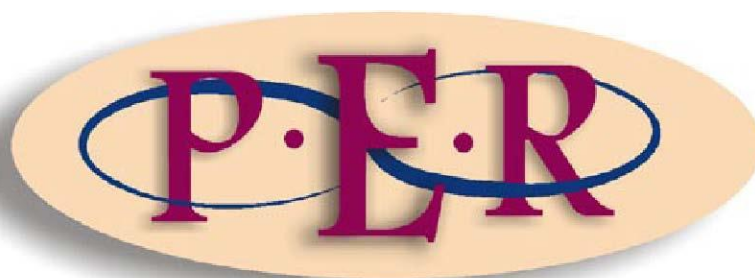


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## THE VIABILITY AND CONSTITUTIONALITY OF THE SOUTH AFRICAN NATIONAL REGISTER FOR SEX OFFENDERS: A COMPARATIVE STUDY

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### 1 Introduction

Issues surrounding sexual offences have always been contentious. Some governments have attempted to deal with this crime by creating a sex offender register whereby the activities and movements of sexual deviants are monitored and the details of convicted sex offenders are recorded for open or restricted public use.<sup>1</sup> South Africa provides for a National Register for Sex Offenders (NRSO) in terms of section 42 of the *Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007*.<sup>2</sup> This jurisdiction has had the ideal opportunity to ameliorate the flaws and to reproduce the successes of other registers dealing with sex offenders. In this regard, the SA Law Reform Commission (SALRC) debated the feasibility of a sex offender register for a considerable period of time.<sup>3</sup> Aspects such as the scope of the register, public access to the register's information, and who to include in the register were discussed, amongst other matters. The SALRC specifically considered studies in the United States (US) and the United Kingdom (UK) on the efficacy of sex offender registers in those countries. The aim of this article is consequently to compare the sex offender registers in the US, UK and SA in order to determine whether the NRSO is an improvement on the already-established registers, and also

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<sup>1</sup> Some form of sex offender register exists in almost all Anglophone countries, amongst which are the United States (US), the United Kingdom (UK), Canada, Australia, New Zealand, Ireland and South Africa (SA). Germany, France, Japan and Singapore also have registers. See HRW *No Easy Answers* 10.

<sup>2</sup> *Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007* (hereinafter the *Sexual Offences Act*).

<sup>3</sup> The SALRC (previously the SALC, amended by Judicial Matters Amendment Act 55 of 2003) appointed a committee to study the possibility of establishing a sex offender register as early as in 1997, on which issue a paper was then published. See SALRC *Sexual Offences against Children* 15-18. The recommendation was that such a register was not feasible mainly because of high costs and organisational inefficiency. See SALRC *Sexual Offences Report* 269.

whether the compilation of such a register may violate the *SA Constitution*.<sup>4</sup> It is argued that the NRSO, although admirable in its ideals, may not be viable because of certain misconceptions, as well as considerable implementation and administrative concerns. Other responses are suggested which may be more beneficial to the treatment of sex offenders and public safety in general and may contribute to the effectiveness of the NRSO. In the discussion to follow, the situation in the US and the UK will first be considered for comparison to the NRSO, although the purpose of the NRSO is not wholly analogous to that of the US and UK registers. Constitutional tests of these registries will be used as examples of possible constitutional challenges to the NRSO.

## 2 Sex offender registration in the United States

All sex offender registers in the US stem from public outrage as a reaction to high-profile child abduction and murder cases by strangers. The *Jacob Wetterling Crimes against Children and Sexually Violent Offender Registration Act*, 1994 came into effect in 1994 after 11-year-old Jacob Wetterling was abducted by a stranger at gunpoint.<sup>5</sup> The Act obliges states to establish a registry of convicted sex offenders, specifying the sex crimes which would make an offender liable to having his or her name entered in the registry, the time period offenders' names should remain on the registry, and how the database should be maintained.<sup>6</sup> The *Wetterling Act* was amended later in the year to include *Megan's Law*.<sup>7</sup> This federal law obliges all states to "release relevant information that is necessary to protect the public concerning a

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<sup>4</sup> *Constitution of the Republic of South Africa*, 1996. It was the aspiration of the then National Council of Provinces chairperson to "steer a path between the UK and US [sex offender register] models". Vapi 2002 [http://www.iol.co.za/index.php?click\\_id=6&art\\_id=ct20020202174013122S100747&set\\_id=1](http://www.iol.co.za/index.php?click_id=6&art_id=ct20020202174013122S100747&set_id=1).

<sup>5</sup> Abducted in 1989, Jacob is still missing today and his abductor was never found. Non-family abductions are rare - less than one in 25 children are kidnapped by strangers. See Wright *Sex Offender Laws* 15-16.

<sup>6</sup> *Violent Crime Control and Law Enforcement Act*, 1994 (42 USC 14071). The registers resided with the police and sheriffs, and were not publicly available.

<sup>7</sup> *Violent Crime Control and Law Enforcement Act*, 1994 (42 USC 14071(d)). In this case, 7-year-old Megan Kanka was lured to her neighbour's house in July 1994, where he raped and strangled her. Unbeknown to her parents, the neighbour was a twice-convicted sexual offender. Three months after her death, the New Jersey Senate passed *Megan's Law*.

specific person required to register".<sup>8</sup> The statute mandated that sex offender information websites be created and maintained by every state and made available for public viewing.<sup>9</sup> A further federal registration system for sex offenders was created in 1996 with the passing of the *Pam Lychner Sexual Offender Tracking and Identification Act*, 1996.<sup>10</sup> This Act was repealed by the *Adam Walsh Child Protection and Safety Act* of 2006<sup>11</sup> (AWA), however the national registry created by the 1996 Act was incorporated into the AWA.<sup>12</sup> Like *Megan's Law*, the AWA directs all states to integrate and coordinate sex offender information, and to maintain the websites for general public access and notification.<sup>13</sup> Currently, all 50 states have passed some type of public notification law. These laws vary greatly in their implementation, such that the position in no two states is identical.<sup>14</sup> Some statutes mandate proactive notification;<sup>15</sup> others authorise only notification,<sup>16</sup> whilst several allow notification only if community safety is of concern.<sup>17</sup> Methods of notification have included

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<sup>8</sup> *Violent Crime Control and Law Enforcement Act*, 1994 (42 USC 14071(d)(2)).

<sup>9</sup> *Violent Crime Control and Law Enforcement Act*, 1994 (42 USC 14071(d)(2)).

<sup>10</sup> The *Violent Crime Control and Law Enforcement Act*, 1994 (42 USC 14072), which directed the Federal Bureau of Investigation to create a national sex offender database. The public can conduct a search for a suspected sex offender by entering a name or physical address on the website where access to each state's individual register is provided.

<sup>11</sup> *Adam Walsh Child Protection and Safety Act* 42 USC 16901 (2006) (AWA); enacted in recognition of Adam Walsh' parents, 25 years after the 6-year-old boy was kidnapped and murdered in 1981.

<sup>12</sup> *Sex Offender Registration and Notification Act* 42 USC 151 16918(a) (SORNA)

<sup>13</sup> Named the Dru Sjodin National Sex Offender Public Website; after a 22-year-old girl was murdered by a high-risk sex offender. Although all states have sex offender registers, only 14 states and the District of Columbia have laws that criminalise the misuse of sex offender data. HRW *No Easy Answers* 90.

<sup>14</sup> Matson and Lieb *Megan's Law* 7. As AWA sets the minimum standard for registration, states are free to create more comprehensive registration requirements than the federal legislation. These very broad requirements have created many problems for the states as insignificant sexual misbehaviour may result in an entry on the sex registry, eg, public urination is included as a sexual offence in 13 states' legislation, and consensual sex between teenagers is considered a sex crime in 29 states. See HRW *No Easy Answers* 37.

<sup>15</sup> In Alabama, the details of all sexual offenders, irrespective of the type or severity of offence committed, are made available to the public via a leaflet mailed or handed to all persons residing near a registered sex offender. The notice is also published in the local police station and newspaper, and posted electronically online. See *Alabama Adult Sex Offender Community Notification* (Ala Code 15-20A-21 2011).

<sup>16</sup> Eg, in Ohio notification is mandatory only for the most serious offenders, while habitual sexual offenders might be subjected to community notification procedures if that is ordered by the sentencing judge. See *Ohio Rev Code Ann* 2950 (K) (West 2006).

<sup>17</sup> In Washington, the local law enforcement authorities are permitted to notify the public when the information may be necessary for public protection. See *Wash Rev Code Ann* 4 24 550 (West Supp 1995).

providing an 800-phone number, access through the Internet, written requests; or actively notifying specific communities through the mail, flyer distribution, community meetings or in person.<sup>18</sup>

As avowed by AWA, the purpose of keeping a register is to protect the public from sex offenders as a response to "the vicious attacks by violent predators".<sup>19</sup> A sex offender is regarded as any individual who commits a sexual offence, irrespective of whether it was committed against a child or an adult.<sup>20</sup> Convicted sex offenders are required to register before the end of their jail terms, while non-custodial offenders must register at least three days after being sentenced.<sup>21</sup> Details to be recorded in the register includes the offender's name, social security number, a copy of the offender's identity card or driver's licence, all addresses of residence, place of employment or study, a description of any vehicle operated, the licence plate number(s), a physical description of the offender, previous convictions, the current status of the offender, an existing photograph, finger and palm prints, and a DNA sample.<sup>22</sup> The details of the sex offenders are recorded in the register for a predetermined time period, depending on the tier classification in which the specific offender falls.<sup>23</sup> The higher the tier, the more probable the risk to re-offend. As determined by AWA, the maximum registration period for a Tier I offender is fifteen years, twenty-five years for a Tier II offender, and lifelong registration for a Tier III offender.<sup>24</sup> Depending on the tier in which an offender is classified, the person must, on release from incarceration, report in person at his or her local law enforcement

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<sup>18</sup> Farley 2008 *Washburn LJ* 473.

<sup>19</sup> AWA 42 USC 16901.

<sup>20</sup> AWA 42 USC 16911(1).

<sup>21</sup> AWA 42 USC 16913(b)(2).

<sup>22</sup> AWA 42 USC 16914.

<sup>23</sup> AWA 42 USC 16915(a). Tier I offenders committed the least serious sexual transgressions (ie felonies and misdemeanours not included under Tier II and III) which are punishable by imprisonment of one year or less. Tier II sex offences include crimes committed against a minor punishable by more than one year imprisonment including sex trafficking, coercion and enticement, transportation with intent to engage in criminal sexual activity, abusive sexual contact, use in a sexual performance, solicitation to practice prostitution, the production or distribution of child pornography and committing an offence after becoming a Tier I offender. Tier III offences are punishable by more than one year imprisonment. These crimes include aggravated sexual abuse, abusive sexual contact against a minor under 13 years of age, kidnapping of a minor, and committing an offence after becoming a Tier II offender. Inclusion in the registry is thus offence-based.

<sup>24</sup> AWA 42 USC 16915(a)(1)-(3).

agency every year, every six months or every three months.<sup>25</sup> Photographs and information are then updated. Non-compliance with registration requirements results in a fine or federal imprisonment of up to ten years.<sup>26</sup>

The few empirical studies undertaken concerning the implementation of sex offender laws in the US show that unrestricted public access to sex offender registers subjects registrants to harassment, ostracism, and even violence, with little evidence that this form of community notification protects anyone from sexual violence.<sup>27</sup> Residency restrictions which prohibit former offenders from living within a designated distance<sup>28</sup> from places where children gather also have unconstructive consequences. These restrictions have the effect of banishing former offenders from entire towns, forcing them to live far from home, families, jobs, and treatment, and hindering law-enforcement supervision.<sup>29</sup>

The greatest obstacles the US faces are implementing and maintaining the registers. It has been shown that the information in the national sex offender registries is not very accurate or reliable.<sup>30</sup> For example, in a review by the Department of Justice's Implementation of the *Sex Offender Registration and Notification Act* (SORNA), the information in the registries was found to be incomplete, inaccurate and unreliable for use by law enforcement and the general public.<sup>31</sup> This conclusion was reached after noticing that "registries were missing records, did not always identify known fugitives, and did not always contain sufficient information to enable law

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<sup>25</sup> AWA 42 USC 16916.

<sup>26</sup> AWA 42 USC 16913(e).

<sup>27</sup> HRW *No Easy Answers* 4, 7. Knowledge that a convicted sex offender was residing in a specific neighbourhood affected people's fear and safety levels within the community; which had an impact on their lifestyles as well as their perceptions about and behaviour towards the specific person. See Montgomery *Megan's Law* 157.

<sup>28</sup> As these requirements (from 150 meters to 762 meters) are regularly reviewed and made stricter, offenders who have lived a lifetime in their particular homes may need to move.

<sup>29</sup> HRW *No Easy Answers* 3; Ewing *Justice Perverted* 84-86. Finding housing for this purpose is problematic.

<sup>30</sup> See, eg, Harris, Levenson and Ackerman 2014 *Crime & Delinquency* 25-30, who reveal that the names of many out-of-state registrants are entered in two or more different state registers, thus inflating the overall count for registered sex offenders both countrywide and for specific states. They further argue that although the aim of the AWA was the national standardisation of sex-offender registration, such standardisation has not been achieved. The AWA tier system has also been very poor in predicting recidivism.

<sup>31</sup> US Department of Justice *Review of the Sex Offender Registration and Notification Act* iii.

enforcement and the public to accurately identify sex offenders".<sup>32</sup> Sex offenders also provide false addresses for their residences or changed their names. This furthermore complicated the prerequisite in SORNA that every state record the reason as to why certain offenders fail to register or disappear completely<sup>33</sup> and for the Attorney General to take any appropriate action to ensure compliance.<sup>34</sup> It appears that the US' register and notification policy do not prove to be very efficient as recent revelations of abductions by sex offenders confirm.<sup>35</sup>

### 3 Sex offender registration in the United Kingdom

The first sex offender registration requirements in the UK were provided for in the *Sex Offenders Act* of 1997,<sup>36</sup> which required convicted sex offenders to register their names and addresses with the police within 72 hours of being released from jail. Failure to do so carried a six-month jail sentence. The Act also restricted open access to registered information, as the register resided with the police.<sup>37</sup> This Act was replaced by the *Sexual Offences Act*, 2003, which incorporated the previous Act's sex offender register requirements.<sup>38</sup> The 2003 Act describes the register as an invaluable tool in aiding the public at risk from registered sex offenders. The belief is

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<sup>32</sup> US Department of Justice *Review of the Sex Offender Registration and Notification Act* iii.

<sup>33</sup> One reason for this may be that the registration requirements are so strict in certain states. In Alabama, sex offenders have to personally validate their details every 3 months, while homeless sex offenders have to report to the police every week. Non-compliance results in felony charges being laid. See Ala Code 15-20A-10; Ala Code 15-20A-12.

<sup>34</sup> AWA 42 USC 16922.

<sup>35</sup> In *S of California v Phillip Garrido* Case No P10CRF0364 (2011), a registered sex offender kidnapped 11-year-old Jaycee Lee Dugard in 1991 and kept her imprisoned as a sex slave for 18 years. He even had regular visits from parole officers who saw the girl on occasion, yet no investigation was made. In a similar case, *S of Ohio v Ariel Castro* Case No CR575419A (2013), Castro kidnapped 3 teenage girls in 2002 and 2004, and imprisoned them for his sexual pleasure at his home in Cleveland, Ohio. The girls were discovered only in 2013, when one girl escaped from the compound.

<sup>36</sup> *Sex Offences Act*, 1997 c 51; replaced by the *Sexual Offences Act*, 2003 c 42.

<sup>37</sup> Introduced by the *Criminal Justice and Court Services Act*, 2000, the Multi-Agency Public Protection Arrangements (MAPPA) keep information on sex offenders collated by and shared amongst prison, probation and police agencies. A report on the number of sex offenders in regions is released annually, but no names are given. High-risk sex predators are monitored and, if necessary, affected community members are informed through "controlled disclosure". According to the *Criminal Justice Act*, 2003 c 44 327A s 3(a)-(b), disclosure is allowed at the discretion of the police if a sex offender poses a risk of "serious harm to any particular child or children or to children of any particular description" and if it is "necessary to protect the particular child or children from serious harm".

<sup>38</sup> Launched in 2005 as a web-based database titled the Violent and Sex Offender Register (ViSOR).

held that the register dissuades sex offenders from recidivism by enabling the police to directly know where offenders live if an offence is committed.<sup>39</sup>

The *Sexual Offences Act, 2003* obliges sex offenders to register with their local police department within three days after sentencing.<sup>40</sup> Like the classification done by the US, the names of sex offenders in the UK will be recorded in the register for different durations depending upon the gravity of their offences. The minimum period for which an offender's name can be on the register is two years, while the most serious offenders may remain on the register indefinitely.<sup>41</sup> The information required from offenders includes their date of birth, the name on the sentencing notification, the date of the notification, other names used, the offender's national insurance number, home address and the addresses of any other premises regularly visited, passport details, fingerprints, current photographs, and any other data required by the Secretary of State.<sup>42</sup> The notification requirements have been amended to include a DNA sample, any e-mail addresses, bank account and credit card details.<sup>43</sup> Sex offenders in the UK need to report to the police annually to verify their notification details.<sup>44</sup> They also have to notify the police about any amendments to their recorded information as well as any travel plans outside the borders of the UK, which includes their dates of departure and return, countries to be visited, and any other necessary information.<sup>45</sup> An offender who does not adhere to the registration requirements may be liable to a fine and a maximum of five years imprisonment.<sup>46</sup>

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<sup>39</sup> UK Home Office *Review of the Protection of Children* 18.

<sup>40</sup> Section 83(1) of the *Sexual Offences Act, 2003*. If incarcerated, the initial notification is made within 3 days of release. This requirement is similar to that of the US.

<sup>41</sup> Section 82 *Sexual Offences Act, 2003*. In *R and Thompson v Secretary of State for the Home Dept* 2011 1 AC 331 339, indefinite registration was ruled to be in breach of art 8 ECHR. Individuals may now appeal to have their names removed from the list.

<sup>42</sup> Sections 83(5), 87(4) of the *Sexual Offences Act, 2003*.

<sup>43</sup> Pt 4 *Criminal Justice (Forensic Evidence and DNA Database System) Bill, 2013*.

<sup>44</sup> Section 85 of the *Sexual Offences Act, 2003*. Offenders with no main or sole residence must report weekly.

<sup>45</sup> Section 86 of the *Sexual Offences Act, 2003*. No such travel specifications are set out in the SA register.

<sup>46</sup> Section 91 of the *Sexual Offences Act, 2003*. In 2001, 97% of sex offenders complied with the registration requirements. The figure remained the same in 2007. UK Home Office *Review of the Protection of Children* 12.



Like the situation in the US, a highly-publicised murder of a child sparked emotive public outcry for more open public access to sex offender information.<sup>47</sup> Although the UK refused to succumb to public pressure, *Sarah's Law* (Child Sex Offender Disclosure Scheme) was created in 2000 which allowed affected parties to be informed about specific perpetrators.<sup>48</sup> In contrast to the US' notification scheme, which is public, *Sarah's Law* allows for limited community access. *Sarah's Law* has been updated and the newest version (2009) allows parents to request from the police the criminal status of a suspicious individual or someone who has frequent, unsupervised contact with their children. In this process, police will investigate whether the person of interest has been convicted of any sex offences against a child.<sup>49</sup> If affirmed, the case is referred to MAPPA to determine the potential dangerousness of the offender. If the person is deemed a high-risk offender by MAPPA, the persons concerned will be informed, but it is expected of these persons to keep the information confidential. This new development seems to edge closer to the US' notification laws, as parents and the community will have access to police registers in certain stipulated situations.<sup>50</sup> It appears that the UK's legislature is moving towards following the trend in the US as it is proposing and passing legislation that allows for even more community access to sex offender information.<sup>51</sup> It is argued that the new schemes may force non-compliance from sex offenders in terms of the registration requirements, as is the situation in the US.

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<sup>47</sup> The only information concerning sex offenders available to the public online at present is available through the Child Exploitation and Online Protection Centre, which releases the names of missing or non-compliant sex offenders.

<sup>48</sup> Named after Sarah Payne, an 8-year-old girl kidnapped and murdered by a convicted child sex offender in 2000. Hynes 2013 *Penn State J L & Int Affairs* 365.

<sup>49</sup> Under the Sarah's Law pilot scheme launched in Warwickshire, Cambridgeshire, Cleveland and Hampshire in 2008, police will assess priority cases within 24 hours, and all others within 10 working days.

<sup>50</sup> This may be deduced from the fact that after the amendment to the Law, 585 enquiries were made in 18 months of which 315 were investigated. Of those, 21 persons turned out to be on the sex offenders' register. Hughes 2010 <http://www.independent.co.uk/news/uk/crime/sarahs-law-to-be-rolled-out-nationally-1914989.html>.

<sup>51</sup> UK Home Office 2011 <https://www.gov.uk/government/news/greater-protection-for-children-as-sex-offender-disclosure-scheme-goes-national>.

#### 4 Sex offender registration in South Africa

In SA, sexual crimes are of "grave concern, as [they have] a particularly disadvantageous impact on vulnerable persons".<sup>52</sup> After a highly-publicised brutal rape of a nine-month-old baby girl in 2001,<sup>53</sup> the then Western Cape premier voiced the public's hostility towards sexual violations as an outrage against humanity and stated that "convicted sexual offenders should never again be allowed to live as free men or women".<sup>54</sup> A national sex offender register was seen as a possible solution to the problem.<sup>55</sup> It is thus evident that an impetus similar to those experienced in the US and the UK led to the eventual conception of SA's NRSO, although the issue was investigated for almost 10 years.

Chapter 6 of the *Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007*<sup>56</sup> creates the NRSO, which aims to increase social controls over sexual deviants. Measures are introduced to tighten the requirements of the register and to improve the documenting of alleged or convicted sex offenders in order to prohibit any possible employment opportunities where children or mentally-disabled persons are present.<sup>57</sup> According to section 42(1), the details of all offenders found guilty of sexual crimes against children or mentally ill persons or even those who are alleged to have committed a sexual offence and have been dealt with in terms of section 77(6) or 78(6) of the *Criminal Procedure Act 51 of 1977* have to be included in this register.<sup>58</sup> These details include the name, any aliases or nicknames,

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<sup>52</sup> Preamble of the *Sexual Offences Act*.

<sup>53</sup> Phillips 2001 <http://news.bbc.co.uk/2/hi/africa/1703595.stm>.

<sup>54</sup> Williams 2003 <http://www.iol.co.za/news/south-africa/register-sex-offenders-says-van-schalkwyk-1.115025?ot=inmsa.ArticlePrintPageLayout.ot>.

<sup>55</sup> Although the SALRC was initially against its implementation, the SA Parliament overwhelmingly supported a register as "sex offenders were not rehabilitated in jail and committed the same offences [upon release] ... [It will] empower communities to protect themselves, especially when they know who the sex offenders are [and] complement the positive steps already being taken by the police and other government agencies". Vapi 2002 [http://www.iol.co.za/index.php?click\\_id=6&art\\_id=ct2002020217401312\\_2S100747&set\\_id=1](http://www.iol.co.za/index.php?click_id=6&art_id=ct2002020217401312_2S100747&set_id=1).

<sup>56</sup> Introduced on 16 December 2007; replacing the *Sexual Offences Act 23 of 1957*. The NRSO became operational on 30 June 2009.

<sup>57</sup> Smythe, Pithey and Artz *Sexual Offences* 17-11-17-12; 17-18-17-19.

<sup>58</sup> According to *IJ v S* (Western Cape High Court) Unreported Case No A121226, convicted sex offenders will not be automatically listed any more but will get an opportunity to convince a judge that their names should not go in the register. S 50 of the *Criminal Law (Sexual Offences and Related Matters) Amendment Act 5 of 2015 (Sexual Offences Amendment Act 2015)*

profession or trade of the person, physical and postal address, identity number, passport number, and driver's licence number of the offender.<sup>59</sup> The nature of the crime, the date of the offence, the case number and the court in which the trial took place, the place of conviction and relevant prison identification number (if applicable) will also be noted.<sup>60</sup> The Act confers upon the Minister of Justice the competency to appoint a fit and proper person as registrar, who is tasked with entering all offenders within this category into the NRSO,<sup>61</sup> regardless of whether they were alleged to have committed a sexual offence or were found guilty before or after the coming into force of the Act or whether their convictions or alleged transgressions were committed in or outside the Republic.<sup>62</sup> In contradistinction to the US sex registries, it is notable that the scope in the SA provision is more restricted and the requirements less stringent, as unrestrained registration structures are not instituted. This may be a result of the SALRC's recommendation against the application of the US' community notification legislation.<sup>63</sup>

The contents of the NRSO will not be available to the public - only those entitled to apply for a certificate will have access to the information contained in the register.<sup>64</sup> The *Sexual Offences Act* requires sex offenders to disclose their conviction status to current or potential employers.<sup>65</sup> Employers and licensing authorities also have the

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however determines that only juvenile transgressors will be considered by the courts as to whether their particulars will be entered into the NRSO or not.

<sup>59</sup> Section 49(i)-(iii) of the *Sexual Offences Act*. In contrast to the registration requirements of the US and the UK, the NRSO requires the least amount of information which must be recorded concerning each offender.

<sup>60</sup> Section 49(iv)-(vii) of the *Sexual Offences Act*. The name of the medical institution or practitioner must also be noted if the person was dealt with in terms of s 77(6) or s 78(6) of the *Criminal Procedure Act* 51 of 1977. The Act, however, does not stipulate when and how offenders' registration and the updating of details should transpire.

<sup>61</sup> Section 42 of the *Sexual Offences Act*; Smythe, Pithey and Artz *Sexual Offences* 17-15.

<sup>62</sup> This retrospective application in the register may be unconstitutional in terms of ss 35(3)(l)-(m) of the *Constitution*. Eg, in *Reynolds v US* 565 US 10-6549 (2012), it was held that pre-Act offenders do not need to register under SORNA. The UK register does not apply to retrospective application.

<sup>63</sup> SALRC *Sexual Offences Report* 762. The SALRC noted at 752 that registration practices form part of a "network of measures and good practice to protect children and the community from those who might harm them ... it cannot predict criminal behaviour".

<sup>64</sup> Section 44 of the *Sexual Offences Act*.

<sup>65</sup> This includes the fact that their particulars are included or are to be included in the NSRO, according to s 46 of the *Sexual Offences Act*, as amended by the *Sexual Offences Amendment Act* 2015. Non-compliance by the employee with this provision may lead to a fine or

duty to check the NRSO to ascertain if potential or current employees are included.<sup>66</sup> The employer may use the information obtained from the NRSO only to "take reasonable steps to prevent an employee ... from continuing to gain access to a child or a person who is mentally disabled, in the course of his or her employment".<sup>67</sup> It is a criminal offence for anyone to intentionally disclose or publish information contained in the register, except as when necessary to give effect to the provisions of the Act or when ordered to do so by a court.<sup>68</sup>

The purpose of the NRSO is first and foremost to protect vulnerable potential victims - children and mentally-disabled persons - from coming into contact with sex offenders during the course of employment by establishing and maintaining a record of convicted and alleged offenders,<sup>69</sup> but also to allow employers,<sup>70</sup> licensing authorities,<sup>71</sup> and relevant authorities dealing with fostering, kinship- and temporary safe caregiving, adoption and curatorship the ability to apply for a prescribed certificate stating whether or not the particulars of a potential employee or applicant are contained in the NRSO.<sup>72</sup>

In both SA and the UK the duration of the registration period is linked to the length (or potential length) of the offender's sentence (reflecting the severity of the crime),

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imprisonment not exceeding 7 years, or both. Also see Smythe, Pithey and Artz *Sexual Offences* 17-21-17-30.

<sup>66</sup> Section 45(1) of the *Sexual Offences Act*. It is odd that in terms of s 45(1)(a), it is only optional that an employer enquires as to the sexual convictions of a permanent employee, yet where a prospective employee is concerned (s 45(1)(b)), it is obligatory to request a certificate. Non-compliance by the employer with this provision may lead to a fine or imprisonment not exceeding 7 years, or both. There is, however, no sure way of ensuring compliance with this requirement.

<sup>67</sup> Section 45(2)(d) of the *Sexual Offences Act*.

<sup>68</sup> Section 52(4) of the *Sexual Offences Act*.

<sup>69</sup> Section 43(a) of the *Sexual Offences Act* s. Also see Smythe, Pithey and Artz *Sexual Offences* 1-2.

<sup>70</sup> Section 40 of the *Sexual Offences Act*: any state or private body which "employs employees who, in any manner and during the course of their employment, will be placed in a position of authority, supervision or care of a child or a person who is mentally disabled or working with or will gain access to a child or a person who is mentally disabled or places where children or persons who are mentally disabled are present or congregate".

<sup>71</sup> Section 40 of the *Sexual Offences Act*: "any authority which is responsible for granting licenses or approving the management or operation of any entity, business concern or trade relating to the supervision over or care of a child or a person who is mentally disabled".

<sup>72</sup> Sections 43(b)-(d) of the *Sexual Offences Act*. The Act does not specify any set time period wherein the Registrar must reply to the application. No clearance certificates have as yet been issued. See DoJCD *Sexual Offences Report* 58.

although SA's provisions are more lenient. The *Sexual Offences Act* 23 of 1957 requires that the details of persons sentenced to imprisonment or correctional supervision for between six to eighteen months be removed from the NRSO after a period of ten years, those sentenced to six months or less be removed after seven years, and offenders with lesser punishments be removed after five years.<sup>73</sup> Any person sentenced for a period of more than eighteen months or a person with two or more convictions is not eligible for such removal.<sup>74</sup>

It is thus evident that in comparison with the registers of the US and the UK, the NRSO aims to compromise between a broadly-inclusive public registry and no register at all. It contains sections of both the US and UK registers, but more closely resembles the UK's register. Its purpose is narrowly defined, different from but also more limited than that of the US, and its requirements less stringent. SA seemed to be cautious in enacting a sex offender register, especially to avoid potential constitutional challenges. This prospect will consequently be examined.

## **5 Possible constitutional challenges to the NRSO**

As the supreme law of SA, the *Constitution* determines that any law or conduct that does not correspond to the stipulations contained therein is invalid. All legislation is subject to the Bill of Rights, in which the most fundamental democratic values are underscored in section 1(a) of Chapter 1. Many of these rights may form the basis for a constitutional challenge to the NRSO. According to the Act, sex offenders are singled out for differentiation which could cause them prejudice. The question is whether this discrimination is fair or unfair, and if unfair, whether it is justified.<sup>75</sup> The public's right to freedom and security of person, the right to bodily and psychological integrity and the right to access to information will be weighed against the sex

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<sup>73</sup> Sections 51(1)(a)-(b) of the *Sexual Offences Act*. A person who committed a sexual offence while mentally-ill but is discharged in terms of the *Health Care Act*, 2000 may also be eligible for removal from the list after 5 years. The registration period is thus also determined by the sentencing judge's discretion.

<sup>74</sup> Section 51(2) of the *Sexual Offences Act*.

<sup>75</sup> *Harksen v Lane* 1998 1 SA 300 (CC) paras 43-50.

offender's right to dignity, equality, privacy and preferred employment, and not to be treated in a cruel and unusual manner, according to the limitation clause.<sup>76</sup>

Human dignity plays a major role in determining whether discrimination is unfair or not: discrimination which impairs dignity, or has the potential to do so, will be deemed unfair.<sup>77</sup> The NRSO has the potential to undermine and impair the inherent dignity of these persons as human beings and affect them adversely in a comparably serious manner.<sup>78</sup> Research in the US has shown that sex offenders' innate dignity is marred through this possibly life-long punishment, humiliation and harassment.<sup>79</sup> The SALRC regards the register as having no justification or rehabilitative effect. Its deterrent value is suspect, and it could drive high-risk predatory sexual offenders further underground.<sup>80</sup> The list is also seen as additional retribution for offenders who have served a sentence and paid their dues to society.<sup>81</sup> Through their registration on the NRSO, which is a further restrictive measure, those registered lose the right enshrined in section 9 guaranteeing them equality before the law and

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<sup>76</sup> Section 36 of the *Constitution*. This proportionality test involves both substantive and procedural issues, amongst which it is required that "the law should apply generally rather than targeting specific individuals". See *President of the Republic of South Africa v Hugo* 1997 6 BCLR 708 (CC) para 102.

<sup>77</sup> Carpenter 2004 *Codicillus* 4.

<sup>78</sup> Sections 9(3)-(4) of the *Constitution*; *Prinsloo v Van der Linde* 1997 6 BCLR 759 (CC). Constitutional challenges to the registers in the US may serve as examples, since the NRSO has not as yet been tested in this regard. In *Doe v State* 189 P 3d 999 1000 (Alaska 2008) para 235 the Supreme Court found the registration requirements "significant and intrusive" (para 235) and that registration "exposes registrants, through aggressive public notification of their crimes, to profound humiliation and community-wide ostracism" (para 236). The conclusion reached was that the statute provides "a deterrent and retributive effect that goes beyond any non-punitive purpose" (para 238). Although public notification is not allowed in SA, offenders' dignity may still be impaired by being singled out and humiliated through inclusion in the register.

<sup>79</sup> Eg, in the Oregon case of *S v Bateman* 95 Or App 456 771 P2d 316 (1989), a child molester had to place a sign on his car and on the door of his house that read "Dangerous Sex Offender". In *Smith v Doe* 538 US 84 (2003) para 164, the US courts acknowledged that being placed on the register causes humiliation. However, in the UK, shaming the offender by means of notification is not permitted. After the murder of Sarah Payne, a tabloid newspaper wanted to create their own paedophile register and invited readers to send in names of suspected and convicted sex offenders for publication. This was immediately prohibited by the government. See McAlinden 2005 *Brit J Criminol* 378-379. Yet even when sex offender's names are removed from the list, the police (and community, if made public) still view these persons with suspicion.

<sup>80</sup> SALRC *Sexual Offences Report* 269-270.

<sup>81</sup> In *Doe v State* 189 P 3d 999 1000 (Alaska 2008), the US Supreme Court found that the sex offender register has moved from being a protection measure to becoming a punishment in its own right. See Thomas 2008 *Howard J Crim Just* 227. This could also be true in SA.

the right to equal protection and benefit of the law.<sup>82</sup> When they are forced to register and to reveal their personal details to others, they are treated unequally to other citizens, including ex-convicts.<sup>83</sup>

Furthermore, according to section 12(1) of the *Constitution*, everyone disposes the right of freedom and security of person.<sup>84</sup> This right guarantees physical and psychological integrity, and to be free from all forms of violence regardless of whether it derives from a private or public source. No-one may be tortured or treated or punished in a cruel, inhuman or degrading way.<sup>85</sup> It is clearly the purpose of the Act to protect and promote the individual's and society's rights with the new statutory extensions on the common-law forms of sexual crimes. However, many of the goals for registration may come at too great an expense to the implicated individuals. Although the names on the NRSO may not be made public, registrants and their loved ones may live in constant dread of discovery. As perceived in the US, publication modified communities' perceptions about and behaviour towards these offenders, and led to unreasonable fear for their safety amongst citizens residing in an area where a sex offender is registered.<sup>86</sup> Vocal opponents to this law in the US

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<sup>82</sup> *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 1 SA 6 (CC) para 62.

<sup>83</sup> In *People v Adams* 581 NE 2d 637 (1991) para 642, the court examined whether the *Illinois Sex Offender Act* violated the *US Constitution's* equal protection clauses because it "irrationally differentiates between persons similarly situated". Eg, in the US, child pornographers are not subjected to the registration requirement. Similarly, alleged, accused or convicted child murderers are also not placed on a list in SA.

<sup>84</sup> Section 12(1) of the *Constitution*.

<sup>85</sup> *In re Reed* 663 P2d 216 (Cal 1983), registration of a relatively minor offence was struck down as cruel and unusual punishment in the US. However, in *People v Adams* 581 NE 2d 637 (1991), Adams, convicted twice of molesting his 12-year-old daughter, contended that the *Illinois Sex Offender Act* imposed a duty on him based on his status as a convicted criminal although he had already paid his debt to society and thus constituted cruel and unusual punishment (para 640). This claim was rejected as the purposes underlying the *Registration Act* are non-penal (para 641) and the burden of registration is far from "severe" (para 212). Teichman 2005 *Harv J on Legis* 387-388 asserts that US sex offenders "have been subjected to threats, vandalism of their property, physical assaults, and gunshots". No information on the consequences of the NRSO currently exists in SA.

<sup>86</sup> This creates public alarm, which may lead to vigilantism. See Thomas 2008 *Howard J Crim Just* 218. An additional setback is that home prices in the US deflated by approximately 5%-16% when sex offenders lived within 160 meters of the property, according to Bian *et al Neighbourhood Tipping* 15-16. The drafters of the NSRO recognised that a law divulging offender's details could have disastrous consequences, as community justice is already a problem in SA. As such, the objective of the NSRO is not specifically the monitoring of sex offenders.

and UK suggest that a register would merely create an illusion of safety, and that it may cause even more violence.<sup>87</sup>

It can further be argued that the NSRO is intrusive on the offender's right to privacy<sup>88</sup> as it invades "the inner sanctum of a person, such as his/her family life ... and home environment".<sup>89</sup> This occurs through the inclusion of their personal details in a register without their permission. The register does include a confidentiality clause which makes provision for the safe-keeping and disposal of records. Although it is an offence to disclose information listed on the register arbitrarily, previous experience concerning confidentiality issues (eg with police dockets) has swayed one to become sceptical. Another negative effect of the NSRO on the privacy of the individuals concerned is that it may inadvertently identify the victim in the case of incest.<sup>90</sup>

The right to access to information, as included in section 32 of the *Constitution*, is also promoted via the NSRO. This section determines that everyone has the right to access to any information held by the state or by any other person, which is reasonably required for the exercise or protection of any rights.<sup>91</sup> In terms of the

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<sup>87</sup> SALRC *Sexual Offences Report* 268-269.

<sup>88</sup> Section 14 of the *Constitution*. Both the US and UK courts have pronounced that an offender's privacy rights remain ancillary to upholding public safety. See Wilkins 2003 *U Rich L Rev* 1245-1255; *Connecticut Dept of Pub Safety v Doe* 538 US 1 (2003). In *Doe v Poritz* 662 A2d 367 (NJ 1995), the court reasoned that there could be no reasonable expectation of privacy in matters already exposed to public viewing such as prior arrest and conviction records. In *R and Thompson v Secretary of State for the Home Dept* 2011 1 AC 331 339, the UK Supreme Court acknowledged that s 82 of the *Sexual Offences Act, 2003*, which requires sex offenders sentenced to over 30 months imprisonment to inform the police of their address and travel abroad, for life, without any possibility of judicial review, was incompatible with the privacy rights contained in art 8 of the *European Convention of Human Rights* (1950) (ECHR). Similarly, in *H and L v A City Council* 2011 EWCA (Civ) 403, a blanket disclosure to several organisations of a re-offending sex offender's conviction and pending trial was regarded as a violation of his art 8 rights.

<sup>89</sup> *Bernstein v Bester* 1996 2 SA 751 (CC) para 67.

<sup>90</sup> Matson and Lieb *Sex Offender Registration* 4. Although UK courts attempt to keep defendants' names confidential, the publication of the names of convicted sex offenders cannot be prohibited according to s 39 of the *Children and Young Persons Act, 1933*. This causes a problem where a victim is the child of a defendant as in *R v Teesside Crown Court* 2005 EWCA Crim 1983.

<sup>91</sup> *Van Huyssteen v Minister of Environmental Affairs and Tourism* 1996 1 SA 283 (C) 299D-330F. It has been asserted that the government could face legal challenges by not making the NRSO public, especially if a perpetrator re-offends. See Legalbrief Today 2013 <http://legalbrief.co.za/story/decision-to-keep-sex-offenders-list-hidden-may-face-legal-challenge/#sthash.mo7XLIo4.dpuf>. In terms of *Carmichele v Minister of Safety and Security* 2001



Act, any employer is accorded a right to access to information in the register, and may apply for a certificate stating whether or not the particulars of a prospective or current employee are recorded in the NSRO. This is necessary for the public's protection and the security of person. Conversely, disclosure of the information would be an invasion of the privacy of offenders.<sup>92</sup> It has been alleged that once the names of offenders appear on lists, their offences are common knowledge, and often this prevents them from securing employment, which again results in offenders becoming itinerant.<sup>93</sup>

Access to the information on the sex offenders' list may have only limited value in a South-African context. This is because of the widely shared fallacy that children are at grave danger of sexual victimisation by strangers.<sup>94</sup> The real risks children face are quite different: statistics show that most sexual abuse of children is committed by family members or persons known and often trusted by the victim, and by someone who has not previously been convicted of a sex offence.<sup>95</sup> It is argued that victims of intra-familial sexual abuse may not report the crimes due to distress related to the adverse consequences thereof to the family.<sup>96</sup> A further erroneous belief is that sex offenders continually repeat their offences.<sup>97</sup> Authoritative studies indicate that three out of four sex offenders do not reoffend.<sup>98</sup> The majority of sex offenders are furthermore not caught or detected. SA's conviction rate of child sexual abuse is also very low – only one in nine children report abuse, and recent

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4 SA 938 (CC), a legal duty rests on the state, acting through the police, to protect citizens against violent crime, which includes sexual violations. In this regard, sex crimes committed by registered re-offenders may lead to civil cases being instituted against the state.

<sup>92</sup> See *Department of Justice v Reporters' Committee for Freedom of the Press* 489 US 749 (198), where requests for individual criminal histories were rejected as an invasion of privacy.

<sup>93</sup> Joseph 2008 [http://www.iol.co.za/news/south-africa/new-sex-offenders-register-unnecessary-1.403843#.VOWIs\\_mUd8E](http://www.iol.co.za/news/south-africa/new-sex-offenders-register-unnecessary-1.403843#.VOWIs_mUd8E).

<sup>94</sup> So-called "stranger danger".

<sup>95</sup> Hynes 2013 *Penn State J L & Int Affairs* 355. It is asserted that 93% of offenders who commit sex crimes against children know their victims. Also see SAHRC *South Africa's Children* 6, where it is indicated that people closest to SA children perpetrate the majority of child sexual violation cases.

<sup>96</sup> Fitch *Megan's Law* 36-37.

<sup>97</sup> Hynes 2013 *Penn State J L & Int Affairs* 355. When compared to all criminals, sex offenders have very low recidivism rates.

<sup>98</sup> Hynes 2013 *Penn State J L & Int Affairs* 355.

studies indicate that only 8% of cases will result in a conviction.<sup>99</sup> This would mean that very few sex offenders would actually be listed on the NSRO, which runs counter to the stated intention of the register to prevent convicted sex offenders from being hired to work with children. In SA especially, one's registration as a sex offender can also be surmounted by obtaining false identity documents.

Section 22 of the *Constitution* affirms that every citizen of SA has the right to choose their trade, occupation or profession freely. On the other hand, section 41 of the *Sexual Offences Act* 23 of 1957 states that persons whose particulars have been included in the NSRO may not work with a child or a mentally disabled person in any circumstance or in any position. This includes any business or trade where children are or may be present. This stipulation places obstacles on possible employment choices and activities to pursue a livelihood anywhere. It is very limiting since one finds oneself in the vicinity of children almost everywhere, not only in schools and day-care centres, but also in hospitals, in shops and at bus stops etc. Employment opportunities are not only limited in scope, but employers who ascertain that the particulars of an employee have been recorded in the NSRO have to terminate the employment of such an employee with immediate effect. The employee or potential employee also has a duty to inform his current or future employer that he is or was convicted of or is alleged to have committed a sexual offence against a child or mentally disabled person. If he does not conform with this requirement he is guilty of an offence and is liable on conviction to a fine or to imprisonment for a period not exceeding seven years or to both a fine and such imprisonment.<sup>100</sup> These provisos not only lead to very limited job prospects, but could also produce consequences similar to the US's residency restrictions. In order to secure employment, current or potential employees may not inform their employers of any previous convictions or allegations of having committed a sexual offence against a child or a mentally

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<sup>99</sup> In 2013-2014, 62 649 sexual offence cases were reported to the police, but only 5 484 resulted in convictions. See Legalbrief Today 2015 <http://legalbrief.co.za/story/research-highlights-poor-rape-conviction-rate/>; Joseph 2008 [http://www.iol.co.za/news/south-africa/new-sex-offenders-register-unnecessary-1.403843#.VOWIs\\_mUd8E](http://www.iol.co.za/news/south-africa/new-sex-offenders-register-unnecessary-1.403843#.VOWIs_mUd8E).

<sup>100</sup> Section 46(3) of the *Sexual Offences Act*.

disabled person.<sup>101</sup> These restrictive regulations may thus demotivate offenders from attempting to find employment.

All of these rights can be limited in terms of section 36, provided that it is reasonable and justifiable to do so in an open and democratic society based on the values of human dignity, freedom and equality.<sup>102</sup> In this last section, the causal connection between the Act and its purpose will be examined to determine whether or not it serves as a legitimate limitation of the affected rights.<sup>103</sup> If the law cannot serve its stated purpose, it is an unreasonable limitation of the rights.

As previously stated, the NSRO's purpose is to protect the vulnerable against sexual predators,<sup>104</sup> which protection is more vital than ever in a technologically advanced age. A sex register should also 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.<sup>105</sup> In SA the insufficiency of government resources may result in a complete failure of the NSRO.<sup>106</sup> While the register was created in 2009, only 2 340 sex offenders had been registered by 2012, while the *Sexual Offences Act* required the registration of offenders to be completed within six

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<sup>101</sup> In the US, sex offenders seem to increasingly disregard registration regulations. In a 2006 report, Washington State found that almost one fifth of sex offenders required to register are convicted of failure to register. The percentage of these non-registrants increased from 5% in 1990 to 18% in 1999, and is still rising. See Drake and Barnoski *Sex Offenders* 16.

<sup>102</sup> This entails a generous rather than a legalistic interpretation "aimed at fulfilling the purpose of a guarantee and securing for individuals the full benefit of the Charter's protection" - *Sobramoney v Minister of Health* 1997 12 BCLR 1696 (CC) para 41.

<sup>103</sup> According to s 36(1) of the *Constitution*, a court will conduct a balancing and proportionality inquiry as to the importance of the right's being limited, the purpose of the limitation and the likelihood of achieving that purpose, the nature and extent of the limitation, the relationship between the limitation and the purpose advanced, and whether the purpose could reasonably be achieved through less restrictive means.

<sup>104</sup> Section 43 of the *Sexual Offences Act*; Smythe, Pithey and Artz *Sexual Offences* 1-2.

<sup>105</sup> However, studies have revealed that sex offender registration laws increased the recidivism rates of offenders. Prescott and Rockoff 2011 *J Law Econ* 161 state that the greatest drop in sexual crimes transpired before the passing of these laws and that the laws have had no effect on reducing the number of sexual offences.

<sup>106</sup> Eg, according to KPMG auditors, gender-based violence in SA already costs between R28.4bn and R42.4bn a year, which totals an estimated 0.9% to 1.3% of the annual GDP. Financial constraints have led to the Thuthuzela Care Centres, which assist rape victims, not being provided with rape kits for about a year in 2014-2015. See Legalbrief Today 2015 <http://legalbrief.co.za/story/research-highlights-poor-rape-conviction-rate/>. Even the US government is under severe financial strain arising from the requirement that it administer additional sex offender programmes after their release of offenders. Wright *Sex Offender Laws* 161.

months after the commencement of the Act.<sup>107</sup> The maintenance and monitoring of such a register is expensive and dependent on the compliance of the offender for the updating of any amendments. The US' paedophile register is semi-functional because a dedicated group of social workers, police, probation officers and law professionals are employed to continually monitor the register. Given the situation in South Africa, the purpose of the list could already have been lost.

Considering that SA already possesses the Child Protection Register (CPR) provided for by Chapter 7 of the *Children's Act* 38 of 2005, the NRSO is also unnecessary duplication. The CPR records all reported instances and convictions of all sexual offences and violent crimes against children; all attempts to commit violence against a child and possession of child pornography, and also the names of persons deemed to be unsuitable to work with children.<sup>108</sup> Critics of the NRSO regard SA's child protection sector to be "so short of resources ... it's downright irresponsible to establish a second register".<sup>109</sup> The CPR is seen as more inclusive and useful, as it is a more comprehensive register. The assimilation of these two registers and the alignment of their purposes would provide for a lighter administrative burden as unnecessary and expensive replication would be prevented.

The SA legislation also does not expressly specify who is to be considered as sex offenders. The outcome is that all sexual transgressions, however minor or whether committed by a juvenile or not, were regarded as sexual offences. Juvenile transgressions have since been addressed by the Constitutional Court. In *J v*

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<sup>107</sup> Section 42(1) of the *Sexual Offences Act*. In 2013, 3 526 names appeared on the register; in 2014, 15 452 names, and in 2015 17,776 names. The increase from 2013 to 2014 is due to the inclusion of 8 376 historic names (offences prior to the enactment of the *Sexual Offences Act*). The delay in capturing prior convictions is that the victim's age or mental state was not required in the previous case information. See DoJCD *Sexual Offences Report* 56-57. The Child Protection Register (CPR), however, although fully operational and with a budget of R1.7m, only listed one name in 2011. SAPA 2011 <http://www.news24.com/SouthAfrica/News/Child-protection-register-1-person-listed-20110822>. Only 488 names were registered by 2014. During the 2014-2015 financial year, 63 664 inquiries were made as to whether the names of job applicants are included on the CPR, yet no totals on how many names are currently recorded in the register are provided. See Department of Social Development 2015 <http://www.gov.za/speeches/social-development-child-protection-register-3-jun-2015-0000>.

<sup>108</sup> See s 120(4)(a) of the *Children's Act* 38 of 2005 as amended by *Children's Amendment Bill* (B13-2015).

<sup>109</sup> Joseph 2008 [http://www.iol.co.za/news/south-africa/new-sex-offenders-register-unnecessary-1.403843#.VOWIs\\_mUd8E](http://www.iol.co.za/news/south-africa/new-sex-offenders-register-unnecessary-1.403843#.VOWIs_mUd8E).

*National Director of Public Prosecutions* 2014 2 SACR 1 (CC), section 50(2)(a) of the *Sexual Offences Act* was proclaimed unconstitutional as the provision would inevitably lead to the inclusion of a child convicted of a sexual offence against a child or a mentally disabled person in the NSRO. The court argued that this provision seriously infringed several rights of children, especially the right that their best interests should always be considered of paramount importance in any matter relating to them.<sup>110</sup> The peremptory language of the provision also did not afford offenders any opportunity to make representations or arguments as to why such a persons' details should not be included in the NSRO. The *Criminal Law (Sexual Offences and Related Matters) Amendment Act 5 of 2015 (Sexual Offences Amendment Act 2015)* now stipulates that the names of these juveniles will appear on the NSRO only after a state prosecutor has applied for such an order, and after careful consideration by the court of the child's probability of committing another sexual offence.<sup>111</sup>

In *Teddy Bear Clinic for Abused Children v Minister of Justice and Constitutional Development* 2014 2 SA 168 (CC), the criminalisation of consensual sexual acts of children between 12- and 16-years-old (as in sections 15-16 in the *Sexual Offences Act*) was declared unconstitutional.<sup>112</sup> The very broad definition of "sexual violation" in the *Sexual Offences Act* meant that all types of consensual sexual intimacy between juveniles such as light petting or oral sex would be considered an offence in terms of these sections. The consequence thereof would be that the names of these juvenile offenders would be recorded in the NRSO; and if convicted of two or more such sexual offences, the entry would be permanent. The *Sexual Offences Amendment Act 2015* currently provides that consensual sexual acts between teenagers older than 12 but younger than 16 is not criminal. A child between the

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<sup>110</sup> Section 28 of the *Constitution*; *J v National Director of Public Prosecutions* 2014 2 SACR 1 (CC) para 33. Other affected rights included children's right to dignity, privacy, fair labour practice and freedom of trade, occupation and profession, their right to be protected from degradation and not to have their wellbeing and moral and social development placed at risk.

<sup>111</sup> See s 50 of the *Criminal Law (Sexual Offences and Related Matters) Amendment Act 5 of 2015*. Also see *S v CKM* 2013 2 SACR 303.

<sup>112</sup> These sections infringed children's constitutional rights to dignity, privacy, bodily and psychological integrity, as well as the principle of the paramountcy of their best interests. *Teddy Bear Clinic for Abused Children v Minister of Justice and Constitutional Development* 2014 2 SA 168 (CC) para 25.

ages of 12-15 years may also lawfully have consensual intercourse with a 16- or 17-year-old, as long as the age difference between the two partners is two years or less. It is hoped that with these amendments SA will not find itself in a position like that in the US where in 2007 more than 700,000 sex offenders were registered, which number included the details of individuals convicted of prostitution and public urination, as well as those who committed their only offences decades ago.<sup>113</sup> However, a remaining dilemma in SA is whether sex offenders convicted of a crime which has been repealed, such as statutory rape, or of sexual offences previously punished in terms of the common law, will still appear on the register.<sup>114</sup>

There certainly are many high-risk sexual perverts that need to be closely and consistently monitored by law enforcement, but there are more effective and less intrusive means to control sex offenders and achieve public safety. In defending the NSRO, advocates assert that people have a right to know so as to be able to protect their children against sexual predators who are unable to reform. The inability to reform some sexual malefactors could be ascribed to the non-existent or poor treatment programmes available in SA.<sup>115</sup> The establishment of these programmes could impact on public safety as it has been found that attendees who adhere to course requirements are less likely to commit a further offence than those who reject therapeutic intervention.<sup>116</sup>

Other alternative methods to achieve the purpose are the establishment of various supervision methods such as electronic and global positioning satellite (GPS)

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<sup>113</sup> HRW *No Easy Answers* 5.

<sup>114</sup> In terms of *S v Acting Regional Magistrate, Boksburg* 2011 2 SACR 274 (CC), which declared s 69 of the *Sexual Offences Act* unconstitutional (precluding the prosecution and punishment of common-law rape committed before but reported only after the Act's commencement), it seems as if these persons will appear on the list.

<sup>115</sup> The heterogeneity of sex offenders requires a variety of programmes. Here SA can look towards the UK's Circles of Support and Accountability (COSA) course, which provides continual assistance to the offender in terms of reintegration back into the community and making the offender aware of his or her own responsibilities. In the US, a programme called the Special Sex Offender Sentencing Alternative (SSOSA) offers offenders treatment and supervision in exchange for a shorter jail term.

<sup>116</sup> Wright *Sex Offender Laws* 169.

monitoring, or chemical castration and compulsory DNA- and polygraph-testing.<sup>117</sup> SA legislation already provides for longer sentences for dangerous sexual predators. Repeat high-risk sex offenders could also be committed to mental institutions indefinitely.<sup>118</sup> SA should also institute risk assessment screening for sexual offenders prior to their being released from prison, as is done in the US, where the risk classification also sets the parameters for the removal of one's name from the register. The SA version does not make provision for these procedures as alternative ways of dealing with sex offenders.

## 6 Conclusion

SA had the ideal opportunity to carefully consider whether or not to institute a sex offender register as well as the implications of establishing such a register by drawing on the experiences of the US and the UK. The community notification scheme employed in the US was found to be riddled with problems, and to provide no conclusive data as to the effectiveness of these laws. Despite rational arguments, evidence and recommendations against its conception, the government nevertheless continued with the creation of the register, and chose to replicate the UK model. However, it seems that new sex offender legislation in the UK is moving towards the US' stance of open public access.

Compared to the US' and UK's sexual offender registers, SA's NRSO is less restrictive, but the law, according to many, does not function as intended and is misguided, failing to protect children from sex crimes but making it nearly impossible for former offenders to rebuild their lives. SA is likely to face challenges to those encountered in the US and the UK, of which a lack of experience and resources,

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<sup>117</sup> Eg, in Alabama an electronic monitoring system is used on sexually violent predators to ascertain whether they were in the vicinity of a crime scene, beyond a restricted area, or violated curfew requirements. Other measures taken into consideration by the SALRC included sexual offender drug and alcohol treatment and testing orders, rehabilitative treatment, restorative justice and diversion for child offenders, and the supervision of high-risk sex offenders. See SALRC *Sexual Offences Report* 58.

<sup>118</sup> As in the US, where sex offender civil commitment legislation (*Violent Crime Control and Law Enforcement Act, 1994* (42 USC 14071)) incarcerates dangerous or mentally ill sex offenders for an indefinite period of time.

both monetary and administrative, are the most salient. These problems may prevent the achievement of the purpose of the registry.

Whether or not the sex offender register will be further constitutionally challenged in court will have to be seen. In the US, a shift of the burden of proof onto sex offenders to establish that they were no longer sexually violent predators was declared unconstitutional because it violated procedural due process guarantees under the federal and state constitutions.<sup>119</sup> SA's version is similar in the sense that the removal of one's name from the list is subject to the exercise of the registrar's discretion after proper application from the offender.<sup>120</sup> A wait-and-see attitude will have to be adopted here.

Critics of the register doom it to be a failure, labelling it "feel-good legislation" and a futile effort to name and shame the offenders. Similar legislation has not brought about a reduction in the level of sexual offences in countries where it is currently in operation. As established, a sex offender register does not prevent the commission of sexual offences. Sex offender policy issues may be implemented because they are popular, but that does not mean that they are efficient, effective or equitable. The state would do better to protect the public through legislation based on empirical evidence, while ensuring that citizens' constitutional rights are not infringed.

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<sup>119</sup> In *S v Bani* 36 P3d 1255 (Haw 2001), the court held that Hawaii's sex offender statute violated sex offenders' protected liberty interests without due process of law because public notification of their status as sex offenders is authorised without notice. There is also no opportunity to be heard or any preliminary decision as to if, and to what extent, the offenders actually posed a danger to society.

<sup>120</sup> In this regard, no mention is made in the Act as to the registrar's competences and capabilities in discerning sex offenders, or whether expert opinion will be consulted.



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## LIST OF ABBREVIATIONS

|                    |  |
|--------------------|--|
| AWA                | Adam Walsh Child Protection and Safety Act of 2006   |
| Brit J Criminol    | British Journal of Criminology                       |
| COSA               | Circles of Support and Accountability                |
| CPR                | Child Protection Register                            |
| DoJCD              | Department of Justice and Constitutional Development |
| ECHR               | European Convention on Human Rights                  |
| Harv J on Legis    | Harvard Journal on Legislation                       |
| Howard J Crim Just | Howard Journal of Criminal Justice                   |
| HRW                | Human Rights Watch                                   |
| J Law Econ         | Journal of Law and Economics                         |
| MAPPA              | Multi-Agency Public Protection Arrangements          |



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|------------------------------|---|
| NRSO                         | National Register for Sex Offenders                 |
| Penn State J L & Int Affairs | Penn State Journal of Law and International Affairs |
| SAHRC                        | South African Human Rights Commission               |
| SALC                         | South African Law Commission                        |
| SALRC                        | South African Law Reform Commission                 |
| SAPA                         | South African Press Association                     |
| SORNA                        | Sex Offender Registration and Notification Act      |
| SSOSA                        | Special Sex Offender Sentencing Alternative         |
| U Rich L Rev                 | University of Richmond Law Review                   |
| ViSOR                        | Violent and Sex Offender Register                   |
| Washburn LJ                  | Washburn Law Journal                                |