

Submission

to the

Department of Justice and Correctional Services

on the

Criminal Law (Sexual Offences and Related Matters) Amendment Act Amendment
Bill

[B – 2020]

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1. Introduction

The Centre for Applied Legal Studies (CALs) is a civil society organisation based in the School of Law at the University of the Witwatersrand. CALs is also a law clinic, registered with the Legal Practice Council. As such, CALs connects the worlds of academia and social justice and brings together legal theory and practice. CALs operates across a range of programme areas, namely: rule of law, basic services, business and human rights, environmental justice, and gender.

The Gender Justice programme at CALs focuses on ensuring the rights of people of all gender identities and expressions are realised and protected as set out in the Constitution of South Africa. The programme's work largely centres on addressing all forms of gender-based violence and in particular the trauma that victims and survivors face when they are failed by the systems that are meant to protect them.

The Gender Justice Programme at CALs has consistently engaged in various gender-related issues through numerous submissions to Parliament. Most recently, these have included submissions on the [South African Law Reform Commission Issue Paper on a Single Marriage Statute](#) (August 2019); the [Prescription in Civil and Criminal Matters \(Certain Sexual Offences\) Amendment Bill](#) (April 2019) and the [Cybercrimes Bill](#) (March 2019) and recently the [Domestic Violence Amendment Bill](#) (April 2020).

CALs often assists with vulnerable individuals who have been victim/survivors of sexual offences. This has included learners who are victims of sexual violence at the hands of educators, ground staff, security and other learners. Schools are one of the places that the NRSO is intricately linked with the safety of learners yet is not achieving its aim. This is due to employers not vetting educators that are hired, the inaccessibility of the NRSO as well as the NRSO's failure to include persons at schools who may have access to children but are not being vetted such as gardening staff, security and scholar patrol attendants.

In light of this experience, we assert that CALS has sufficient expertise and institutional knowledge to comment on the above Bill, the general contents of the NRSO and the facilitation of such.

2. Reflections on the Bill

2.1. General purpose and scope of the register

The purpose of any type of any form of sexual offenders' register is described as being 'a form of public protection and not part of the punishment' of being found guilty of the offence.¹ It is important that a sexual offences register should succeed in its primary aim of protection.

The National Register for Sexual Offenders (NRSO) was established in 2007 by Parliament. Although the aim of the register should have been a generalised protection it was (and still remains) focused on 'giv[ing] employers in the public sectors such as schools, creches and hospitals the right to check that the person being hired is fit to work with children or mentally disabled people'.² The narrowed focus of the NRSO in dealing primarily with employment status in areas assisting vulnerable persons is naïve and restrictive. This will be discussed further below where it will be suggested that the NRSO extend its scope beyond mere employer-employee relationships and begin to look at offenders who may and often do come into contact with vulnerable people in situations outside of employment.

Unlike other jurisdictions, such as that of the UK, whose register is focused on 'monitoring the risk from known sex offenders', the current NRSO is problematic in that it places the state's obligation to protect vulnerable individual's solely on the employer and strangely (through the suggested amendments in the bill) on the goodwill of the offender (the current or potential employee) through duties to report their

¹ T, Thomas, 'The Sex Offender Register: Some observations on the time periods for registration', *Howard Journal of Criminal Justice*, (2009) 48.3.

² South African Government, *National Register for Sexual Offenders (NRSO)*. Available at <https://www.gov.za/services/national-register-sex-offenders-nrso>.

conviction.³ This will be discussed below in relation to a more integrated approach to duties among stakeholders.

The NRSO and the proposed amendments to such are well-intended and could potentially act as a mechanism for the protection of vulnerable individuals, however, in its current form and with the issues plaguing its effectiveness the NRSO remains a pipedream. If one looks at parliamentary hearings from the previous two years it is clear that the NRSO (and also the National Child Protection Register) are not prioritised by the Department of Justice and Constitutional Development. For example, in November of 2019 in a question posed to the Minister of Basic Education it was asked ‘whether teachers who were convicted prior to the specified date appear on the register; if not, why not; if so, what are the relevant detail?’.⁴ The Minister’s reply was that ‘the Department of Justice & Constitutional Development was not yet ready with its National Sexual Offenders Register (NRSO) and therefore it was not accessible to public entities; public and Government departments for use’. In 12 years from its establishment the NRSO reportedly remains inaccessible, even to government’s own departments. Furthermore, if one looks at the Inter-sectoral report on the Implementation of the Criminal Amendment (Sexual Offences) and Related Matters Amendment Act 32 of 2007 (SORMA) in November 2019 it was stated that during a data verification process it was found that the NRSO had approximately 32 570 entries and of those 24 912 were validated.⁵ Although it is commendable that 32 570 names have been entered, 24% of the names on the register were then not validated and thus problematic to some degree (may it be that they are replicated or merely incorrect).

What emerges in relation to the above is that the Department(s) must begin to prioritise these registers and no call for amendments to the NRSO can have any positive effect until the foundations of the registers are fixed.

³ J, O’Sullivan *et al*, ‘Understanding, implications and alternative approaches to the use of the sex offenders register in the UK’ *Irish Probation Journal* (2016) 13, 87.

⁴ Parliamentary Monitoring Group, *Question NW926 to the Minister of Basic Education*, (4 November 2019). Available at <https://pmg.org.za/committee-question/12622/>.

⁵ Parliamentary Monitoring Group, *Inter-sectoral Report on Implementation of Criminal Law (Sexual Offences and Related Matters) Amendment Act: Department briefing, with Deputy Minister*, (20 November 2019). Available at <https://pmg.org.za/committee-meeting/29393/>.

2.2. Section 2: definitions, of ‘employer’ and ‘person who is vulnerable’

‘Employer’

The NRSO’s primarily focuses on protecting vulnerable persons from sexual offences through employment relationships. And although the Bill does leave scope for an interpretation that could include other individuals through words such as ‘owns’ or ‘manages’, there must be a broadening of who can have access to vulnerable individuals.

Vulnerable individuals also encounter sexual offenders through the voluntary positions that these offenders hold at initiatives set up for vulnerable persons. For, example, in the case of the late Sydney Frankel it was alleged that he would volunteer and donate money to Arcadia, an orphanage. Through his ‘philanthropic’ endeavors he had access to the child victim and sexually violated the child on numerous occasions.⁶

Another example of the access that individuals have to vulnerable persons through not only employment but also voluntary positions is that of the Boy Scouts of America. Boy Scouts of America is described as ‘fun, hands-on learning and achievement that puts kids in the middle of the action and prepares them for today – and for life’.⁷ It is an organisation that depends heavily on voluntary work and explains that it has had 35 million adult volunteers assisting their organisation.⁸ Although Boy Scouts of America was established to promote the flourishing of children, it became riddled with child abuse and was forced to file for bankruptcy in early 2020 due to the ‘financial instability... [as it] faces some 300 lawsuits from men who say they were sexually abused as Scouts’.⁹

⁶ *Levenstein and Others v Frankel and Others*, 29573/16, Plaintiff’s Notice of Motion, page 35 – 38.

⁷ Boy Scouts of America, *Welcome to Boy Scouts of America*. Available at <https://www.scouting.org/>

⁸ Boy Scouts of America, *About the BSA*. Available at <https://www.scouting.org/about/>.

⁹ L, Wamsley & W, Goodwyn, *Boy Scouts of America files for bankruptcy as it faces hundreds of sex-abuse claims*’ NPR, (18 February 2020). Available at <https://www.npr.org/2020/02/18/806721827/boy-scouts-of-america-files-for-bankruptcy-as-it-faces-hundreds-of-sex-abuse-cla>. Volunteering options are set out at <https://www.scouting.org/about/volunteer/>.

In summary it is suggested that the Bill include persons who volunteer at places which focus on assisting vulnerable individuals or places where persons have access to vulnerable individuals.

‘Person who is vulnerable’

The suggested amendment to broaden the scope of those individuals who may be vulnerable to sexual violations from being solely children and persons with psychosocial disabilities is welcomed.

There are a few issues that arise from the suggested definition of ‘vulnerability’ in terms of the Bill. The first is that it would not protect certain individuals that are undoubtedly vulnerable such as women within the gender-based shelter system. Meth explains that there is a further level of vulnerability for women who do not have access to social capital and may not financially be able to leave their partners.¹⁰ These are the persons that gender-based violence shelters primarily cater for.

In terms of NRSO and the Bill, persons working in these shelters would not be screened for sexual offences *unless* there are children in the shelter. This is naturally a nonsensical as this creates a situation where a vulnerable group such as women who are victims/survivors of gender-based violence only gain protection under the NRSO by proxy of their children as they are not included in the current definition.

The second issue related to the inclusion of a ‘young person under the age of 25 receiving tuition at a higher education college, higher education institution or private higher education institution as defined in section 1 of the Higher Education Act, 1997 (Act No. 101 of 1997)’ under the definition of a person who is vulnerable.¹¹ The bill suggests that the above person is only vulnerable or *sufficiently* vulnerable until the age of 25. This is an arbitrary age and does not seem to be based on research around vulnerability linked to age. A person who is attending a higher education institute still

¹⁰ P, Meth, ‘The Shelter dilemma for women experiencing domestic violence’, *Agenda*, (2001) 48, 113.

¹¹ Bill, section 2(b).

experiences vulnerability whether under the age of 25 or over. It must be remembered that age is not the sole determining factor in relation to vulnerability to sexual violence.

2.3. **Section 3:** prohibition of certain type of employment

As mentioned above, there is the need for the Bill to extend beyond ideas of employment. Although section 41(b) and (c) does broaden the scope to include persons who may be in a position of 'authority, supervision or care' of a vulnerable person, this is linked to employment status. This does not take into consideration voluntary assistance which is outside of the realm of employment.

2.4. **Section 4:** registrars' duties

According to the Department of Justice and Constitutional Development's website the following departments are responsible for managing the NRSO: the Minister of the Department of Justice and Constitutional Development must establish and maintain the register, the National Registrar for Sex Offenders administers the NRSO and the South African Police Service, Department of Correctional Services, Department of Health and the courts nationwide submit the relevant information for the registration of offenders.¹²

The proposed amendment centers around the registrar as the individual who remains responsible and accountable for the exercise of the powers and the performance of duties and functions as delegated by the minister. However, it is not clear from the reading of the amendment what those duties and functions are. Should the registrar be responsible for the maintenance of the register as well? This lack of information around the roles and responsibilities contributes to issues with implementing and maintaining the registers. Which, and as canvassed above, has been one of the primary issues with the NRSO.

¹² Department of Justice and Constitutional Development, *FAQ: National Register for Sex Offenders NRS*. Available at <https://www.justice.gov.za/vg/nrso.html>.

It has been shown above that the information in the NRSO is not entirely accurate. Furthermore, in an article in the Daily Maverick, the register's registrar, Ntombi Matjila, explained that at the time the department was doing a data verification process through the courts to obtain information that was not included in the register. Matjila also said the register was previously found to not have accurate, valid or complete information. The office of the auditor-general has been auditing it every year and last year, in order to rectify the audit that was found to be inaccurate, they started validating all the information in the register, taking out all invalid entries made because of system errors.¹³

The channels of delegation need to be made clear, roles and responsibilities should be outlined and training on the administration of the register must be proposed where necessary, to avoid adversely affecting the rights of those whose names have been entered incorrectly and the rights of children and the vulnerable who may face danger, where names of offenders are not entered correctly into the register.

2.5. **Section 6:** licensing

Sections 40 and 41 of the Act are clearly intended to ensure that those who are convicted of sexual offences are not given access to children and other vulnerable persons through their formal employment or for financial gain. As suggested above, feel that the scope of the Act and NRSO be extended to unpaid positions in the kinds of organisations, associations or clubs which are contemplated under 40(b). Many informal community centres, organisations offering skills development for people with disabilities, faith-based organisations and clubs catering for vulnerable people, particularly children, not only engage the services of employees, but also volunteers.

CALS has working with a number of women and children who have come forward about abuse at the hands of a deacon in their church, for example. We are also aware of several recent cases involving camp counsellors and scholar patrol officers who are not necessarily employees of the schools and organisations directly or are not in

¹³ A, Makinana, *Sex offenders' register to be 'expanded' – but not necessarily made public* (20 November 2019). <https://www.timeslive.co.za/politics/2019-11-20-sex-offenders-register-to-be-expanded-but-not-necessarily-made-public/>.

remunerated positions. We would ask whether there should not still be an onus on the organisations to ensure that their volunteers are not listed on the register before allowing them access to vulnerable people.

Furthermore, many of the kinds of organisations contemplated in 40(b) are not necessarily required to be licensed or registered if they are not, for example, residential child and youth care facilities, partial care facilities or shelters as outlined in the Children's Act.¹⁴ According to the DG Murray Trust, 'the vast majority of NGOs in South Africa are established as Voluntary Associations'¹⁵ which are governed by the common law and have very few regulatory requirements and may register with the Department of Social Development on a voluntary basis.

Many organisations catering for vulnerable people may therefore fall outside of licencing requirements. Indeed, Scouts South Africa's Organisational Rules, for example, insist that 'neither SSA or any of its units is subject to the control of any department of the government of the Republic of South Africa, or of any Regional government, or of any Metropolitan Council, or local authority'.¹⁶ While it is understandable that the Act primarily targets employment and commercial benefit for regulation, we would question whether this is sufficient protection for vulnerable people given the myriad ways they may come into contact with potential perpetrators.

2.6. **Section 12:** timeframes

Section 12 lack clarity around the process of extracting information relating to offenders who have committed and be found guilty of sexual offences in other countries.

Extradition is the formal process of one state surrendering an individual to another state for prosecution or punishment for crimes committed in the requesting country's

¹⁴ Children's Act (No. 38 of 2005).

¹⁵ <https://dgmt-commons.co.za/establishing-an-ngo-legal-compliance-and-registration/what-legal-options-exist/establishing-a-voluntary-association/>

¹⁶ Accessed on 21 April 2020 at <https://www.scouts.org.za/wp-content/uploads/Organisational-Rules-2017v1.pdf>

jurisdiction. It typically is enabled by a bilateral or multilateral treaty. Some states will extradite without a treaty, but those cases are rare.¹⁷ Section 501 (b) of the Amended Bill is not designed for people who have committed sexual offences in other jurisdictions and are on the wanted list. Rather, it deals with people who committed offences and served their sentences in other jurisdictions. There is a big challenge in getting information in the later scenario because the process of obtaining someone's criminal record from another jurisdiction is not governed by Extradition laws. Other governments might be very reluctant to provide such kind of information because it infringes on people's rights to privacy and dignity.

As such the Bill must come up with a clear procedure on how the process of obtaining information about sexual offences committed in other countries will work out. Moreover, the person or entity responsible for this task must be clearly spelt out in the Act.

¹⁷ <https://www.cfr.org/background/what-extradition>