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Loopholes in the National Sex Offender Registry

What is the National Sex Offender Registry (NSOR)? The NSOR, which came into force on December 15, 2004, is a national database that serves as an investigative tool for police, designed to help investigate crimes of a sexual nature by requiring the registration of certain information relating to sex offenders.¹ Designated offenders are required to register their name and aliases, age, gender, detailed physical descriptions, main and secondary residence addresses, addresses for where they are employed, volunteer or study and phone numbers. A photograph may also be taken.² The RCMP is responsible for the administration and maintenance of this database and police in the various jurisdictions are responsible for inputting data and enforcing registration provisions.³

Who is on it? Recently amended section 490.012 of the *Criminal Code* states that a court shall, on application of the prosecutor, make an order requiring a person to be listed on the registry. For certain designated offences, the court shall make such an order when the Crown has proved beyond a reasonable doubt that act was committed with the intent to commit one these offences. The court is not required to make an order if the offender establishes that doing so would infringe upon his or her personal liberty to such an extent that it would be grossly disproportionate to the public interest of having him or her listed. The court must provide reasons for making or refusing an order to register.⁴ The offender may appeal the order⁵ and is required to be served with notice of his or her duty to register.⁶ Anyone can be ordered to register who is still “on sentence,” meaning anyone in prison, parole or probation when the legislation came into effect.⁷

How long are they listed for? The order to register lasts for either 10 years, 20 years or life, and is tied to the length of the maximum term of imprisonment for the designated

¹ *Sex Offender Information Registration Act*, S.C. 2004, c. 10 s. 2(1).

² *Ibid.* s. 5.

³ *Ibid.* s. 14.

⁴ *Criminal Code*, R.S.C. 1985, c. C-46 s. 490.012.

⁵ *Ibid.* s. 490.014.

⁶ *Ibid.* s. 490.018.

⁷ *Ibid.* s. 490.02 (1) (a).

offence and whether this is the first time an order is made.⁸

What are the penalties for non-compliance? Failure to comply, without a reasonable excuse, can result in a fine of not more than \$10,000, imprisonment for a term not more than 2 years, or both.⁹

Who can access the registry? The registry can only be accessed by police for investigational purposes or others authorized for research or statistical purposes. Information in the database may not be disclosed to anyone except the sex offender to whom the register relates and those listed above.¹⁰

*****THERE ARE TWO MAJOR LOOPHOLES IN THIS REGISTRY!*****

Loophole #1: Many convicted sex offenders are not listed on it. There is some reason for concern that the registry does not automatically include all convicted sex offenders and that courts are given discretion for whom to place an order on. However, given that the test for this is “grossly disproportionate,” it seems unlikely that many offenders will be able to qualify for this exemption.

Of greater concern is that the registry is not fully retroactive, meaning that those who completed their sentences prior to Dec. 15, 2004 are not listed on it. The province of Alberta identified 27 sex offenders who are at risk of re-offending and who are not included in the registry because they have already served their sentence.¹¹ The federal government has expressed concern that a retroactive registry might be found to violate the “double jeopardy” principle of the *Charter of Rights and Freedoms*, which stipulates that one has the right not to be tried or punished for an offence that that one has already been punished for.¹²

This concern is unfounded. In 2003 the United States Supreme Court ruled that the Alaska Sex Offender Registration Act did not violate the *ex post facto* clause of the U.S. Constitution, which is essentially the same principle as double jeopardy. The court found that although the state registry was retroactive, it was not punitive because it was intended as a civil regulatory scheme only and did not act as a punishment of sex offenders convicted before the law came into force.¹³ The Canadian federal government should simply be bold enough to pass legislation making the NSOR retroactive and trust that Canadian courts will recognize that it also is not punitive, but preventative.

⁸ *Ibid.* s. 490.013.

⁹ *Ibid.* s. 490.031.

¹⁰ *Supra* note 1, s. 16.

¹¹ Robin MacKay, “Bill C-16: Sex Offender Information Registration Act,” online: Library of Parliament <http://www.parl.gc.ca/common/bills_ls.asp?Parl=37&Ses=3&ls=c16>.

¹² *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, s. 11 (h).

¹³ *Supra* note 11: The case referred to is the 2003 *Smith et al. v. Doe et al.* decision.

Loophole #2: The registry is not publicly accessible. Since 1996 the U.S. federal government has required states to provide notification to communities of sex offenders in their neighborhoods. It varies between states as to which offenders should be registered, what information is disclosed, and how notification is given. Schools are always notified when a sex offender moves into the area, and organizations, residents and the media may or may not be. Residents are able to search for registered sex offenders either by name or geographically to find out who is living in their area. Depending on the state, this can either be done on the internet, or by paper request at local law enforcement offices.¹⁴

In Canada, the only province with a publicly accessible registry is Alberta; this is posted on the internet. Before a sex offender is placed on it, a mandatory risk assessment is made and “only the most serious offenders who are deemed to present a risk of significant harm to the public” are placed on it. A physical description, photo and the general area in which the offender lives are posted.¹⁵

The NSOR should be accessible to the public. The purpose of this would be, as is stated on the Alberta High-risk Offenders website, “to enable members of the public to take suitable precautionary measures.”¹⁶

There are many critics who argue that making sex offender registries public is counterproductive. One of the reasons they state is that having an open sex offender registry creates a false sense of security. Most child sex offences occur in the home by a family member or someone who is known to the child, and they argue that sex offender registries reinforce the false stereotype of a “stranger offender.”¹⁷ However, a public sex offender registry can also help parents decide who they will allow into their homes and in close association with their children. Without public access, a single mother could start a relationship with a dangerous convicted child sex offender and have no way of knowing.

Another more valid concern is that a publicly accessible registry can make it more difficult for offenders to rehabilitate themselves and reintegrate into society. There is the risk of vigilantism against offenders and those who support them, and it may be difficult for them to secure employment or housing. In some communities residents have picketed outside the home of a sex offender and harassed family members.¹⁸ Heather Davies points out that chasing offenders out of the community in which they have support systems to where they have none only increases their risk to re-offend.¹⁹

While some offenders will certainly suffer some difficulties, a balancing must be made in the public interest. There are a range of options available to the federal government to mitigate these concerns. As is done in Alberta, perhaps only the most serious offenders could be listed on a website, and as in some U.S. states, information on

¹⁴ *Ibid.*

¹⁵ “Solicitor General and Public Security. High-risk offenders,” online: Alberta Government <<http://www.solgen.gov.ab.ca/hro/default.aspx>>.

¹⁶ *Ibid.*

¹⁷ Heather Davies, “Sex Offender Registries: Effective Crime Prevention Tools or Misguided Responses?” (2004) 17 C.R. (6th) 156 (eC).

¹⁸ *Ibid.*

¹⁹ *Ibid.*

other child sex offenders could be obtained only through written request to the police.

Recidivism: Many of the arguments surrounding sex offender registries are supported by various recidivism rate statistics, i.e. how many offenders recommitted a sexual or violent crime after release. These statistics vary widely, from 5.3%²⁰ to more than 60%.²¹ However, given that many child sexual assaults are not reported until decades later, and many are probably never reported, official rates are probably way below reality. While it is true that we cannot estimate exactly how much of a risk these offenders pose, at least some well-respected studies suggest that this risk is considerable. In light of this, parents should have the right to find out who is in their communities, enabling them to decide what kinds of precautions to take with their children.

Recommendations:

- 1. The NSOR should be fully retroactive.**
- 2. The NSOR should be open to law enforcement officers and the public.**

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²⁰ Dan Gardner, "Sex offender registry no sure answer" *Guardian* (19 April 2004) A6: The article cites a short-term study released by the United States Department of Justice in 2003.

²¹ Susan Bourette, "Tainted Love" *The Globe and Mail* (28 May 2005) F4: One recent long-term study by well-respected Toronto psychologist Ron Langevin shows recidivism rates of 60 % and higher.