

**THE CONSTITUTIONALITY AND JUSTIFICATION OF THE NATIONAL  
REGISTER FOR SEX OFFENDERS**

by

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## SUMMARY

It behooves any legislator confronted with a society plagued by continuous and increasingly violent crimes, to promulgate legislation which strives to deter potential offenders by *inter alia* limiting the access they have to potential victims. It is in this vain that the South African legislator promulgated legislation which established a National Register for Sex Offenders whereby convicted (or in certain circumstances alleged) offenders' access to potential victims are limited by restricting the opportunities these offenders might have to commit another sexual offence.

The aim of this dissertation is to closely examine this newly established National Register for Sex Offenders. This examination is performed within a constitutional framework from whence a comparative analysis of an analogous register in the United Kingdom is conducted. This dissertation seeks to pre-empt potential shortcomings of the National Register for Sex Offenders by providing recommendations based on findings from the aforementioned comparative study.

This dissertation begins by setting out the scope and parameters of the National Register for Sex Offenders wherein it is also discussed whether or not this register acts as an extenuation of an offender's punishment and if so, whether or not it is justifiable. After this investigation, various possible infringements of the offender's constitutional rights are identified, discussed and justified. This dissertation, subsequently, studies an analogous register also recently established in the United Kingdom which helps to identify certain shortcomings in the National Register for Sex Offenders, whereafter certain recommendations are made.

Most importantly, it is recommended that an independent authority should be established to regulate and administer the National Register for Sex Offenders. Furthermore, it is recommended that the National Register for Sex Offenders and the National Child Protection Register should be amalgamated into one register which will not only save taxpayers' money, but will also avoid any confusion. Another crucially important recommendation is that the scope of the National Register for Sex Offenders should be widened to include all vulnerable adults and not only those that are mentally disabled.



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## CHAPTER 1

### Contextualisation of the National Register for Sex Offenders

#### 1. Introduction

The South African societal make-up is characterized by persistent and unperturbed violence, of which violence against the person, human life and property is the most prominent. As a result thereof, the public has called for increasingly stringent sentencing measures which will *inter alia* result in more sustainable rehabilitation of convicted offenders of the aforementioned violent offences. Unfortunately, these measures do not seem to deter offenders, nor does it constitute such sustainable rehabilitation as is illustrated by the high recidivism rate currently in South Africa.

Accordingly, the legislator enacted the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 which came into operation on 16 December 2007. Chapter 6 of this Act (which came into operation on 16 June 2008) provides for the implementation of a national register containing all the particulars of convicted sexual offenders, limited to sexual offences committed against children as well as mentally disabled people. The rationale for this register is to protect the weakest members of our society, i.e. the children and mentally disabled. Although the Judicial Matters Amendment Act 66 of 2008 provides that the Minister of Justice and Constitutional Development had until 30 June 2009 to establish the Sex Offenders Register, it only recently came into operation on 1 September 2010.

There are a few general consequences which result from having ones' particulars placed on this sex offenders register. These include the following:

- The person will be prohibited from taking up certain positions of employment where he<sup>1</sup> will work with children/mentally disabled people or where he will have access to children/mentally disabled people;
- The person will also not be granted a licence which allows him to operate or manage any entity which supervises or cares for children/mentally disabled people;

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<sup>1</sup> Unless indicated otherwise, any reference in this dissertation made to male also refers *mutatis mutandis* to female, and *vice versa*.

- The person may not become the foster parent, kinship care-giver, temporary safe care-giver or adoptive parent of a child nor may he become the curator of a person who is mentally disabled; and
- The employer has a legal obligation to ascertain whether (current or prospective) employees are on the register and not to employ any person whose details are on the register, except where the safety of children/mentally disabled people can be guaranteed.

It is clear from these consequences that the register possibly infringes some constitutionally protected rights of the offender which – it is submitted – warrants further investigation.

## **2. Problem Statement**

The abovementioned constitutional challenges include – but are not limited to – the infringement of an offender's right to privacy, dignity and freedom and security of the person. This dissertation will therefore seek to illustrate how these infringements - if found to in fact constitute infringements - can be justified in terms of section 36 of the Constitution.

Furthermore, the *raison d'être* of the register needs to be explored to ascertain what the parameters are in which the legislator envisaged this register to work in. An extension of this exploration would *inter alia* be the rationale behind the limited applicability of the register, i.e. only offenders who committed a sexual offence against a child or mentally disabled person. This dissertation also aims to identify certain shortcomings of the register and provide recommendations based on analogous legislation from a foreign jurisdiction.

## **3. Aims of Study and Methodology**

By examining the constitutional challenges arising from the register, the dissertation aims to provide clear arguments whether the register is constitutionally justifiable or not. This in turn will enable any interpreter of the legislation to be equipped with the knowledge of whether the register passes constitutional muster or not.

In view of the fact that this is a burgeoning field in context of the South African legal jurisprudence, a comparative analysis of an analogous sex offenders register used in

another legal system (i.e. the United Kingdom's Vetting and Barring Scheme) will be performed so as to ascertain the efficacy of sex offenders registers. This analysis also strives to assist in identifying the shortcomings of the register in its current form, and elucidate any suitable recommendations which should be incorporated into the framework of the register.

With regards to the constitutional questions, the dissertation will adopt a positivistic approach which entails the two-pronged test to determine whether the infringements of the constitutionally enshrined rights are justified or not.

#### **4. Limitations of Study**

An ever-present difficulty when writing about newly implemented legislation, is the dearth of available literature related to the pertaining subject-matter. This is especially true in the present dissertation, as both the primary register under perusal (the National Register for Sex Offenders) and the analogous register used in the comparative analysis (the Vetting and Barring Scheme) only recently came into operation.

This study of the National Register for Sex Offenders will consequently be limited to a pre-emptive analysis of envisaged shortcomings and potentially invalid consequences arising from the register. This dissertation therefore does not purport to include all the foreseeable issues related to the register.

#### **5. Structure of the Dissertation**

This dissertation will be divided into five different chapters. The current chapter aims to orient the reader with regards to the context of the dissertation and serves as an introduction to the dissertation. Chapter two will briefly set out the parameters of the National Register for Sex Offenders and also highlight the foreseeable pragmatic issues related to the register. Chapter three will identify, discuss and justify any constitutional infringements the register might induce. In chapter four a comparative analysis will be performed to compare the NRSO to a UK register, in order to identify the shortcomings of the NRSO. Lastly, chapter five will proffer some recommendations for legislative reform.



## CHAPTER 2

### The National Register for Sex Offenders - A Critical Analysis

#### 1. Introduction

Before an investigation can be launched into the implications and foreseeable consequences of the National Register for Sex Offenders (the NRSO), it is essential to have a well-developed understanding of the operational parameters and scope of the NRSO.

This chapter endeavours to establish the aforementioned understanding, by discussing the objectives and general provisions of the NRSO, whereafter the classification thereof is also discussed. It is imperative to understand whether the NRSO serves as an extension of the offender's punishment, or can be seen as a mere preventative measure which seeks to limit the access of convicted or alleged sexual offenders to children or mentally disabled individuals, whatever the case may be.

After the NRSO's classification has been established (and it has been ascertained whether such classification is justified or not) a comparison is made between the NRSO and the apparently similar National Child Protection Register. This comparison seeks to highlight the submission that the aforementioned registers should rather have been assimilated into one all-encompassing register which would have circumvented the potential pragmatic difficulties.

#### 2. The Objects of the NRSO

The main objectives of the NRSO are to protect children and people who are mentally disabled against sexual offenders by establishing a record of convicted or alleged sexual offenders and providing this information to the relevant employer, licensing authority or other relevant authorities.<sup>2</sup>

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<sup>2</sup> Sec. 43 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (hereinafter referred to as "the Act").

### 3. General Provisions of the NRSO<sup>3</sup>

Section 50 of the Act stipulates whose particulars must be included in the NRSO. This includes any person:

- who has been convicted of committing a sexual offence.<sup>4</sup> This also takes into account any person who has been convicted of committing any equivalent sexual offence in any foreign jurisdiction;<sup>5</sup>
- who is alleged to have committed a sexual offence and of whom a court has made a finding and given direction in terms of section 77(6) or 78(6) of the Criminal Procedure Act, 51 of 1977.<sup>6</sup> This is also applicable to any person who was dealt with in the same manner in any foreign jurisdiction;<sup>7</sup>
- who has served or is serving a sentence of imprisonment resulting from a conviction for a sexual offence;<sup>8</sup>
- whose particulars appear in a foreign jurisdiction's official register following the conviction of a sexual offence.

There are a few general consequences which result from having one's particulars placed on the NRSO. These include the following:

- The person will be prohibited from taking up certain positions of employment where he will work with or have access to children or mentally disabled people;<sup>9</sup>
- The person will also not be granted a licence which allows him to operate or manage any entity which supervises over or cares for children or mentally disabled people;<sup>10</sup>
- The person may not become the foster parent, kinship care-giver, temporary safe care-giver or adoptive parent of a child nor may he become the curator of a person who is mentally disabled;<sup>11</sup>

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<sup>3</sup> To eschew the *verbatim* repetition of the Act, any discussion *infra* of a provision containing reference to a sexual offence, will only be regarded as offences committed against a child or mentally disabled person, unless indicated otherwise.

<sup>4</sup> Sec. 50(1)(a)(i) of the Act.

<sup>5</sup> Sec. 50(1)(b)(i) of the Act.

<sup>6</sup> Sec. 50(1)(a)(ii) of the Act.

<sup>7</sup> Sec. 50(1)(b)(ii) of the Act.

<sup>8</sup> Secs. 50(1)(a)(iii) and (iv) of the Act.

<sup>9</sup> Secs. 41(1)(a) and 41(2)(a) of the Act.

<sup>10</sup> Secs. 41(1)(c) and 41(2)(c) of the Act.

<sup>11</sup> Secs. 41(1)(d) and 41(2)(d) of the Act.

- If the person is employed at the time of the commencement of the NRSO, he must disclose a conviction of a sexual offence to his employer without delay, irrespective of whether the offence was committed during the course of his employment;<sup>12</sup>
- The person must also disclose a conviction of a sexual offence when applying for employment.<sup>13</sup>

Section 45 also obliges employers to:

- apply to the Registrar for a prescribed certificate which states whether or not a current or potential employees' particulars have been recorded in the NRSO;<sup>14</sup>
- ascertain whether or not current or prospective employees are on the NRSO and not to employ any person whose details are found therein, except where the safety of children or mentally disabled people can be guaranteed;<sup>15</sup>
- immediately terminate an employment relationship where an employee fails to disclose a conviction of a sexual offence;<sup>16</sup> and
- take reasonable steps to prevent an employee whose particulars are recorded in the NRSO from having access to a child or a person who is mentally disabled, which include transferring said person to another post or position whilst guaranteeing the safety of children or people who are mentally disabled.<sup>17</sup>

Chapter 6 goes on to deal with the administrative and organisational aspects related to the NRSO. This *inter alia* includes the following:

- The NRSO should have been established on 30 June 2009 by the Minister of Justice and Constitutional Development;<sup>18</sup>
- It stipulates which people are entitled to apply for certificates which state whether or not the particulars of an individual are recorded in the NRSO;<sup>19</sup>
- The obligations of employees to disclose whether or not their particulars are recorded in the NRSO;<sup>20</sup>

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<sup>12</sup> Sec. 46(1) of the Act.

<sup>13</sup> Sec. 46(2) of the Act.

<sup>14</sup> Secs. 45(1)(a) and (b) of the Act.

<sup>15</sup> Secs. 45(2)(a) and (b) of the Act.

<sup>16</sup> Sec. 45(2)(c) of the Act.

<sup>17</sup> Sec. 45(2)(d) of the Act.

<sup>18</sup> Sec. 42(1). The original date for the commencement of the NRSO was 30 June 2008, but this was extended to 30 June 2009 by sec. 36 of the Judicial Matters Amendment Act 66 of 2008.

<sup>19</sup> Sec. 44 of the Act.

<sup>20</sup> Sec. 46 of the Act.

- The obligations in relation to licensing applications and applications for fostering, kinship care-giving, temporary safe care-giving and adoption of children or curatorship;<sup>21</sup>
- It sets out which particulars of the offender should be recorded in the NRSO;<sup>22</sup>
- The procedure and prerequisites for the removal of an individual's particulars from the NRSO;<sup>23</sup> and
- The inherent confidentiality pertaining to an individual's information recorded in the NRSO.<sup>24</sup>

#### 4. The Classification of the NRSO

In a critical analysis of the NRSO, it is essential to determine whether the NRSO can be seen as a further punishment imposed on the pertaining offender, and if so, which of the crystallized aims of punishment are incorporated when placing an offenders' particulars on the NRSO. In order to make this determination, the meaning of punishment in context of the South African criminal jurisprudence needs to be perused so as to ascertain whether or not the placement of an individuals' particulars on the NRSO effectuate such a punishment, and if it does, whether it is in fact justifiable.

##### ***4.1 The meaning of 'punishment' and whether or not the NRSO effectuates punishment***

From a young age people are indoctrinated with the notion that any action which transgresses boundaries set by a higher authority (shifting with age from the individual's parents to any other entity with authority over the pertaining individual) justifies the imposition of an appropriate punishment.<sup>25</sup> It is this fundamental concept of causality

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<sup>21</sup> Secs. 47 and 48 of the Act.

<sup>22</sup> Sec. 49 of the Act.

<sup>23</sup> Sec. 51 of the Act.

<sup>24</sup> Sec. 52 of the Act.

<sup>25</sup> The seminal work in this regard was done by Jean Piaget in 1932 in *The Moral Judgment of the Child* where he posited that there are two discernable stages of moral development (i.e. the morality of constraint stage and the morality of co-operation stage). He stated that the child's perspective of punishment shifts from a belief that punishment itself defines the wrongness of an act, to one where the child perceives that punishment will act as compensation for the victim and lead to the reform of the offender. Cf Kohlberg "The Development of Children's Orientations Towards a Moral Order" 1963 *Vita Humana* 11-33; Papalia *et al* (2002) *A Child's World: Infancy Through Adolescence* 316-318 and 407-412; Turiel "The Development of Children's Orientations Towards a Moral, Social, and Personal Orders: More than a Sequence in Development" 2008 *Human Development* 21-39.

imprinted in each person, which forms the basis of the *talio*-principle<sup>26</sup> (i.e. an eye for an eye).

As a result of the combination of the *talio*-principle and this indoctrinated belief that punishment should follow a wrongful act, victims of a criminal offence generally believe that a *quasi quid pro quo* situation exists where he has been wronged, and would consequently like to see retributive justice done. Punishment is therefore a concept inherently justified in and by every individual, anchored in people's need to have their deep-seeded retributive desires satiated. With this as background, it is now imperative at this juncture to clearly understand the concept of 'punishment' as most often applied to determine whether the NRSO can consequently be classified as such.

#### 4.1.1 *The concept of punishment*

Punishment, as it is most commonly used, can be defined as "the prescription of a form of suffering in penalty for an offence".<sup>27</sup> This definition, although satisfactory for everyday use, does not suffice as a clear, legalistic and all-encompassing description of punishment. Punishment is inextricably woven into the fabric of criminal law, and in this sense "criminal law" can be seen as a misnomer due to the fact that the Afrikaans ("strafreg"), German ("Strafrecht") and Dutch ("strafreg") words for criminal law explain the relationship between criminal law and punishment more adequately.<sup>28</sup> Rabie & Strauss<sup>29</sup> provide a more relevant definition where the authors quote Hans-Heinrich Jescheck's definition of punishment:

"Punishment is the balancing of a punishable infringement of the law with the infliction of an evil which is commensurate with the gravity of the injustice and the *mens rea* of the offender, which expresses a public disapproval of the offender's act and thereby leads to verification of the law."

The authors further elaborate by stating that the most important feature of punishment is the moral condemnation and disapproval associated therewith.<sup>30</sup> This permutation of punishment's definition - according to Rabie & Strauss - clearly shows that punishment

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<sup>26</sup> Van der Vyver "The International Criminal Court and the Concept of *Mens Rea* in International Criminal Law" 2004 *University of Miami International & Comparative Law Review* 57.

<sup>27</sup> Trident Press International (1995) *Webster's Dictionary* 810.

<sup>28</sup> Terblanche (2007) *The Guide to Sentencing* 4.

<sup>29</sup> Rabie & Strauss (1985) *Punishment* 7. See also Burchell (2007) *Principles of Criminal Law* 5.

<sup>30</sup> *Ibid.*

can only be explained from a retributive basis.<sup>31</sup> However, as noted by Joubert, retribution is not the only aim of punishment.<sup>32</sup> Due regard should *inter alia* be given to the rehabilitative value and considerations of restorative justice that punishment potentially possesses. It has consequently been suggested that the aims of punishment should rather shift to a system where the punishment is sculpted to fit the personality and circumstances of the offender - i.e. a more individualised punishment which will *inter alia* facilitate the readjustment of the criminal to the demands of society.<sup>33</sup>

In addition, the essential elements of punishment - as identified by Hart<sup>34</sup> - are as follows:

1. It must involve pain or other unpleasant consequences;
2. It must be for an offence against legal rules;
3. It must be of an actual or supposed offender, for his or her offence;
4. It must be intentionally administered by human beings other than the offender;
5. It must be imposed and administered by an authority constituted by a legal system against which the offence is committed.

A sixth essential feature of punishment has also been identified, being that the person ordering or administering the unpleasant consequences must have justification for doing so.<sup>35</sup>

It is consequently submitted that a slight variation of the definition by Jescheck quoted *supra*, will define punishment as it is currently being applied, through an assimilation of the above-mentioned elements of punishment and the move towards more rehabilitative punishment. The following, alternative definition is therefore preferred for any further discussions in this dissertation:

"Punishment is the balancing of a punishable infringement of the law with the infliction of an evil which is commensurate with the gravity of the injustice and the *mens rea* of the offender, which expresses a public disapproval of the offender's act, **is justifiable in the pertaining society, promotes rehabilitation and the concept of restorative justice (where possible)** and thereby leads to verification of the law."

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<sup>31</sup> Rabie & Strauss 12.

<sup>32</sup> Rabie (ed Joubert) (2004) 6 *LAWSA* par 4. See also Terblanche 155-171 for a general discussion of the aims of punishment.

<sup>33</sup> Burchell 79.

<sup>34</sup> As summarized in Spohn (2009) *How Do Judges Decide?* 4.

<sup>35</sup> Spohn 5.

#### 4.1.2 *The NRSO as a form of punishment*

When this definition is applied to the NRSO, it is clear that having one's particulars recorded in the NRSO indeed holds unpleasant consequences<sup>36</sup> for the offender, which is commensurate with the gravity of the offence and carries a reflection of the public's disapproval as a result of the heinousness of this category of sexual offences. Consequently, at the core of the NRSO lies a system which is intrinsically an extension of the offender's court-imposed punishment.<sup>37</sup>

That having been said, in a few cases that have come before the European Commission of Human Rights, the question was addressed whether or not a registration requirement such as this, constitutes punishment.<sup>38</sup> The European Commission found that the mere fact that a registration requirement requires certain information to be placed on a register, does not *per se* amount to punishment.<sup>39</sup> Furthermore, sentencing is a discretionary act, based on the application of entrenched principles developed to strive for uniform sentences, taking into account all the pertaining circumstances and seeking to allay the aims of punishment. The registration requirement in terms of the NRSO is also a legislatively-prescribed order that must follow the conviction (or allegation in certain circumstances) of a sexual offence committed against children or mentally disabled persons.<sup>40</sup> Chapter 6 is therefore peremptory insofar as a presiding officer has no discretion as to whether or not he wishes to place the offender's information on the register, provided that the aforementioned requirements are met.<sup>41</sup>

It would therefore appear from these cases that where a presiding officer is only applying the law as a result of the presence of the pre-requisite conviction or allegation, such registration cannot amount to punishment.<sup>42</sup> This argument is however fallacious, insofar as it ignores the abovementioned foundations of punishment. It is submitted that *any* order by a court, whether formalistically imposed or not, which goes so far as to cause unpleasant consequences for the offender and/or curtail certain rights and liberties, does in fact constitute punishment.

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<sup>36</sup> The prohibitions pertaining to the occupations available for such an offender and the fact that he may never adopt, nor be the foster-parent of any child (as discussed *supra* 5) can be seen as unpleasant circumstances.

<sup>37</sup> McAlinden (2007) *The Shaming of Sexual Offenders* 111.

<sup>38</sup> *Ibbotson v United Kingdom* 1999 27 EHRR CD 332 and *Adamson v United Kingdom* 1999 28 EHRR CD 209.

<sup>39</sup> *Ibbotson v United Kingdom supra* 334.

<sup>40</sup> Sec. 50(2) of the Act.

<sup>41</sup> *S v RB; S v DK and Another* 2010 1 SACR 447 (NCK) par [24].

<sup>42</sup> *Ibbotson v United Kingdom supra* 334 and *Adamson v United Kingdom supra* 211.

### 4.1.3 *The 'dangerousness debate'*

A further aspect in relation to registration as an extension of the offender's punishment, is the so-called 'dangerousness debate'.<sup>43</sup> As discussed *supra*, the main aim of the NRSO is to limit and/or prohibit access by the relevant offender to children or mentally disabled persons. This is done to protect future victims due to the *danger* that an offender *might* commit a similar offence again.<sup>44</sup> The court is hereby punishing an offender on the perceived likelihood that he will commit an offence solely based on the fact that he belongs to a specific risk category.<sup>45</sup>

It is submitted that this 'debate' can be put to rest if a balance can be found between the two opposing, ideological models for a criminal justice system – i.e. due process<sup>46</sup> and crime control<sup>47</sup>.<sup>48</sup> It is consequently submitted that the NRSO finds this balance, insofar as the offenders' liberties are curtailed by the NRSO so as to suppress possible future violations whilst still granting the offender mechanisms which will enable him to have his particulars removed from the NRSO.

Having established that the NRSO constitutes punishment, it is now necessary to ascertain *infra*<sup>49</sup> whether or not this punishment can be rationally justified and whether it promotes rehabilitation together with the concept of restorative justice.

## 4.2 *The justifiability of the NRSO as a form of punishment*

It is evident from the objectives set out above<sup>50</sup> that the NRSO is an attempt by the legislator to rein in the ever-increasing instances of sexual offences committed against children and mentally disabled individuals by limiting the access these offenders might have to potential victims. Therefore, the NRSO is supposedly justified since sex

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<sup>43</sup> McAlinden 112.

<sup>44</sup> McAlinden 113.

<sup>45</sup> *Ibid.*

<sup>46</sup> The central value of this model – although accepting that it is desirable to suppress crime – is that innocent persons should not be convicted of a crime they did not commit and that the criminal process should give the necessary recognition of the basic human rights of the accused, and should also strive to protect such rights.

<sup>47</sup> This model sets out to effectively and efficiently organise crime by repressing criminal conduct, and views such repression as the most important function of the criminal process even if it is at the cost of certain human rights and civil liberties.

<sup>48</sup> See in general Burchell 106-111.

<sup>49</sup> In 4.2 and 4.3 respectively.

<sup>50</sup> Discussed *supra* 4.



offenders - without proper rehabilitation, as is mostly the case in South Africa<sup>51</sup> - pose a greater risk to society than other categories of offenders.<sup>52</sup>

Does this explanation adequately justify the existence of a register which will effectively infringe certain constitutional rights and curtail the offender's liberty? Is the NRSO justifiable as something more than "retributive measures [which are] enacted in large part to satisfy the concerns of a punitive public in relation to sex offenders and to help instil public confidence that something tangible [is] being done by the government to control and manage sex offenders in the community more effectively"?<sup>53</sup> As a point of departure from which these questions will be answered, it is necessary to differentiate between *retributive* justifications and *utilitarian* justifications.<sup>54</sup>

Retributive justifications posit that offenders are rightly punished as a result of their transgressions, for they deserve such punishment.<sup>55</sup> It should be kept in mind that the cornerstone of retributive theories is the principle of proportionality between the committed offence and the sentence imposed on the offender.<sup>56</sup> It is indeed this very principle which differentiates retribution from revenge.<sup>57</sup> In contrast, the emphasis in utilitarian justifications is placed on the prevention of crimes in the future, and punishment meted out on this premise is socially beneficial insofar as it is advantageous to the social order.<sup>58</sup>

The NRSO can consequently be justified through the application of utilitarian theories<sup>59</sup>, in view of the fact that an offender's particulars are recorded so as to assist in the *prevention* of possible future offences by limiting the pertaining offender's access to the target victim-group.<sup>60</sup> It is noteworthy that prevention is only rationally justifiable where

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<sup>51</sup> This is apparent from the high rate of recidivism currently in South Africa, which the Department of Correctional Services estimated at 94% - according to a Correctional Services Portfolio Committee meeting held on 26 February 2008 (Parliamentary Monitoring Group (2008) "Use of Consultants and Outsourcing by Correctional Services: input by Minister & National Commissioner" <<http://www.pmg.org.za/report/20080226-use-consultants-and-outsourcing-services-department-correctional-serv>> [Accessed on 24 June 2010]).

<sup>52</sup> McAlinden 111.

<sup>53</sup> McAlinden 124.

<sup>54</sup> Burchell 69-80; Spohn 6.

<sup>55</sup> Spohn 6.

<sup>56</sup> Burchell 69.

<sup>57</sup> *Ibid.*

<sup>58</sup> Burchell 73; Spohn 6.

<sup>59</sup> The relevant manifestation in this regard is prevention/incapacitation.

<sup>60</sup> Burchell 73-74; Terblanche 162-163.

the offender is likely to commit further crimes *unless* restrained.<sup>61</sup> It is therefore submitted that the registration requirements set out in the NRSO go beyond the mere fulfilment of society's "retributive needs", in view of the fact that it also aims to perform a utilitarian role.

### **4.3 The promotion of rehabilitation and restorative justice by the NRSO**

Although it has been illustrated *supra* that the NRSO, as a form of punishment, fulfils the punishment aims of retribution and prevention, it behooves the dissertation's investigation into the fundamental principles that underlie the NRSO, to establish whether it promotes rehabilitation and the application of restorative justice as well.

#### **4.3.1 Rehabilitation**

A rehabilitative punishment aims to convert an offender into a law-abiding citizen by effectuating the self-realization of his wrong deeds, or by identifying the cause of the offender's criminal behaviour and treating him with the relevant therapeutic measures.<sup>62</sup> This is, quite succinctly, the premise of rehabilitation as an aim of punishment.

This punishment aim has been on the receiving end of some vehement criticism.<sup>63</sup> It is suggested that rehabilitation is rather an ideal, separated from reality, and can only be implemented in instances where the offender has an identifiable propensity towards certain criminal conduct which must be treated, or where the pertaining offender is a juvenile.<sup>64</sup>

If the NRSO brings about the treatment of the relevant sexual offenders, it will in fact promote rehabilitative aims. The pertaining offender might be spurred to mend his broken ways as a direct result of the constant reminder of his past transgressions the NRSO will provide. However, it is submitted that this seems highly unlikely and consequently that the NRSO bears minimal (if any) rehabilitative value.

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<sup>61</sup> Burchell 74. Given the high rate of recidivism (as illustrated *supra* n51), it is submitted that this punishment will remain justifiable in terms of utilitarian theories for as long as this rate remains so high.

<sup>62</sup> Burchell 78-80; Snyman (2008) *Criminal Law* 18-19; Terblanche 163-165.

<sup>63</sup> Snyman 18-19; Terblanche 164-165.

<sup>64</sup> *Ibid.*

### 4.3.2 Restorative Justice

Restorative justice is another ideal – having recently gained increasing judicial recognition<sup>65</sup>, is also mostly used with the application of diversion and by various NGO's throughout South Africa<sup>66</sup> – which sets out to shift the current retributive focus of South African criminal law to that of non-punitive resolutions where the concerned parties are – as the name indicates – restored to the position that they were before the offence was committed.<sup>67</sup> This principle can be equated to the delictual principle, whereby delictual claims endeavour to return the aggrieved party to the position he was before the act occurred.<sup>68</sup> Restorative justice is, however, not limited to application within the field of sentencing.<sup>69</sup>

It therefore follows that the NRSO does bring about a certain degree of restorative justice, insofar as it shifts the focus of the punishment of the offender from purely retributive. Nevertheless, it does not go so far as to establish a reconciled relationship between the offender and the victim, nor does it restore the victim in the position that he was before the occurrence of the reprehensible act.

## 5. A Juxtaposition of the NRSO and the National Child Protection Register

The Children's Act<sup>70</sup> also created a National Child Protection Register (the NCPR) which captures all the reported cases of child abuse or deliberate neglect, the particulars of convicted offenders for child abuse or deliberate neglect and records the information of persons found to be unsuitable to work with children.<sup>71</sup>

These registers *inter alia* differ in the following respects:

- The administrative aspects, insofar as the NRSO provides for an appointment of a Registrar for the Register, whereas the NCPR's functions and duties are the responsibility of the Director-General of Social Services.<sup>72</sup> Furthermore, the

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<sup>65</sup> See *S v Maluleke* 2008 1 SACR 49 (T) and *S v Tabethe* 2009 2 SACR 62 (T).

<sup>66</sup> Sherman & Strang "Crime and Reconciliation: Experimental Criminology and the Future of Restorative Justice" 2009 *Acta Criminologica* 5-6.

<sup>67</sup> Burchell 7; Terblanche 175; Tshela "The Restorative Justice Bug Bites the South African Criminal Justice System" 2004 *SACJ* 6.

<sup>68</sup> Tshela 2004 *SACJ* 6.

<sup>69</sup> Terblanche 175.

<sup>70</sup> 38 of 2005. This Act came into full operation on 1 April 2010.

<sup>71</sup> Secs. 114 and 120 of the Children's Act.

<sup>72</sup> Sec. 42(2) of the Act and sec. 111(1) of the Children's Act.

outcomes of the NRSO are reflected in certificates, whilst letters are issued in terms of the NCPR.<sup>73</sup>

- The emphasis in the NRSO is placed on sexual abuse, whereas the NCPR is focused on any and all types of abuse and deliberate neglect of a child/children.<sup>74</sup>
- The NRSO aims to protect both children and mentally disabled persons who are victims of sexual abuse, whereas the NCPR seeks to protect only children against abuse and deliberate neglect.<sup>75</sup>
- The NRSO also includes persons who have been convicted of sexual offences in foreign jurisdictions, while the NCPR does not expressly provide for the inclusion of cases of abuse or deliberate neglect outside the boundaries of South Africa.<sup>76</sup>
- There are differences in the method used and time that has to elapse in order to remove a particular individual's information from the relevant register.<sup>77</sup>

It is inescapable to question the legislators reasoning behind the simultaneous existence of two separate registers, each requiring a great deal of resources to sustain, but inherently fulfilling the same functions. One cannot help but wonder why the registers could not have simply been amalgamated into one, especially if it is borne in mind that an employer will consequently have to peruse both registers to determine whether an employee is suitable to work with children.

It is submitted that by extending the definition of sexual abuse in the NRSO to include abuse<sup>78</sup> and deliberate neglect<sup>79</sup> as defined in the Children's Act, and reconciling the aforementioned administrative differences between these registers, one comprehensive

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<sup>73</sup> Sec. 44 of the Act and sec. 127(3) of the Children's Act.

<sup>74</sup> Sec. 43 of the Act and secs. 113 and 118 of the Children's Act.

<sup>75</sup> *Ibid.*

<sup>76</sup> Sec. 50(1)(b) of the Act and sec. 120 of the Children's Act.

<sup>77</sup> Sec. 51 of the Act and sec. 128 of the Children's Act.

<sup>78</sup> Sec. 1 of the Children's Act provides the following definition:

'**Abuse**, in relation to a child, means any form of harm or ill-treatment deliberately inflicted on a child, and includes-

- (a) assaulting a child or inflicting any other form of deliberate injury to a child;
- (b) sexually abusing a child or allowing a child to be sexually abused;
- (c) bullying by another child;
- (d) a labour practice that exploits a child; or
- (e) exposing or subjecting a child to behaviour that may harm the child psychologically or emotionally.'

<sup>79</sup> Sec. 1 of the Children's Act provides the following definition:

'**Neglect**, in relation to a child, means a failure in the exercise of parental responsibilities to provide for the child's basic physical, intellectual, emotional or social needs.'

register can be implemented to save on costs and defer pragmatic difficulties. Such a register will need to be aptly renamed so as not to create confusion.<sup>80</sup>

## 6. Foreseeable Interpretation and Legal Problems Related to the NRSO

It is submitted that there are a few pragmatic problems which may arise when the NRSO is fully operational. A few of these potential problems are highlighted and discussed briefly *infra*.

### 6.1 Interpretation problems relating to the employer's duty to 'ensure' the safety of a child or mentally disabled person

It was stated above<sup>81</sup> that an offender whose details have been recorded in the NRSO, will only be allowed to work in an environment with children and mentally disabled individuals where their protection can be guaranteed by the employer. It is exactly this last qualification that can be potentially problematic.

The following questions immediately arise: What constitutes a guarantee of the safety of the relevant child or mentally disabled person? Will the pertaining authority need to provide ample evidence which unequivocally shows that such an individuals' safety is guaranteed, or will a mere statement to that effect appease this requirement? The answers to these questions are of grave importance to employers, as they stare a sentence of up to seven years' imprisonment in the face for failure to comply.<sup>82</sup>

When one applies the normal rules of interpretation of a statute (i.e. giving effect to the ordinary grammatical meaning of the words of the statute)<sup>83</sup>, the definition of 'ensure' needs to be scrutinized so as to ascertain what the legislator intended with this provision. The ordinary grammatical meaning is as follows:

(a) According to the Webster's Dictionary<sup>84</sup> it can be defined as:

"to make certain of getting or achieving"

(b) The Concise Oxford dictionary<sup>85</sup> defines it as:

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<sup>80</sup> For example: "The National Register for the Protection of Children and the Mentally Disabled".

<sup>81</sup> *Supra* 6.

<sup>82</sup> Sec. 45(3) of the Act.

<sup>83</sup> As the North Cape High Court recently did during an interpretation of sec. 50 of the Act in *S v RB; S v DK and Another supra* par [9].

<sup>84</sup> Trident Press International 315.

- " 1. make certain;
2. secure (a thing for a person etc.); or
3. make safe."

(c) Burton's Legal Thesaurus<sup>86</sup> provides the following definition:

"ascertain, assure, certify, check, clinch, confirm, corroborate, dismiss doubt, endorse, give security, give surety, guarantee, indemnify against loss, insure, keep from harm, keep safe, make certain, make sure, offer collateral, promise, protect, safeguard, secure, underwrite, verify, warrant"

It is obvious from these definitions that an employer must cast no doubt as to whether the relevant child or mentally disabled person is safe from the offender. This places a heavy burden on an employer, but the employer is fully capable and entitled to terminate the services of the employee in terms of section 45(2)(a)(i) of the Act and therefore accepts this risk by not using this legislatively-endorsed grounds for termination.

### ***6.2 The impact of the NRSO with regards to the legislatively-imposed duty to terminate a contract of employment where the employee's information is recorded in the NRSO***

Upon discovering that an employee's particulars are captured in the NRSO, an employer has a duty<sup>87</sup> to terminate the contract of employment with the pertaining employee. This is however only the case where the employer cannot ensure the safety of the child or mentally disabled person, whatever the case may be. The obvious question consequently arises whether such a termination of a contract of employment would be reasonable and just in light of the current principles of South African labour law.

It is considered trite law that an employer may only terminate the employee's contract where sufficient *causa dismissalis* exist.<sup>88</sup> Amongst these different *causae* are those which necessitate the termination of an employee's contract due to operational

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<sup>85</sup> Allen (1990) *The Concise Oxford Dictionary* 390.

<sup>86</sup> Burton (2006) *Burton's Legal Thesaurus* 216.

<sup>87</sup> *Supra* 6.

<sup>88</sup> Van Jaarsveld & Van Eck (2005) *Principles of Labour Law* par [500].

considerations not within the control of the relevant employer.<sup>89</sup> Even though the reason for the termination of the employee's contract does not fall within the power of the employer, it must still amount to substantial and procedurally fair termination.<sup>90</sup>

Substantive fairness holds that the dismissal of an employee must be based on *bona fide* and fair reasons.<sup>91</sup> Even where a dismissal of an employee has been proven to be substantially fair, it must still amount to procedural fairness.<sup>92</sup> Procedural fairness dictates that an employee must receive - within a reasonable time - a written notice wherein the details are set out for *inter alia* the reasons for dismissal and the alternatives that have been considered by the relevant employer.<sup>93</sup>

It is subsequently submitted that a dismissal in the event where an employee's information has been recorded in the NRSO and the safety of the children or mentally disabled individuals in his work environment could not be guaranteed, would effectuate a substantial and procedurally fair termination of his contract of employment.<sup>94</sup> The employer in such a situation has a *bona fide* reason for protecting children, and would have exhausted all other alternatives<sup>95</sup> before dismissing the relevant employee.

### **6.3 Recent case law relating to the NRSO**

#### **6.3.1 *S v RB; S v DK and Another***<sup>96</sup>

Even though the NRSO has only recently come into operation at the time of writing, there has already been one reported case pertaining thereto. This case highlights the fact that there are some foreseeable pragmatic consequences that will need to be ironed out judicially. In the matter before the court, the questions before Majiedt J and Olivier J were twofold<sup>97</sup>, to wit:

- (a) Should the names of juvenile offenders also be recorded in the NRSO?; and

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<sup>89</sup> *Ibid.*

<sup>90</sup> As envisaged in secs. 188(1)(a)(ii) and 188(1)(b) of the Labour Relations Act 66 of 1995. See also Van Jaarsveld & Van Eck par [504].

<sup>91</sup> See in general Van Jaarsveld & Van Eck paras [506]-[514].

<sup>92</sup> Van Jaarsveld & Van Eck par [515].

<sup>93</sup> Sec. 189(3) of the Labour Relations Act. See also Van Jaarsveld & Van Eck par [516].

<sup>94</sup> This will obviously only be the case where the employer complies with the procedures set out in the Labour Relations Act and other relevant legislation.

<sup>95</sup> As prescribed in sec. 45(2)(d) of the Act.

<sup>96</sup> *Supra.*

<sup>97</sup> *S v RB; S v DK and Another supra* par [2].

(b) Must the information of an offender whose punishment has been postponed<sup>98</sup>, also be entered in the NRSO?

With regards to the first question, the judges found that the legislator did not expressly exclude minors from the scope of application of the NRSO, nor does it infringe upon a minor's right<sup>99</sup> not to have his information published.<sup>100</sup> The court also found - rather succinctly - that the relevant child's right in terms of section 28(2) of the Constitution (guaranteeing that his best interests are of paramount importance), is justifiably limitable in terms of section 36(1) of the Constitution, in view of the importance, objects and purpose of the NRSO.<sup>101</sup>

The judges found - relative to the second question - that a wider interpretation of section 50(2)(a)(i) of the Act, would obviate certain conflicts that were raised by counsel.<sup>102</sup> Effectively, this would mean that the information of a sexual offender who has been found guilty, but whose sentence has been postponed, should still be entered into the NRSO.

### 6.3.2 *Child Welfare South Africa v Registrar of the National Register for Sex Offenders and Another*<sup>103</sup>

This unreported case was decided on 3 December 2009 in the North Gauteng High Court. There was uncertainty whether the information of convicted sexual offenders should be captured, even though the NRSO was not operational. The court granted an order - which was published by the Minister of Justice and Constitutional Development<sup>104</sup> - stating that any relevant authority need not comply with section 48(1) of the Act, until the NRSO is fully operational.

## 7. Conclusion

In this chapter, the operational parameters of the NRSO have been perused along with the classification and justification of the NRSO. It has come to the fore that the NRSO is

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<sup>98</sup> In terms of sec. 297(1)(a) of the Criminal Procedure Act 51 of 1977.

<sup>99</sup> As envisaged in sec. 154(3) of the Criminal Procedure Act.

<sup>100</sup> *S v RB; S v DK and Another supra* paras [9] - [36].

<sup>101</sup> *S v RB; S v DK and Another supra* par [30].

<sup>102</sup> *S v RB; S v DK and Another supra* paras [37] - [43].

<sup>103</sup> Case No. 68184/09 (ZANGHC).

<sup>104</sup> South Africa (2009) Notice from the Department of Justice and Constitutional Development *Government Gazette* (General Notice No. 1670), 29 December (Government Gazette No. 32850).



an extension of the punishment imposed by the relevant court on the offender and serves the aim of preventing the offender from committing a similar offence. Furthermore, it also acquiesces the public's need for retributive justice, insofar as it gives the offender his 'just deserts'.

With regards to the simultaneous existence of two registers fulfilling the same inherent function (*vis-à-vis* the protection of a defenceless class of individuals), it is nigh impossible to understand the reasoning on the side of the legislator. It only serves to aggravate the already-heavy burden on taxpayers and it is therefore suggested that it would have been wiser to have compounded the provisions of both registers into one all-encompassing register.

## CHAPTER 3

### Constitutional Issues Relating to the National Register for Sex Offenders

#### 1. Introduction

The current dispensation of constitutional sovereignty in South Africa, dictates that any law or conduct must be consistent with the Constitution and all the obligations imposed thereby, together with the rights encapsulated in the Bill of Rights.<sup>105</sup> It is therefore incumbent upon any interpreter and enforcer of legislation to have regard as to whether or not all the provisions in the relevant legislation infringes constitutionally-enshrined rights.

In view of this, this chapter endeavours to juxtapose the rights of the offender, child and mentally disabled persons to ascertain whether or not any infringement or curtailment of the relevant offenders' rights are justifiable. This will be accomplished by identifying and discussing the relevant constitutional rights which stand to be protected or infringed by the NRSO.

#### 2. Constitutional Rights of the Offender Potentially infringed by the NRSO

The following rights reflect the fundamental constitutional rights which might be infringed and/or curtailed by the NRSO, but in no way represents a *numerus clausus*.

##### **2.1 The offender's right to human dignity**<sup>106</sup>

Ensuing from the prolonged arbitrary denial of common human dignity during apartheid, the Constitution and subsequent case law has repeatedly espoused the right to dignity as being the foundational undercurrent of the Bill of Rights, and even the Constitution as a whole.<sup>107</sup> Consequently, the right to human dignity is afforded dual functions, i.e. the function as a guaranteed right and the function as a

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<sup>105</sup> Secs. 2, 8(1) and 39(2) of the Constitution of the Republic of South Africa 1996 (hereinafter referred to as "the Constitution").

<sup>106</sup> Sec. 10 of the Constitution, which states that: "Everyone has inherent dignity and the right to have their dignity respected and protected".

<sup>107</sup> Haysom *Dignity* in Cheadle *et al* (2005) *South African Constitutional Law: The Bill of Rights* 5-6 and the cases cited therewith.

foundational value underscoring all other constitutional rights.<sup>108</sup> Therefore, any interpretation of the right to human dignity in a given context, must be two-fold and in view of this, the right to human dignity will first be perused as a guaranteed right, whereafter its role as a foundational value will be briefly discussed.

### 2.1.1 *The right to human dignity as a guaranteed right*

Even though this right forms one of the cornerstones of the Constitution, no clear definition presently exists as it is still "a concept seldom defined and often invoked".<sup>109</sup> Nicholas Haysom<sup>110</sup> posits - with reference to Shackter - that the following represents a definition which serves as a general guide when attempting to give meaning to human dignity:

"[T]he respect for human dignity amounts to...the Kantian injunction to treat every human being as an end, not a means. Respect for the intrinsic worth of every human being should mean that individuals are not to be treated merely as instruments of (*sic*) objects of the will of others."

The author further states that there are three discernable elements of the right to dignity. *Firstly*, this right implies that an individuals' autonomy must be respected.<sup>111</sup> *Secondly*, it entails that an individual must be afforded protection from conditions or treatment which would subvert his sense of worth in society.<sup>112</sup> *Thirdly*, the right to human dignity holds that all humans should be recognized as having equal worth and value.<sup>113</sup>

With regards to the human dignity of an offender in context of the NRSO, it is submitted that the capturing of such an offender's particulars would not amount to a gross infringement of this right. He would still be autonomous insofar as he would not be subjected to an arbitrary imposition of this punishment, as it is one of the direct results of his own actions, thereby negating arbitrariness. His sense of worth in the given society would not suffer, as the NRSO is only accessible by proper authorities

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<sup>108</sup> Goolam "Human Dignity - Our Supreme Constitutional Value" 2001 *Potchefstroom Electronic Law Journal* 1-2; Haysom in Cheadle 5-7.

<sup>109</sup> Haysom *Dignity* in Cheadle *et al* 5-4.

<sup>110</sup> Haysom *Dignity* in Cheadle *et al* 5-5.

<sup>111</sup> Haysom *Dignity* in Cheadle *et al* 5-7.

<sup>112</sup> *Ibid.*

<sup>113</sup> *Ibid.*

and his worth and value in society will not depreciate, as he is still recognized as being equal to other humans.

### *2.1.2 The right to human dignity as a foundational value underpinning the Constitution*

It must always be borne in mind that the role of human dignity is to furnish the Constitution with a moral purpose, always mindful of the atrocities of the past and ever-vigilant not to repeat them.<sup>114</sup> It is for this very reason, as alluded to above, that dignity forms a crucial part of the foundation from whence the other constitutional rights are to be interpreted.

Keeping this in mind, all the subsequent discussions of the rights of an offender and those of a relevant child or mentally disabled person will be done with the understanding of this significant, fundamental and pre-eminent constitutional right. However, the significance of this right should not be over-emphasized as it is still limitable<sup>115</sup> in applicable circumstances.<sup>116</sup>

## **2.2 The offender's right to freedom and security of the person**<sup>117</sup>

As this right hinges on whether the offender's freedom has been arbitrarily limited or infringed with a just cause, it is fundamental to understand what is meant by the concepts of 'freedom' and 'just cause'.

### *2.2.1 The concept of 'freedom'*

When one refers to freedom in context of the criminal justice system, the salient aspect under investigation is the *deprivation* of freedom. This is not only restricted to imprisonment resulting from criminal proceedings, but extends to circumstances where any deprivation of liberty exists.<sup>118</sup> Therefore, a deprivation of the offender's

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<sup>114</sup> Haysom *Dignity in Cheadle et al* 5-4.

<sup>115</sup> In terms of sec. 36(1) of the Constitution. See *infra* 29.

<sup>116</sup> Haysom *Dignity in Cheadle et al* 5-15.

<sup>117</sup> The relevant part of sec. 12(1)(a) of the Constitution reads that: "Everyone has the right to freedom and security of the person, which includes the right not to be deprived of freedom arbitrarily or without just cause".

<sup>118</sup> Davis *Freedom and Security of the Person in Cheadle et al* (2005) *South African Constitutional Law: The Bill of Rights* 7-4.

freedom to choose any occupation falls within the ambit of this section as it constitutes a limitation of an enumerated freedom<sup>119</sup>.

### 2.2.2 *The concept of 'just cause'*

Any encroachment on the freedom of an individual may only be justifiable where it is not done arbitrarily or where it is done with just cause. This acts as a substantive source of protection for the rights afforded by section 12 of the Constitution.<sup>120</sup> To bring about a non-arbitrary deprivation of freedom, there should be a rational connection between the measure used and the purpose behind it.<sup>121</sup>

The purpose of the NRSO - as alluded to *supra* at 2.2 - is to protect children and mentally disabled persons against offender's who have shown a proclivity of committing sexual offences. The measures taken - to limit the access these offender's might have to children and mentally disabled persons - are indeed rationally connected to the aforementioned purposes, as it logically follows that steps should be taken to put defenceless, potential victims beyond the grasp of such an offender.

Although it might *prima facie* seem as though an offender's right to freedom and security of the person is infringed by the NRSO, it has been shown *supra* that this is not the case, since the relevant offender is deprived of his freedom(s) non-arbitrarily and with just cause.

### 2.3 *The offender's right to privacy*<sup>122</sup>

It is submitted that the assertion made by O'Regan J in *NM and Others v Smith and Others (Freedom of Expression Institute as Amicus Curiae)*<sup>123</sup>, although somewhat lengthy, eloquently and comprehensively describes the importance, inter-dependence and function of privacy as follows:

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<sup>119</sup> Specifically sec. 22 of the Constitution, discussed *infra* 26.

<sup>120</sup> Davis *Freedom and Security of the Person* in Cheadle *et al* 7-5.

<sup>121</sup> Davis *Freedom and Security of the Person* in Cheadle *et al* 7-6.

<sup>122</sup> Sec. 14 of the Constitution reads as follows: "Everyone has the right to privacy". It is beyond the scope of this work to peruse this right in full, but a broad discussion of it can be found in Davis & Steenkamp *Privacy* in Cheadle *et al* (2005) *South African Constitutional Law: The Bill of Rights* 9-1 to 9-7.

<sup>123</sup> 2007 5 SA 250 (CC) paras [130]-[131].

"[130] Underlying our Constitution is a recognition that, although as human beings we live in a community and are in a real sense both constituted by and constitutive of that community, we are nevertheless entitled to a personal sphere from which we may and do exclude that community. In that personal sphere, we establish and foster intimate human relationships and live our daily lives. This sphere in which to pursue our own ends and interests in our own ways, although often mundane, is intensely important to what makes human life meaningful.

[131] The right to privacy recognises the importance of protecting the sphere of our personal daily lives from the public. In so doing, it highlights the inter-relationship between privacy, liberty and dignity as the key constitutional rights which construct our understanding of what it means to be a human being. All these rights are therefore inter-dependent and mutually reinforcing. We value privacy for this reason at least – that the constitutional conception of being a human being asserts and seeks to foster the possibility of human beings choosing how to live their lives within the overall framework of a broader community. The protection of this autonomy, which flows from our recognition of individual human worth, presupposes personal space within which to live this life."

Denying an offender a personal sphere from whence to live autonomously would therefore infringe upon his constitutional right to privacy. It is submitted that this is not the case with the NRSO as section 52 of the Act provides for the confidentiality of an offender's information which, if disclosed in any way other than that envisaged by Chapter 6 of the Act<sup>124</sup> or in a court of law<sup>125</sup>, is punishable by imprisonment or a fine. Preventative measures have therefore been taken by the legislator to ensure that the confidentiality of the offender's information is maintained, and his private sphere is thereby respected and left unscathed.

#### **2.4 The offender's right to freedom of movement**<sup>126</sup>

The origins of this right can be traced as far back as 15 June 1215 when the *Magna Carta* was issued by King John of England.<sup>127</sup> It is recognized as one of the core and

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<sup>124</sup> Sec. 52(1)(a) of the Act.

<sup>125</sup> Sec. 52(1)(b) of the Act.

<sup>126</sup> Sec. 21(1) of the Constitution states that: "Everyone has the right to freedom of movement".

indispensable aspects of a citizen's liberty to be able to move around unimpeded in the Republic.<sup>128</sup> Any interference with this right will only be allowed if such a limitation is justified in accordance with section 36 of the Constitution.<sup>129</sup>

It is however submitted that our law would be remiss if it allowed convicted individuals with a statistical and known propensity for recidivism, to have an unfettered freedom of movement.<sup>130</sup> The NRSO will effectively only temper an offender's movement with regards to his place of work, effectuating merely a minor infringement of his right to freedom of movement.

## **2.5 The offender's right to choose and practice a trade, occupation or profession**<sup>131</sup>

At the heart of this constitutional right lies two inextricably entwined factors, to wit: a *choice* by any citizen of the Republic of South Africa to *practice* any trade, occupation or profession.<sup>132</sup> It follows logically that such a choice will only find real expression when and where it is indeed practiced by the relevant citizen.<sup>133</sup> Accordingly, although section 22 of the Constitution only refers to the *practice* that is "regulated by law", where a regulation curtails the relevant individual's *choice* of trade, occupation or profession it would not suffice to merely prove that there exists a rational basis for this regulation.<sup>134</sup> In this regard, Ngcobo J held that:

"It is clear from the text of the provision that choice and practice are not to be regulated to the same extent. Where the regulation, viewed objectively, would have a negative impact on choice, the regulation must be tested under section 36(1). In other cases, the test is one of rationality."<sup>135</sup>

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<sup>127</sup> Maduna *Residence and Movement* in Cheadle *et al* (2005) *South African Constitutional Law: The Bill of Rights* 16-1.

<sup>128</sup> *Ibid.*

<sup>129</sup> Maduna *Residence and Movement* in Cheadle *et al* 16-9. See *infra* 29 for a discussion of sec. 36 of the Constitution.

<sup>130</sup> Maduna *Residence and Movement* in Cheadle *et al* 16-16.

<sup>131</sup> Sec. 22 of the Constitution states that: "Every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law".

<sup>132</sup> Lagrange *Economic Activity Rights* in Cheadle *et al* (2005) *South African Constitutional Law: The Bill of Rights* 17-2 n3.

<sup>133</sup> *Ibid.*

<sup>134</sup> Lagrange *Economic Activity Rights* in Cheadle *et al* 17-4.

<sup>135</sup> *Affordable Medicines Trust and Others v Minister of Health of the Republic of South Africa and Another* 2006 3 SA 247 (CC) par [92]. See also Lagrange *Economic Activity Rights* in Cheadle *et al* 17-5.

The NRSO limits the *choice* of employment for the offender by prohibiting him from taking up employment at an establishment where he might come in contact with children or mentally disabled persons, whatever the case may be. It will therefore have to be shown that such a limitation on the choice of the offender is justified in terms of section 36(1).<sup>136</sup>

### 3. Constitutional Rights Protected by the NRSO

It has been repeatedly noted that the NRSO endeavours to positively contribute to the safety of some of the weaker members of society. This effectively constitutes a manifestation of the constitutional imperative to enact legislation which promotes the values encapsulated by the Bill of Rights.<sup>137</sup> Some of these protected constitutional rights will be briefly discussed *infra*.

#### 3.1 *Everyone's right to be free and secure from all forms of violence*<sup>138</sup>

The wording of section 12(1)(c) of the Constitution lends itself to horizontal application, as every individual is guaranteed the right to be free from all forms of violence, including violence originating from a private source.<sup>139</sup> It is submitted - due to the specific wording used by the legislator to include "all forms of violence" - that sexual violence also falls within the ambit of this constitutional right.<sup>140</sup> Furthermore, it is submitted that it is laudable that the State is attempting - through the implementation of the NRSO - to fulfil its constitutional and court-imposed<sup>141</sup> duty to protect individuals from all forms of violence.

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<sup>136</sup> See *infra* 29 for a discussion of sec. 36 of the Constitution.

<sup>137</sup> Secs. 2 and 7(2) of the Constitution. It also gives expression to the international instruments related to the protection of children, ratified by South Africa, as discussed in Sloth-Nielsen *Children in Cheadle et al* (2005) *South African Constitutional Law: The Bill of Rights* 23-2 to 23-4.

<sup>138</sup> Sec. 12(1)(c) of the Constitution reads as follows: "Everyone has the right to freedom and security of the person, which includes the right to be free from all forms of violence from either public or private sources".

<sup>139</sup> Davis *Freedom and Security of the Person* in Cheadle *et al* 7-16.

<sup>140</sup> See also *Omar v Government of the Republic of South Africa and Others (Commission for Gender Equality, Amicus Curiae)* 2006 2 SA 289 (CC) par [17] where Van der Westhuizen J states that this constitutional right must be read in conjunction with *inter alia* the rights to dignity, life and privacy, thus extending the ambit of this right by acknowledging that any violence which affects these rights also constitute an infringement of sec. 12(1)(c). This section has unfortunately not enjoyed much further interpretation by the courts and still requires a full analysis, as stated in Davis *Freedom and Security of the Person* in Cheadle *et al* 7-16.

<sup>141</sup> *Van Eeden v Minister of Safety and Security (Women's Legal Centre Trust, as Amicus Curiae)* 2003 1 SA 389 (SCA) par [16]; Davis *Freedom and Security of the Person* in Cheadle *et al* 7-16 n84.



### 3.2 *Everyone's right to bodily integrity*<sup>142</sup>

This right every individual enjoys to security and control over their own body protects every person's right to make decisions related to their bodies, without extrinsic sources dictating and directing such decisions. This right is essential to the principle of autonomy, which in turn emphasizes one of the cornerstones of the Constitution, i.e. human dignity.<sup>143</sup> The following words by Kriegler J<sup>144</sup> best describes the importance of this right:

"[T]he right to life, to human dignity and to bodily integrity are individually essential and collectively foundational to the value system prescribed by the Constitution. Compromise them and the society to which we aspire becomes illusory."

By establishing the NRSO, the legislator has made a giant stride in attempting to secure children and mentally disabled persons' right to the security of their bodily integrity, thereby emphasizing the importance of this right as well as sending out the message that the legislator views any infringement thereof in a serious light.

### 3.3 *The paramountcy of the child's best interests*<sup>145</sup>

It has been reiterated that in any matter where a child's welfare is concerned, the best interests of the child should serve as the overriding factor guiding any decision related thereto.<sup>146</sup> However, this right does not only represent an instrument for the interpretation of the enumerated rights in section 28(1), but is an independent right which also appears alongside other rights and reinforces them.<sup>147</sup>

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<sup>142</sup> Sec. 12(2)(b) of the Constitution states: "Everyone has the right to bodily and psychological integrity, which includes the right to security in and control over their body".

<sup>143</sup> The brief discussion of this right will only be limited to the negative obligation created by this constitutionally-enshrined right, as it falls beyond the scope of this work to discuss the intrinsic autonomous rights all individuals possess.

<sup>144</sup> In *Ex parte Minister of Safety and Security: In re S v Walters and Another* 2002 4 SA 613 (CC) par [28].

<sup>145</sup> Sec. 28(2) of the Constitution reads as follows: "A child's best interests are of paramount importance in every matter concerning the child".

<sup>146</sup> Sec. 9 of the Children's Act; *Prinsloo and Another v Bramley Children's Home and Others* 2005 5 SA 119 (T) 127I - 128B; *AD and Another v DW and Others (Centre for Child Law as Amicus Curiae; Department for Social Development as Intervening Party)* 2008 3 SA 183 (CC) par [49]; *S v M (Centre for Child Law as Amicus Curiae)* 2008 3 SA 232 (CC) par [15]; *Director of Public Prosecutions, Transvaal v Minister for Justice and Constitutional Development* 2009 2 SACR 130 (CC) par [74]; *Skelton Constitutional Protection of Children's Rights* in Boezaart (ed) (2009) *Child Law in South Africa* 281 and the sources referred to in n96-108; *Sloth-Nielsen Children* in *Cheadle et al* 23-30 to 23-33.

<sup>147</sup> *Minister of Welfare and Population Development v Fitzpatrick and Others* 2000 3 SA 422 (CC) par [17]; *Skelton Constitutional Protection of Children's Rights* in Boezaart 280.

It is this inherent flexibility of section 28(2) which affords it with the strength to determine the best interests of a child in any circumstances, still mindful of the fact that this right - like all other constitutional rights - is not absolute.<sup>148</sup> With regards to the NRSO, it is submitted that the best interests of the child acts as a justifiable limitation on any of the potentially infringed constitutional rights of the offender.

#### **4. The Limitation Clause<sup>149</sup>**

The limitation clause acts as a mechanism which aims to balance societal interests and constitutionally entrenched rights by giving the majority its political will, but only within a framework demanding the exercise of this will subject to rational justification.<sup>150</sup> Furthermore, the limitation clause *inter alia* functions as an acknowledgment of the fact that constitutional rights are not absolute.<sup>151</sup> In what follows, the application of the limitation clause - as per the two-stage enquiry<sup>152</sup> - will be discussed briefly.

##### **4.1 The first stage of the enquiry**

Before determining whether or not a given constitutional right has been justifiably limited, it must first be established whether or not the specific right has been infringed. This represents the first stage of enquiry, and consists of a determination of the boundaries of the right as well as whether or not the relevant action or law, transgressed said boundary.<sup>153</sup>

The Constitutional Court has endorsed the approach that the interest underpinning the pertaining constitutional right should be defined, effectively narrowing the interpretation of the right, whilst taking into account the text, its context and the

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<sup>148</sup> *S v M (Centre for Child Law as Amicus Curiae) supra* par [26]; Skelton in Boezaart 282-284.

<sup>149</sup> Sec. 36(1) of the Constitution reads as follows: "The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-

- (a) the nature of the right;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relation between the limitation and its purpose; and
- (e) less restrictive means to achieve the purpose."

<sup>150</sup> Cheadle *Limitation of Rights* in Cheadle *et al* (2005) *South African Constitutional Law: The Bill of Rights* 30-2.

<sup>151</sup> Cheadle *Limitation of Rights* in Cheadle *et al* 30-3.

<sup>152</sup> *S v Zuma and Others* 1995 2 SA 642 (CC) par [21]; Cheadle *Limitation of Rights* in Cheadle *et al* 30-3.

<sup>153</sup> Cheadle *Limitation of Rights* in Cheadle *et al* 30-3.

foundational values.<sup>154</sup> For example, when one looks at the offender's right to freedom of movement<sup>155</sup>, the foundational value of this right is a protection of his human dignity by ensuring that he is allowed to move freely and without any arbitrary limitations. This right enjoys constitutional protection due to the history of apartheid where specific categories of people could not move about freely due to arbitrary legislation. The foundational value and context of the right to freedom of movement therefore dictates that any law which restricts such freedom, constitutes an infringement of this right.

#### **4.2 The second stage of the enquiry**

The second stage of enquiry comes into play where the boundaries of a specific constitutional right have been established, and it has also been found that these boundaries have been crossed by the relevant law<sup>156</sup>. Consequently, it is established in the second stage whether or not this infringement occurred reasonably and justifiably in an open and democratic society based on the foundational values of the Constitution.

In order to make this determination, it must firstly be ascertained if the purpose of the relevant law is sufficiently serious to justify a limitation of the right.<sup>157</sup> Thereafter it should be determined whether any rational connection exists between the limitation and its purpose.<sup>158</sup> After the application of these enquiries, the importance of the aforementioned purpose must be weighed against the infringement.<sup>159</sup> This proportionality-enquiry will also take into account whether the same purpose could have been achieved by using less restrictive means.<sup>160</sup>

It is submitted that Chapter 6 of the Act does not constitute arbitrary legislation, and therefore constitutes a law of general application as envisaged by section 36(1) of the Constitution. In addition, it is also submitted that the purpose of the NRSO is

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<sup>154</sup> *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 1 SA 984 (CC) par [46]; *Cheadle Limitation of Rights* in *Cheadle et al* 30-5.

<sup>155</sup> Discussed *supra* 25-26.

<sup>156</sup> The fact that the law must be of general application - as prescribed in sec. 36(1) - does not mean that it should be equally applicable to all, but rather that such a law should not be arbitrary - *Cheadle Limitation of Rights* in *Cheadle et al* 30-9.

<sup>157</sup> *Cheadle Limitation of Rights* in *Cheadle et al* 30-12.

<sup>158</sup> *Ibid.*

<sup>159</sup> *Ibid.* The so-called "doctrine of proportionality".

<sup>160</sup> *Ibid.*

sufficiently serious to justify a limitation of most of the constitutional rights, as it endeavours to secure the safety of children and mentally disabled persons.

## **5. Conclusion**

In this chapter the possible infringement of various constitutionally entrenched rights of the offender were identified and discussed. It has consequently come to the fore that there are indeed certain potential infringements, but most - if not all - are limitable and justifiable in terms of section 36(1) of the Constitution.

Thereafter, the rights of children and mentally disabled persons that the NRSO aims to protect have also been identified and discussed. It has been shown that the legislator should be commended for acting on its constitutionally- and court-imposed duty to protect the constitutional rights of the weaker members of society.

## CHAPTER 4

### A Comparative Analysis: the United Kingdom's Safeguarding Vulnerable Groups Act

#### 1. Introduction

The promulgation of legislation which tracks the movement of sexual offenders after they have been released from prison, is not a new concept and has been implemented in a few foreign jurisdictions.<sup>161</sup> The common denominator of these legislations, is that an offender must register his details after having been found guilty of a sexual offence. The difference between these various registers lies in the divergent repercussions of such registration.

Some states in America<sup>162</sup> go so far as to publish the details of known sex offenders on the internet and even provide the public with *inter alia* the offender's name, address, physical description and photograph.<sup>163</sup> It is submitted that the American forms of sex offender registration is not easily justifiable in an open and democratic society based on constitutional values as is found in South Africa, insofar as it *inter alia* promotes the persecution of sex offenders by the public.<sup>164</sup> As a result, this chapter will not discuss the American sex offender registers and will only explore analogous legislation from the United Kingdom, to wit the Safeguarding Vulnerable Groups Act 2006 (the SVGA).

This legislation has only recently come into operation, limiting the scope of this comparison to a superficial investigation of the parameters within which the SVGA operates. This will be done by succinctly discussing the objectives and main provisions of the SVGA which will establish an understanding of how this Act operates. A few key features will also be highlighted, which - it is submitted - any other jurisdiction would do well to emulate.

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<sup>161</sup> McAlinden 98-100. See for example Megan's Law 42 USCA § 14072 in the United States of America, Canada's Sex Offender Information Registration Act 2004 and the Sexual Offences Act 2003 from the United Kingdom, as a few examples.

<sup>162</sup> To wit, California, Florida, Michigan, Minnesota and Indiana.

<sup>163</sup> McAlinden 102.

<sup>164</sup> Ahuja (2006) "Sex Offender Registries: Putting Lives At Risk?" <[http://abcnews.go.com/US/story?id=1855771 &page=1](http://abcnews.go.com/US/story?id=1855771&page=1)> [Accessed: 9 August 2010].

## 2. A Brief Historical Overview of the SVGA

Ensuuing from the Soham murders in 2002, where Jessica Chapman and Holly Wells were kidnapped and murdered by a school caretaker (Ian Huntley)<sup>165</sup>, the Bichard Inquiry questioned the manner in which people - who would come into contact with vulnerable groups - were vetted.<sup>166</sup> This came in response to the massive public outcry resultant from the fact that the authorities were aware of Ian Huntley's sexually deviant past, but it had not come up during the vetting procedure before being appointed as caretaker.<sup>167</sup>

The fact that the resultant legislation (the SVGA) acts as a governmental response to the emotional outcries of the public, lends credence to the viewpoint that sex offenders are treated differently due to the emotive nature of the crime, especially where the victims concerned are deemed vulnerable.<sup>168</sup> Recommendation 19 of the Bichard Inquiry espoused the need for a single agency to be established so as to vet any individual who desires to work or volunteer with children or vulnerable adults.<sup>169</sup> This agency will consequently be authorised to ban any unsuitable person from working or volunteering with the aforementioned vulnerable groups.<sup>170</sup>

In response to Recommendation 19, the SVGA was promulgated in 2006 and the Independent Safeguarding Authority (ISA)<sup>171</sup> was subsequently established in England, Wales and Northern Ireland as the agency entrusted with the vetting of these individuals and this vetting procedure is done in accordance with the Vetting and Barring Scheme (the Scheme).<sup>172</sup> Although the ISA envisages that over 11.3 million people will register with the Scheme within the next five years, the SVGA has

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<sup>165</sup> Clennell (2002) "Britain falls silent for Holly and Jessica" <<http://www.independent.co.uk/news/uk/crime/soham-murders-britain-falls-silent-for-holly-and-jessica-640925.html>> [Accessed: 18 September 2010].

<sup>166</sup> Bichard Inquiry Report (2004) 1.

<sup>167</sup> *Ibid.*

<sup>168</sup> McAlinden "Vetting sexual offenders: State over-extension, the punishment deficit and the failure to manage risk" 2010 *Social & Legal Studies (Soc. & L. Studies)* 26.

<sup>169</sup> Bichard Inquiry Report (2004) 15-16.

<sup>170</sup> *Ibid.*

<sup>171</sup> Originally referred to as the Independent Barring Board.

<sup>172</sup> Registration in terms of the Scheme has been halted as of 15 June 2010 by the Home Secretary, Theresa May. This is to allow government to 'remodel the scheme back to proportionate, common sense levels'. Provisions which have already taken effect will remain in place until the Scheme has been re-evaluated. See Lepper (2010) "Vetting and barring scheme put on hold" <<http://www.cypnow.co.uk/news/1010002/Vetting-barring-scheme-put-hold/>> (Accessed on 1 October 2010).

not yet come into full operation, as a phased approach is being utilized, which will lighten the administrative burden.<sup>173</sup>

### 3. The Parameters of the SVGA<sup>174</sup>

The SVGA endeavours to safeguard children and vulnerable adults from potential risk or harm by paid or unpaid employees who, by virtue of their occupational positions, often have unfettered access to these groups.<sup>175</sup> This is achieved by establishing the new Scheme, which replaces all other such arrangements<sup>176</sup> in place at the time of the commencement of the Scheme.<sup>177</sup> The Scheme seeks to bar unsuitable individuals at the earliest possible opportunity from any close contact work or ancillary work with the aforementioned vulnerable groups, by vetting applicants as well as current employees.

A person will be deemed unsuitable (and consequently be considered a 'barred person' for purposes of the Scheme) where he has engaged in relevant conduct.<sup>178</sup> It is interesting to note that relevant conduct - irrespective of whether it is against a child or a vulnerable adult - can range from incitement of another to harm the vulnerable person to any conduct of a sexual nature.<sup>179</sup> This casts the net quite wide as to which forms of conduct will qualify a person to be included in either of the lists, i.e. the Children's Barred List and the Adult's Barred List.<sup>180</sup>

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<sup>173</sup> Independent Safeguarding Authority (2009) "Common misconceptions about the scheme" <<http://www.isa.gov.org.uk/Default.aspx?page=409>> [Accessed on 18 September 2010].

<sup>174</sup> A succinct discussion of the parameters of the SVGA aims to facilitate an easier comparison between the SVGA and the NRSO, so as to determine which areas of the NRSO can and should be altered in order to *inter alia* appease one's sense of pragmatism. This discussion does however not purport to offer a complete analysis of the SVGA.

<sup>175</sup> McAlinden 2010 *Soc. & L. Studies* 31.

<sup>176</sup> Such as those under the Protection of Children Act 1999, Care Standards Act 2000, Criminal Justice and Court Services Act 2000 and Education Act 2002.

<sup>177</sup> McAlinden 2010 *Soc. & L. Studies* 31. The author opines that the Scheme "...resembles a form of state-licensing of those permitted to engage in certain routine activities with children or the vulnerable".

<sup>178</sup> Part 1 and 2 of Schedule 3 of the SVGA.

<sup>179</sup> Sec. 4 of Part 1 and sec. 10 of Part 2 of Schedule 3 of the SVGA.

<sup>180</sup> These lists have replaced List 99, the Protection of Children's Act List and the Protection of Vulnerable Adults List in England and Wales, as well as the Disqualification from Working with Children List, the Unsuitable Persons List and the Disqualification from Working with Vulnerable Adults List in Northern Ireland. From this, it appears as though the United Kingdom's legislator has realized the pragmatic importance of combining various lists into these two aligned lists. At 31 March 2010 a total of 15 349 people have already been migrated from these previous barred lists to the new lists (see Annual Report (2010) 10).

The function of deciding which individuals should be included in either or both of these lists and maintaining these lists, falls to the ISA, which acts as a separate, non-departmental governmental body.<sup>181</sup> The ISA imbues the SVGA with a sense of non-arbitrary objectivity, as it views each case on its own merits and takes into account the relevant surrounding circumstances of each individual by allowing such an individual the opportunity to present a case for their exclusion from the list.<sup>182</sup>

There are, however, certain circumstances which warrant the automatic inclusion of an individual into either or both of the aforementioned lists, without granting the individual an opportunity to make representation or to appeal. These include circumstances where the person has been convicted of or has received a caution related to specified offences, such as rape, murder, sodomy, etc.<sup>183</sup> It appears as though the individual's right to representation is waived due to the severity of the related offence and the fact that a judicial process has already run its course and consequently found him guilty or at the very least, cautioned such an individual.

The SVGA distinguishes between two varieties of activity: regulated and controlled activities.<sup>184</sup> The former relates to any activity which allows for opportunities of close contact with children or vulnerable adults, as well as holding key positions of responsibility<sup>185</sup> with regards to these vulnerable groups. The latter is concerned with ancillary work within the educational or health environment which gives an individual the opportunity to have any form of contact with children or vulnerable adults, or to have the opportunity to have access to the health or social services records of these vulnerable groups.<sup>186</sup>

Save for the differences in penalties related to the contravention of the banning from participation in these activities, the fundamental reason for these two categories of activity is that an employer is able to employ someone - who is barred from regulated activity - to carry out controlled activity. This is, however, only the case where certain safeguards are put in place so as to guarantee the safety of the vulnerable groups. The existence of controlled activity has, however, been questioned by Sir Roger

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<sup>181</sup> Secs. 1, 2(1)(a) and (b) of the SVGA.

<sup>182</sup> See secs. 2(3)(b) and 3(2) of Schedule 3 of the SVGA.

<sup>183</sup> Schedule to the Safeguarding Vulnerable Groups Act 2006 (Prescribed Criteria and Miscellaneous Provisions) Regulations 2009 No. 37.

<sup>184</sup> Schedule 4 and secs. 21-23 of the SVGA, respectively.

<sup>185</sup> E.g. Children's Commissioner.

<sup>186</sup> Secs. 21 and 22 of the SVGA.



Singleton.<sup>187</sup> He states that it unnecessarily complicates the SVGA and also that few employers display a willingness to employ persons barred from regulated activity in a position of controlled activity.<sup>188</sup> One is hard-pressed to fault the employers for this viewpoint.

The Scheme also provides for defences at the disposal of barred persons who engage in regulated conduct.<sup>189</sup> These range from *bona fide* ignorance of his status as a barred person, to proving that he engaged in regulated activity whilst under the reasonable impression that he would prevent harm to a child or vulnerable adult.<sup>190</sup> These provisions display a profound insight on the part of the legislator, as barred persons might be called upon to indeed *protect* vulnerable groups in certain circumstances, and will henceforth not be hindered by the fear of judicial repercussions for such deeds.

#### 4. Conclusion

This chapter has succinctly perused the general parameters of the SVGA and the Scheme. It has come to the fore that the Scheme represents the culmination of various attempts by the United Kingdom's legislator to curb access to vulnerable groups by individuals who have shown a propensity to either sexually or physically abuse individuals from these groups. It is submitted that although still controversial and currently on hold<sup>191</sup>, the Scheme and the SVGA as a whole comprises the fundamental principles necessary to effectively establish any register which aims to assist in keeping offenders away from vulnerable groups.

The salient principles which were identified in this chapter, are the following:

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<sup>187</sup> Drawing the Line (2009) 19-20. Sir Singleton - as the Chief Adviser on the Safety of Children - was commissioned by the Secretary of State to prepare a report which addresses some of the concerns that were raised with regards to the Scheme. The report was finalized and presented to the Secretary of State on 14 December 2009.

<sup>188</sup> Drawing the Line (2009) 20. Sir Singleton - in Recommendation 9 - recommends that the Government seriously re-evaluates the need for these differing forms of activity. It is also noteworthy that he recommended - in Recommendations 1 and 2 - that the Scheme should not interfere within the private sphere where parents have to employ the help of others. This implies that any person chosen by the parents to tend to their children is not compelled to undergo a vetting procedure.

<sup>189</sup> Secs. 7(3) and 7(4) of the SVGA.

<sup>190</sup> *Ibid.*

<sup>191</sup> See *supra* n172. Although the Scheme is currently on hold, it is interesting to note that on 31 March 2010 there were 19 111 people on the Adults Barred List and 21 419 people on the Children's Barred List (see Annual Report (2010) 28).

- (a) The Scheme is administered and run by an independent body who subjectively investigates each person's circumstances in order to establish whether he should be included on either or both of the lists;
- (b) Additionally, although there are two different lists, they are managed by the same independent body which does not exacerbate the financial strain on the government;
- (c) Although the Scheme utilizes two different lists, it is based on pragmatic considerations as it makes sense to separate individuals barred from contact with children from individuals barred from contact with vulnerable adults;
- (d) The Scheme also includes volunteer work and is not only limited to cases where barred individuals will come into contact with vulnerable groups whilst practicing their various occupations; and
- (e) Domestic workers, family or family friends who are barred persons in terms of the SVGA are not forced to undergo the vetting procedure.

It is consequently submitted that an assimilation of these fundamental principles into the NRSO would greatly transform the NRSO into a pragmatic and effective way of keeping offenders away from vulnerable groups.<sup>192</sup>

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<sup>192</sup> See *infra* 39-40.

## CHAPTER 5

### Conclusion and Recommendations

#### 1. Introduction

From the outset, this dissertation has sought to explore and analyse the NRSO as well as comment on any shortcomings which came to the fore through an analysis of an analogous register.

This was firstly achieved by identifying and scrutinising the scope of the NRSO. It was consequently found that the NRSO serves as an extension of the offender's punishment and can be justified as such insofar as it fulfils two fundamental functions of punishment. During this dissection of the NRSO, it also became apparent that there exists no logical reason for the legislator to have established two separate registers which could have easily been combined into one register.

A further significant enquiry was launched into the constitutionality of the provisions and effects of the NRSO. It was found that the NRSO admirably aims to not only protect various constitutional rights of the weaker members of society, but achieves this protection within the boundaries of proportional and minor infringements of the offender's constitutional rights. Where such infringements were found to have occurred, it has also been established that such infringements were justified in terms of the limitations clause of the Constitution.

The last part of the dissertation's examination of the NRSO comprised an examination of an analogous register currently in use in the United Kingdom, the Vetting and Barring Scheme. From the examination of this register the shortcomings of the NRSO became apparent, insofar as it *inter alia* illustrated the need for an independent authority to act as regulator and administrator of such a register.

#### 2. Recommendations

From the aforementioned analysis of the NRSO, a few aspects susceptible to legislative reform have been identified. In what follows, the aspects will be identified and appropriate recommendations be made.

## 2.1 Establishing an independent regulator

Instituting a register which automatically includes certain individuals based on peremptory, legislatively-enunciated requirements, can correctly be considered a perpetuation of the relevant offender's punishment. This in and of itself cannot necessarily be faulted. What is perhaps subject for consideration, is the fact that it is done without taking into consideration the circumstances of each individual offender.

This can, however, be negated by establishing an independent body vested with the power to scrutinize every offender's surrounding circumstances and make an appropriate decision on whether or not he should be included in the NRSO. It is furthermore submitted that the relevant offender should be afforded the opportunity to present a case before the independent body as to whether or not he should be included in the NRSO.

## 2.2 Replacing "mentally disabled" in the NRSO with "vulnerable adults"

One notable aspect of the Scheme, is the classification of children and vulnerable adults as opposed to the NRSO which only provides for the protection of children and mentally disabled individuals. It is submitted that excluding other vulnerable adults (e.g. elderly individuals) in the NRSO, is tantamount to an alienation of a class of our society in dire need of protection.<sup>193</sup>

It is therefore recommended that the insertion of a classification of "vulnerable adults" in the NRSO would afford protection to a wider class of adults in need of protection, thereby giving expression to the true intentions of the legislator, i.e. protecting *all* the weaker members of society by screening the individuals who will come into contact with them.

## 2.3 Amalgamation of the NRSO and NCPR

It has already been alluded to above that it is unnecessarily burdensome on the South African administrative infrastructure to establish and maintain two separate registers. It is consequently recommended that the NRSO and NCPR should be assimilated into one, consolidated register providing for the protection of children and

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<sup>193</sup> Pursuant to the preamble of the Older Persons Act 13 of 2006, there is a constitutional imperative to afford the elderly the protection of their constitutionally enshrined right to human dignity.

vulnerable adults from individuals who have shown a propensity to sexually or physically harm them.

The legislator would do well by following the example of the United Kingdom in this regard (i.e. the SVGA). They have already experimented with various registers related to all forms of abuse experienced by society's weaker members, only to realize that a minimalistic approach would suffice. This was done to *inter alia* eradicate confusion as to which register/list the pertaining offender should be added to. It is submitted that an appropriate title for the amalgamated list is the "National Register for the Protection of Vulnerable Groups".

## **2.4 Exclusionary provisions in the NRSO**

Pursuant to the example set by the Scheme, it is submitted and recommended that the legislator provides defences for offenders where circumstances warrant the exclusion of any prescribed penalty. This includes - but is not limited to - circumstances where an offender whose particulars are on the NRSO, does not *bona fide* know - or could reasonably have known - that he is prohibited from accepting employment where he would come into contact with children or vulnerable adults.

## **3. Concluding Remarks**

Although the tenure of this dissertation may be considered excessively critical of the NRSO, it must be emphasized that the NRSO represents a laudable attempt by the legislator to curtail offender's access to the weaker members of our society. The government should be applauded for valiantly aspiring to act on its constitutional imperative to safeguard the constitutional rights of all.

The dissertation only aims to facilitate the identification of shortcomings in the NRSO and recommend suitable alternatives whereby these shortcomings can be rectified. It is submitted that legislative reform pursuant to these recommendations would transform the NRSO into a pragmatic and effective register which represents (and thereby does not frustrate) the aims of the legislator in this regard.

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