



Sexual Offences Bill

“Affording protections to persons with mental disabilities”

Submission to the Justice and Constitutional Development Portfolio Committee, National Assembly, 31 May 2006

Summary

1. The Bill fails to provide similar protection to persons with mental disabilities as it provides to children who are victims of sexual offences in that the provisions contained in chapter 6, National Register for sex offenders, fails to provide similar protection to persons with mental disabilities. The chapter only refers to persons who have committed sexual offences against children.
2. The SAHRC is concerned that the legislature is creating a number of Registers to protect vulnerable groups (children, older persons & victims of sexual offences) and that this may lead to a duplication of resources and provide gaps in the protection of vulnerable groups.
3. The SAHRC is concerned generally that registers do not provide adequate protection to victims. There is a need for further debate on the issue of offender/abuser registers.

1. The National Register should also protect victims of sexual offences who are mentally disabled

Chapters 3 and 4 of the Sexual Offences Bill (the Bill) seek to provide specific protections for children and persons with mental disabilities by providing for the creation of a number of specific offences. There are a number of similarities between the two chapters and the offences that are created. This indicates that these two particularly vulnerable groups have been identified as needing very specific protections in order to protect them from becoming victims of sexual offences.

Extract from Sexual Offences Bill

CHAPTER 3 SEXUAL OFFENCES AGAINST CHILDREN

Part 1: Consensual sexual acts with certain children

14. Acts of consensual sexual penetration with certain children (consensual rape)
15. Acts of consensual sexual violation with certain children (consensual sexual assault)

Part 2: Sexual exploitation and sexual grooming of children, engaging in sexual acts in presence of children and exposure or display of or causing exposure or display of genital organs, anus or female breasts (“flashing”) or pornography or sexual acts to children

16. Sexual exploitation of child
17. Sexual grooming of child
18. Exposure or display of or causing exposure or display of sexual act to child
19. Engaging in act of sexual penetration in presence of child
20. Engaging in act of sexual violation in presence of child
21. Exposure or display of or causing of exposure or display of genital organs, anus or female breasts to child (“flashing”)
22. Exposure or display of or causing exposure or display of pornography to child

CHAPTER 4 SEXUAL OFFENCES AGAINST MENTALLY DISABLED PERSONS

Part 1: Sexual exploitation and sexual grooming of mentally disabled persons

23. Sexual exploitation of mentally disabled person
24. Sexual grooming of mentally disabled person

Part 2: Engaging in sexual acts in presence of mentally disabled persons and exposure or display of or causing exposure or display of genital organs, anus or female breasts (“flashing”) or pornography or sexual acts to mentally disabled persons

25. Exposure or display of or causing exposure or display of sexual act to mentally disabled person
26. Engaging in act of sexual penetration in presence of mentally disabled person
27. Engaging in act of sexual violation in presence of mentally disabled person
28. Exposure or display of or causing exposure or display of genital organs, anus or female breasts (“flashing”) to mentally disabled person

29. Exposure or display of or causing exposure or display of pornography to mentally disabled person

The definitions section of the Bill provides a detailed definition of persons who would be protected by the provisions of chapter 4.

"mentally disabled person" means a person affected by any mental disability, including any disorder or disability of the mind, to the extent that he or she, at the time of the alleged commission of the offence in question, was—

- (a) unable to appreciate the nature and reasonably foreseeable consequences of a sexual act;
- (b) able to appreciate the nature and reasonably foreseeable consequences of such an act, but unable to act in accordance with that appreciation;
- (c) unable to resist the commission of any such act; or
- (d) unable to communicate his or her unwillingness to participate in any such act;

Chapter 6 creates a National Register for Sex Offenders. It is noticeable that special protections are afforded to children in clause 43 of the Bill, which prohibits a convicted offender from certain types of employment relating to a child, or children, or access to a child or children. There is no similar provisions relating to persons who are convicted of sexual offences perpetrated against persons with mental disabilities.

The chapter goes on to provide for the creation of a register that will only record the names of persons who have committed sexual offences against children.

CHAPTER 6 NATIONAL REGISTER FOR SEX OFFENDERS

- 43. Prohibition on certain types of employment relating to a child or children, or access to a child or children, of or by certain persons who have been convicted of a sexual offence against a child
- 44. Establishment of National Register for Sex Offenders and designation of Registrar of Register
- 45. Objects of Register
- 46. Contents of Register
- 47. Persons whose names must be included in Register and related matters
- 48. Removal of particulars from Register
- 49. Persons entitled to apply for certificate in respect of particulars included in Register
- 50. Confidentiality and disclosure of information
- 51. Regulations pertaining to Register
- 52. Interpretation

The Introduction to the Bill states that the Bill creates comprehensive "...new sexual offences against children and mentally disabled persons, which are virtually the same as similar sexual offences being perpetrated against adults, but the creation of these new same but separate offences aims to address the

particular vulnerability of children and mentally disabled persons in respect of sexual abuse or exploitation.”

It therefore does not appear to be in keeping with the Bill that protections afforded to children are also not extended to persons with mental disabilities. During 2005, serious allegations of abuse, including sexual abuse were made in relation to Townhill psychiatric hospital. Whilst this is a psychiatric hospital which provides services to patients that are mentally ill, many are also considered, due to the severity of their illness, to be persons with mental disabilities. Persons with mental disabilities who live in institutions and hospitals are particularly vulnerable and should be afforded protections in order that they do not become victims of sexual abuse. Very often it is difficult for cases of sexual abuse to be detected and come to the attention of the authorities. Even where this occurs, it is difficult to prosecute these cases and many persons with mental disabilities are not good witnesses due to their disability. The abuse of the mentally disabled goes largely unreported and unnoticed.

Offenders move from sector to sector

Another reason why for why it is important to ensure that persons convicted of sexual crimes perpetrated against persons with mental disabilities are afforded protections is the fact that very often persons who are abusers move from sector to another when they are barred from working in one sector. Thus, a person who has been found guilty of a sexual offence against a child and is no longer able to work in the children’s sector may seek work in another sector such as with the mentally disabled or the elderly.

2. A duplication of resources and providing gaps for abusers

There have now been a number of Bills that have been processed in Parliament recently that make provision for a register of offenders in order to provide protections for vulnerable groups. These are the Children’s Bill and the Older Persons Bill. The SAHRC has commented previously on the issue of registers in draft legislation and these submissions are attached herewith.

The Children’s’ Bill [B70B – 2003] (chapter 7) provides for a National Child Protection Register. Part A of the Register has as its purpose to have a record of abuse or neglect inflicted on specific children and will record reports in terms of the Act, criminal convictions and findings of a children’s’ court. Part B of the register is to register persons who are unsuitable to work with children. Abuse is broadly defined so as to include sexual abuse. There is also a specific definition of sexual abuse. The Director-General of the Department of Social Development is responsible for maintaining the register.

The Older Persons Bill [B68D – 2003] makes provision in clause 31 of chapter 5 (Protection of Older Persons) for the Minister in the prescribed manner to keep a register of persons convicted of the abuse of an older person or any crime or

offence which involved the abuse of an older person (clause 31 read with clause 30(4)). Persons whose names appear on the register may not operate or be employed at any residential facility and may not provide any community-based care and support service to an older person (Clause 31(2)).

31. Keeping of register of abuse of older persons

(1) The Minister must in the prescribed manner keep a register of persons convicted of the abuse of an older person or nay crime or offence contemplated in section 30(4)

(2) A person whose name appears in the register contemplated in subsection (1) may not in any way—

- (a) operate or be employed at any residential facility;
- (b) provide any community-based care and support service to an older person.

Section 30(4) If a court, after having convicted a person of nay crime or offence, finds that the convicted person has abused an older person in the commission of such crime or offences, such finding must be regarded as an aggravating circumstance for sentencing purposes.

The Sexual Offences Bill thus creates a third register, which will be the responsibility of the Justice Minister to establish and maintain (clause 44). The question, which arises, is whether there is a need for so many different types of registers, whether there will be a duplication of resources and whether it will confuse the public. A prospective employer may well check one of the registers and not be aware that there are in fact 2 registers in respect of children that need to be checked.

3. Debating the effectiveness of registers

The SAHRC is concerned generally that registers do not provide adequate protection to victims. There is a need for further debate on the issue of offender/abuser registers.

It would appear that it may well be an appropriate time either now or immediately after the passing of this Bill to consider the entire issue of registers. There are a number of questions that need to be answered, some of these may include:

1. What is it that the State seeks to achieve through the maintaining of such registers?
2. Who are the vulnerable groups that would benefit from the protections that such registers can offer?
3. How best can registers be maintained in order that those persons whose names ought to appear on registers do in fact do so?
4. Which State departments are best placed to coordinate these registers?
5. Is it the Department of Social Development, the Department of Justice, SAP's or another government department?
6. How will information be transferred effectively between Departments?

7. Should the Department of Social Development rather keep one register for all reports of abuse against vulnerable groups whilst the SAPs or Justice maintain a register for criminal convictions? Should all persons who apply for work where they will be in contact with vulnerable persons be screened for previous convictions?
8. If the registers are maintained and there is no cross referencing how will the registers prevent abusers moving from one vulnerable sector to another?

Registers around the world

Offender registers raise a lot of debate. They have been proposed and implemented in some countries in respect of sex offenders, child abuse offenders and offenders who abuse persons with mental disabilities. In line with these developments, elder abuse registers are also being developed. There are many arguments for and against the keeping of these registers that are put forward.

Arguments against the keeping of a register

- ❑ Drives offenders underground.
- ❑ Encourages vigilantism.
- ❑ Provides a false sense of security, only convicted offenders appear on the register and not all perpetrators are identified and criminally convicted.
- ❑ The register is not always easily accessible to the public and those who need to have access to it.
- ❑ Only persons convicted of abuse of an older persons, presumably in terms of the Bill is placed on the list (this would be in line with the current wording of the Bill). Therefore if the person is convicted of a common law crime, e.g. assault, that person will not appear on the register.
- ❑ It is unclear how long a persons name will appear on the register and if there is a process to remove an offenders name.
- ❑ Offenders have been punished and paid their debt to society, this is an ongoing and additional punishment as it denied the offender potential work opportunities. This is a punishment that has not been imposed by a court of law.
- ❑ The register needs to be constantly maintained and the information constantly updated, e.g. change in addresses. This requires resources from the State.

Arguments for the keeping of a register

- ❑ Offenders pose a high risk of re-offending and therefore it is wise to keep a list of who they are and where they are.
- ❑ It is in governments' interest to protect the public from offenders.
- ❑ Privacy interests of the offender are of less importance than the safety and security of the community.
- ❑ Such information will assist in keeping the community safe.
- ❑ It acts as a deterrent to the offenders to commit further crimes

Submissions

1. Chapter 6 of the Sexual Offences Bill should be extended to include protection for persons with mental disabilities.
2. That there needs to be a review and rethink of the legislation that provides for registers in order that vulnerable groups receive adequate protection from known abusers.

Extract from SAHRC Older Persons Bill Submission August 2005

Section 17 – Keeping of register of abuse of older persons

The 1998 Amendment Act introduced the keeping of a register of persons convicted of abusing an older person. This was subject to Regulations being drafted (section 6B Aged Persons Amendment Act 100/98) in order to implement this section. Role-players were not sure whether these Regulations had been drafted. If they had, they had not been communicated to role-players on the ground.

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Comments from the Provincial workshops

During the workshops, there was general support for the keeping of a register. It was viewed as an important reference check when employing a person to work with the aged. However, participants were concerned that the register would be confined to only those persons convicted in terms of the offence of abuse created in the Bill. It was felt

that this may exclude some perpetrators who were convicted of abusing an older person because the prosecution chose to use a common law or alternative statutory provision to convict the person.

In Limpopo, the issue of formally registering people who work with the elderly was raised. It was argued that caregivers should be formally registered. Part of the registration would be to establish whether a person was a fit and proper person and whether they had a criminal record. If so, the nature of the offence should be considered and in appropriate instances the person should be excluded from being a caregiver. It was suggested that all persons who are employed to work with the aged should be subjected to a check in order to ensure that they do not have a criminal record that reflects acts of abuse committed against the elderly.

Participants had a number of very practical concerns about the Register

How accessible the register would be, who would keep it and where would it be kept? – were some questions that were raised. **Accessibility** was linked to how **effective** the register would be in serving its purpose of ensuring that persons who are convicted of an offence of older abuse would not be placed in a position where they could abuse the elderly again. Questions were asked such as: Should there be controlled access? Or should there be partial access?

1. There were many concerns about the possible false sense of security that a register could give. It was recognized that many older person are in vulnerable disempowered positions and that when they become victims of older abuse they may report the incidents. It was also mentioned that older person are vulnerable and should receive special protection in court, such as the holding of in camera hearing, in order to ensure that they testify without hindrance or fear.
2. It was also argued that a positive obligation should be placed on a person who has a criminal record of older abuse to disclose this when seeking employment – this could be included by making it an offence not to disclose that you have been convicted of a crime against older persons when you apply for employment with older persons.
3. The register must be a national register as people move from province to province.
4. There were calls that it should be made available electronically.

The role of the Department of Justice

Participants called on the Department of Justice needs to assist and carry out its tasks and functions if this clause of the Bill is going to be successful. Older persons find it difficult to go to court

- a) The Department needs to pursue cases of abuse more actively and ensure successful prosecution. Many older persons do not pursue charges because they are pressurized to withdraw the charges by family members and friends.
- b) Many older persons are terrified about the possibility of having to testify in court. There should be provisions whereby cases of abuse can be held in camera.

The lack of a community approach results in the community not being protected by the Bill

Section 17(2) refers to facility – this demonstrates the focus of the Bill on facilities and the insufficient orientation of the Bill on community and rural services.

Registers are a complex human rights issue

Participants appreciated the complexity of a register in terms of the different human rights involved. A register potentially violates the employment rights of the offender, is this a justifiable punishment? How do we circumvent privacy rights of the perpetrator? It was agreed that the infringement of a perpetrators rights if their names are placed on a register may well be justified in terms of the limitations clause in the constitution, given the extensiveness of abuse and the need to protect our older person.

Submissions

- b) Section 17(2) is **too narrow**, the word facility should be replaced with residential facilities and any community based care and support service. Persons convicted of abuse should not be allowed to work in community based and especially home-based care services. Residential facilities provide care to 1% of our elderly; therefore the register will only protect these 1% of older persons – in terms of the current legislation. The community needs protection from abusers.
- b) It is proposed that the register must include the names of offenders who are convicted of offences in which the victim is an older person. In this manner, it will ensure that more offenders' names will be placed on the register. It is possible that offenders will not be prosecuted in terms of the Older Persons Bill but rather in terms of other common law or statutory criminal offences. The Older Persons Bill carries a maximum penalty for a conviction of 5 years and a fine and it is therefore, more serious offences such as murder, rape, assault would be prosecuted in terms of the common and statutory law.
- c) More clarity is needed in the Bill on the Register. This needs to be spelt out more clearly in the Bill. Some of these issues include:
 - a. We need to consider what is the purpose of the Register?
 - b. How will it be used?
 - c. What information should be recorded on it?
 - d. Who will compile it?
 - e. Who will have access to it?
 - f. How long will a perpetrators name be on the register, it cannot be on forever surely?
 - g. How will perpetrators be rehabilitated?
 - h. What about persons who abuse the elderly and are convicted of more serious crimes (e.g. rape), in terms of the present legislation their names would not appear on the register as the charge would not be abuse in terms of the Bill but rather common law rape.
- d) Clause 16 should compel the D-G to initiate criminal avenues of redress when reports of abuse are received.

Extract from SAHRC Sexual Offences Bill Submission September 2003

REGISTER OF SEXUAL OFFENDERS

The creation of a Register of Sexual Offenders has been removed from the Bill. Instead the Bill follows the proposal of the SALC by providing for the criminalisation of non-disclosure of sexual offences by persons who apply for employment which places him or her in a position of authority or care of children or where offering to take care of or supervise children – section 23.

The decision whether to provide for such a register or not can be argued strongly from both sides.

Some of the concerns for inclusion of a register:

- ❑ Only convicted offenders names would appear, this gives a false sense of security
- ❑ Person will be punished twice
- ❑ Victim's ID would become known
- ❑ Could lead to vigilantism

On the other hand it is attractive as:

- ❑ Some of the view that it does not cost much- actually it does if it is to be effective
- ❑ It is really feel good legislation.

The SAHRC supports the removal of the register as suggested by the project committee. There are registers already in place that deal more broadly with child abuse issues in the country and have not terribly effective.