SOUTH AFRICAN HUMAN RIGHTS COMMISSION REPORT

File Ref No: GP/2012/309

In the matter between:

MIKE WATERS MP **Complainant**

and

NATIONAL DEPARTMENT OF SOCIAL DEVELOPMENT **Respondent**

CLOSING REPORT

1. **Introduction**

1.1. The South African Human Rights Commission (hereinafter referred to as "the Commission") is an institution established in terms of section 181 of the Constitution of the Republic of South Africa, 1996 (hereinafter referred to as "the Constitution").

1.2. The Commission, and the other institutions created under Chapter 9 of the Constitution, are described as "state institutions supporting constitutional democracy".

1.3. In terms of section 184 (1) of the Constitution, the Commission is specifically mandated to:

1.3.1. Promote respect for human rights and a culture of human rights;

1.3.2. Promote the protection, development and attainment of human rights; and

1.3.3. Monitor and assess the observance of human rights in the Republic.

1.4. Section 184(2) (a) of the Constitution empowers the Commission to investigate and report on the observance of human rights in the country.

1.5. Furthermore, section 184(2) (c) and (d) affords the Commission authority to carry out research and to educate on human rights related matters.

1.6. The Human Rights Commission Act 54 of 1994 ("the HRC Act"), further supplements the powers of the Commission. The HRC Act confers powers on the Commission to investigate complaints concerning fundamental rights and report on such matters.

2. Complaint

2.1 On the 7th of August 2012 the Commission received a complaint from Mr Mike Waters (hereinafter referred to as the complainant), a member of Parliament, against the National Department of Social Development (hereinafter referred to as "the DSD") regarding the implementation of the National Child Protection Register (hereafter referred to as the CPR).

2.2 The complainant alleges that the DSD is **failing to properly implement the CPR and that by failing to enforce the CPR, section 28 of the Bill of Rights of the Constitution of the Republic of South Africa, 1996** (hereafter referred to as the Constitution), which reads as follows: ***"every child has the right to be protected from...neglect, abuse or degradation,"*** **is being violated**.

2.3 As a result the Commission was requested to investigate whether the CPR was being fully implemented.

3. The Complainant:

3.1 The Complainant is Mike Waters, an adult male and a member of parliament, representing the Democratic Alliance, a political party in the Republic of South Africa.

4. The Respondent:

4.1 DSD

4.1.1 The DSD is the **National Department of Social Development** responsible for national social services. The DSD is also the primary government department mandated to keep and maintain the CPR under section 111 of the Children's Act 38 of 2005 (hereafter referred to as the Act). The upkeep and maintenance of the CPR is central to its implementation.

4.2 DOJ&CD

4.2.1 The Commission **included the Department of Justice and Constitutional Development (hereafter referred to as the DOJ&CD)** in its investigation, as a primary role-player in the implementation of the CPR. The inclusion of the DOJ&CD

in the investigation by the Commission is premised on the fact that the DOJ&CD is the primary governmental department tasked with the administration of Courts, and therefore has a joint obligation to facilitate the implementation of the CPR.

4.3 DWCPD

4.3.1 The Department of Women, Children and People with Disabilities was also included in the investigation on the basis of its mandate and central role to promote, facilitate, coordinate and monitor the realization of the rights of women, children and people with disabilities in terms of section 7(5)(a) of the Public Service Act [PSA], 1994 (promulgated under Proclamation No. 103 of 1994, 6 July 2009). The National Department of Women, Children and People with Disabilities was established to:

"monitor other government departments to ensure the mainstreaming of gender, children's rights and disability considerations into all programmes of government and other sectors. This will help government to respond to issues of these targeted groups in an integrated and coherent manner"[1]

4.4 In this regard the Commission was guided by the provisions of section 5 (five) of the Act which states that to achieve the implementation of the CPR, public bodies in the national, provincial and, where applicable, local spheres of government involved with the care, protection and well-being of children ***must*** **co-operate** in the co-ordination of services delivered to children.

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1 The mandate of the DWCPD is set out on their website, available at http://www.dwcpd.gov.za/about/strategic_plan/ (accessed on 21/6/13)

5. Preliminary assessment:

The Gauteng Provincial Office undertook a preliminary assessment of the complaint in terms of its Complaints Handling Procedures as gazetted.

5.1 The Commission found that the Respondent's conduct amounted to a *prima facie* violation of the rights contained in section 28 of the Bill of Rights, which reads as follows: ***"every child has the right to be protected from...neglect, abuse or degradation"***

5.2 The Commission further determined that the alleged violations fell within the mandate and jurisdiction of the SAHRC.

5.3 The Commission further determined that a full investigation was appropriate in terms of its Complaints Handling Procedures.

6. Steps taken by the Commission:

6.1 After receipt of the complaint and preliminary assessment thereof by the Commission on the **7th of August 2012**, the complaint was accepted in terms of the Commission's Complaints Handling Procedures as gazetted.

6.2 An assessment of the relevant frameworks through desktop research informed allegations formulated thereafter.

6.3 On the **2nd of November 2012** letters to DSD, DWCPD as well as DOJ&CD were issued with a final return date for responses of the 31st of December 2012.

6.4 On the **21st of November 2012**, DSD acknowledged receipt of the letter. DSD further indicated that the complaint was to be forwarded to the relevant directorate within the department, Directorate: Child Protection.

6.5 On the **22nd of November 2012**, the Commission issued a reminder to DSD, specifically to the Chief Director: Children, to respond to the Commission by the 31st of December 2012. Simultaneously, the complainant was updated with this information.

6.6 On the **7th of January 2013**, the Chief Director: Children responded indicating that a response to the Commission was already underway via the office of the Minister.

6.7 On the **23rd of January 2013** the DWCPD indicated by means of email correspondence to the Commission that the letter of allegation was never received by the DWCPD. The Commission furnished the DWCPD with proof of delivery report in the form of a transmission receipt. The information contained on the delivery report was contested by the DWCPD and a request for the retraction of a media statement issued by the Commission was made by said department. The Commission clarified the contents of the delivery report to the DWCPD, indicating that the report revealed that the letter of allegation was delivered, and that the media statement had been accurate and would not be retracted. The Commission noted that **no response was received from the DOJ&CD** at this stage of its investigations.

6.8 Some two months from the date of its request, the Commission received a response from the DWCPD on the **29th of January 2013.** On the same date the DOJ&CD also indicated per email that their response was en route to the offices of the Commission.

6.9 On the **7th of February 2013** the Commission received the response from the DSD consisting of a report and supporting records, three months from the date of its request.

6.10 On the **13th of February 2013** the Commission issued a final follow up letter to the DOJ&CD requesting a response and citing section 9(c) of the HRC Act empowering the use of subpoena powers by the Commission. The return date for this purpose was set as the 22nd of February 2013.

6.11 On the **8th of March 2013**, the Commission met with representatives from DSD, in order to clarify statistical data that had been furnished along with their response.

6.12 Due to the non-responsiveness of the DOJ&CD, the Chairperson of the Commission issued a final letter of request for response to the Minister of Justice and Constitutional Development on the **18th of March 2013**.

6.13 On the **2nd of April 2013** representatives from the DOJ&CD indicated that the letter to the Commission had been signed by the Director- General, however, reasons for the delay in receipt were to be investigated.

6.14 On the **11th of April 2013** the Commission received a two page response from the DOJ&CD in the form of a letter dated 5 April 2013.

7. Legal Analysis

7.1 Information requested by the Commission

7.1.1 As the primary implementer of the CPR, the Commission requested the following information from **DSD**:

7.1.1.1 A copy of the latest updated CPR;

7.1.1.2 A comprehensive report from DSD advising amongst others, whether the CPR had not been populated and updated;

7.1.1.3 The means through which updating is done via different sources of information;

7.1.1.4 The frequency with which it is updated

7.1.1.5 Data sources used to obtain information

7.1.1.6 An explanation of the monitoring and evaluation system of the CPR; as well as the frequency of monitoring and evaluation reports.

7.1.2 As a key department on all matters relating to children, the Commission required the following from **DWCPD**:

7.1.2.1 The measures in place to allow the DWCPD to monitor the proper implementation of the CPR.

7.1.3 The information requested from the **DOJ&CD** was based on its oversight of the Courts[2]:

7.1.3.1 The number of Form 28's submitted to Part B of the CPR by Regional Courts nationwide; and;

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[2] Section 120(4) of the Act states the following:

(4) In criminal proceedings, ***a person must be found unsuitable to work with children –***

(a) On conviction of murder, attempted murder, rape, indecent assault or assault with intent to do grievous bodily harm with regard to a child*; or (b) If a Court makes a finding and gives a direction in terms of section 77(6) or 78(6) of the Criminal Procedure Act, 1977 (Act No. 51 of 1977) that the person is by reason of mental illness or mental defect not capable of understanding the proceedings so as to make a proper defence or was by 35 reason of mental illness or mental defect not criminally responsible for the act which constituted murder, attempted murder, rape, indecent assault or assault with the intent to do grievous bodily harm with regard to a child.* The specific findings referred to in Section 120 [4] of the Act are clearly within the exclusive jurisdiction of the Courts. When such a finding is made, the clerk of the Court must submit said finding to Part B of the CPR by means of a Form 28. The latter form is submitted per post by the clerk of the Court to the CPR, which is administered by DSD.

7.1.3.2 Information regarding the training of Regional Court Magistrates on the Act, dates of training which had occurred, and the number of Regional Court magistrates trained in this regard.

7.2 Responses Received

7.2.1 Responses from the DSD are summarized below in accordance with the respective enquiries made by the Commission:

7.2.1.1 Provision of a copy of the latest updated CPR

The DSD responded that in terms of section 112 of the Act, the CPR was kept confidential; however, a comprehensive document was furnished to the Commission indicating the matters added to the CPR. The data furnished to the Commission included the period between **2010 and March 2013**. For purposes of this report, information deemed peripheral to the complaint has been omitted.

The information furnished is deemed to be as reflected in the CPR as **no inference to the contrary** needs to be drawn and no information to the contrary had been provided by the DSD. A subsequent attempt was however made to clarify information as referred to in paragraph 9.2.1.2.9 supra.

7.2.1.2 A comprehensive report from DSD advising amongst others, why the CPR has not properly been populated and updated

The allegation that the CPR was neither properly populated nor updated was not refuted by the DSD. The DSD set out various challenges regarding the implementation of the CPR. These included challenges relating to **human resources, information management** as well as those relating to **stakeholder management**.

It was also clear however from the response of the DSD that attempts are being made by it to fully implement the CPR. Full achievement of this is reported to have been hindered by the factors cited above. One of the key issues highlighted by the DSD has been the **lack of submissions of convictions and findings of unsuitability by Courts**. The need for legal reform was also cited by the DSD, in this instance the particular **duplication of information and resources** resulting from the duty to populate the CPR with information that is similar to that required by the National Register of Sex Offenders was cited as a contributing challenge. These challenges are more closely considered in paragraph 9.4.9.

7.2.1.3 **The means through which updating is done**

The DSD set out the various different forms through which information is submitted to the CPR.[3] In this regard the DSD advised that:

7.2.1.3.1 **Since 2004**, provincial offices of the DSD had been receiving form 22's to record any report of **deliberate abuse and neglect** of children in terms of section 110 of the Act.

7.2.1.3.2 Outcomes of the Children's Courts and convictions are reported through a form 25. Convictions were only **recorded after the Act was fully implemented in 2010**.

7.2.1.3.3 Form 29's are submitted to the CPR by **employers** who wish to **screen their employees** against the CPR, and Form 30's are submitted by individuals who would like to have their own name screened against the CPR.

7.2.1.3.4 Lastly, the form 28 is submitted by **Courts and other fora** to the CPR when a **finding of unsuitability** has been made in regards to a person.

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3 A full discussion of the ambit of form 25 and 28 is discussed hereunder

7.2.1.4 In its submission the DSD indicated that one of the challenges that impacts the updating of the CPR is that **heavy reliance is placed on other role players** to submit the required forms. Secondly, both the DSD and the DOJ&CD highlighted **human resource constraints** as impacting on the updating of the CPR. In this regard it was submitted that submissions are sent, as well as received and logged, **manually**. The DSD points out that from April 2012 to September 2012, **19 199** applications for screening in respect of Form 29 and 30 were made to the CPR.[4] These requests had placed pressure on the DSD, so much so, that staff from other units in the department had been requested to assist with the backlog of applications received.

7.2.1.5 **The frequency of updates**

The DSD indicated that the CPR is updated immediately after the receipt of the submission of the various forms as described in par 7.2.1.3. It was however pointed out that in order for the CPR to be updated with the necessary frequency, the forms must first logically be submitted by relevant stakeholders. For instance, if the Courts do not submit form 25's and 28's, the CPR **will not be a true reflection of the exact number** of convictions, abuse, neglect and unsuitability findings.

7.2.1.6 **Data sources used to obtain information**

The DSD has indicated that the sources of data are those listed in paragraph 7.2.1.3. Therefore, upon receiving either form 25, 28, 29 or 30, the data contained in those forms is manually assessed or captured and used to populate the CPR. Information captured by means of a form 22 is electronically submitted and captured by provinces. In terms of the

[4] Upon receipt of forms 29 and 30 however, the DSD updates requestors of the inquired status within 21 working days of the form 29 and 30 being received.

electronic submissions, these are attended to internally by provincial DSD staff.[5]

7.2.1.7 **An explanation of the monitoring and evaluation system of the register; as well as the frequency of monitoring and evaluation reports**

The DSD has listed various forums through which monitoring and evaluation takes place, including the Interdepartmental Consultative Forum, Welfare Service Forums, Child Protection Forums, and also includes the Portfolio Committee, Parliament, as well as provincial visits as mechanisms through which their performance is monitored. Minutes and reports emanating from these fora have all been attached by the DSD in their response to the Commission. No specific information regarding oversight or monitoring and evaluation of the manual data capturing process was provided save for the submission of outgoing documents for verification and signature.

7.2.2 **The DWCPD**

7.2.2.1 **The monitoring of the CPR**

In their response to the Commission, the **DWCPD indicated that it was aware of challenges pertaining to the implementation of the CPR**, but that these **challenges are due to the vast operationalising requirements and implementation obligations** called for by the Act. The DWCPD also highlighted **resource constraints and fiscal limitations** to enable adequate monitoring of implementation. In this regard the DWCPD recommended that serious attention be given to the alignment of the implementation of the CPR, and budgetary allocations. This echoes the DSD

[5] For purposes of this report, the Commission accepts the DSD's submission of data submitted by means of form 22 is a reflection of information managed by the Information Management Systems and Technology component of the DSD.

submissions. The DWCPD indicated further that through reviewing the Act, the feasibility of some of the provisions may be addressed.

7.2.3 The DOJ&CD

7.2.3.1 Regional Court submissions of Form 28

The DOJ&CD indicated that since implementing the *National Guide for Submission of Notification to the Child Protection Register*, there has been an increase of submissions of form 28's to the office of the CPR. In the previous financial year it is submitted that forty (40) form 28's were submitted to the CPR.

The DOJ&CD goes further in stating that during the first two quarters of this financial year, their statistical report already showed an increase in the number of submissions to a total of 70 submissions of form 28's. In this regard it is noted that the Commission received the response from the DOJ&CD as signed by the Honourable Minister, on the 11th of April 2013. The Minister, as indicated, signed this letter on the 5th of April 2013, which fell within a new financial year. The Commission therefore accepts that the DOJ&CD referred to the 2012/13 financial year as "this financial year", and that in the 2011/12 financial year, 40 form 28's were submitted.

For the period spanning from the 1st of April 2011, and 30th of September 2012, a number of a 110 form 28's were sent to the CPR by Courts. Although the Commission requested the number of form 28's submitted by Regional Courts, the DOJ&CD submitted a total number collected by a **combined statistical reporting tool**, therefore not differentiating between Magistrate Courts and Regional Courts. The DOJ&CD indicated that efforts were underway to create a reporting tool which would enable the

disaggregation of information to facilitate a distinction between submissions from the Regional Court data and those from the Magistrate Court.

7.2.3.2 **Training of Regional Court Magistrates**

The DOJ&CD responded that since the migration of the training function for the judiciary from Justice College to the South African Judicial Education Institute (SAJEI), **the training of judicial officers has been inexorably delayed.**

The DOJ&CD does however indicate that during a conference in 2012, the issue of the CPR was shared with approximately 150 Regional Court Magistrates from all provinces. No clear information was provided regarding the inclusion of members of the High Court bench or those from the District Courts. The DOJ&CD also indicated that from the 14th to 16th of March 2013, the SAJEI held a three day training course for Regional Magistrates on, inter alia, the Act, and that the CPR formed part of this training. No indication was given to the Commission about whether or not this course was optional.

8. Legal Analysis

8.1 International Obligations

8.1.1 South Africa ratified the **United Nations Convention on the Rights of the Child [CRC]**[6] on 16 June 1995. The CRC was the first international treaty ratified by the **new** democratic government of our country. It was also the first legally binding international convention to **affirm human rights specifically for children globally**.

8.1.2 Article 19 of the CRC states the following:

6 Hereafter referred to as the CRC.

*1. States Parties shall take **all appropriate legislative, administrative, social and educational measures** to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.*

*2. Such protective measures **should, as appropriate, include effective procedures** for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other **forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.***

8.1.3 Through these provisions the CRC places an obligation on State Parties to not only enact laws that address and prevent the abuse and maltreatment of children, but also to put in place **effective administrative measures** to address the protection of children against these violations.

8.1.4 Article 19 (2) specifically refers to **procedures** to be put in place by State Parties in order to report instances of child maltreatment.

8.1.5 South Africa is in addition a signatory to the **African Charter on the Rights and Welfare of the Child**,[7] a regional commitment advancing the rights of children in Africa. Article 16 of the ACRWC states the following:

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[7] Hereafter referred to as the ACRWC.

1. State Parties to the present Charter shall ***take specific legislative, administrative, social and educational measures*** *to protect the child from all forms of torture, inhuman or degrading treatment and especially physical or mental injury or abuse, neglect or maltreatment including sexual abuse, while in the care of the child.*

8.1.6 Although similar to the CRC, the ACRWC goes further in requiring State Parties to have specific measures in place **to effectively protect the child from harm and abuse**.

8.1.7 It is clear that both at international and regional levels State Parties have **unambiguous obligations to take specific, and all appropriate measures** to establish methods to protect children from harm and abuse, and also, to prevent harm and abuse from occurring. These measures must furthermore be implemented effectively. Merely enacting legislation is therefore insufficient; the legislation must be properly realized.

8.2 **The Constitution**

8.2.1 The status and application of international law is determined by the Constitution.

8.2.2 According to Boezaart,[8] international law refers to binding instruments that South Africa has ratified, such as the CRC and may also include non-binding instruments. In terms of **section 39 and 233** of the Constitution respectively, Courts and tribunals **must** consider international law when rights contained in the Bill of Rights are interpreted. When national legislation is interpreted Courts and tribunals must adopt a preference for

8 Boezaart, *Child Law in South Africa* (2009) 323.

interpretations of legislation in question that are consistent with international law.

8.2.3 General public international law further requires States to ensure that domestic legislation conforms to international obligations (in casu the provisions of the CRC) and does not allow such States to rely on national law to justify non-compliance with their international obligations. **National law must therefore be brought in line with international obligations** to the extent it falls short of according protections committed to in international obligations.[9]

8.2.4 This positive relationship between international obligations and interpretation, in relation to section 28, finds form in the case **of M v S** 2008.[10] In the latter instance the Constitutional Court held that section 28 of the Constitution must be seen as responding in an expansive way to our international obligations as a State Party to the CRC. It was also found that the principles contained in the CRC guided all policies in South Africa in relation to children.

8.2.5 This approach is supported by experts such as Devenish[11] who contend that most rights elaborated in international instruments such as the CRC are captured in some form or the other in section 28 of the Constitution.

8.2.6 The Constitution recognises that **children are particularly vulnerable** to violations of their rights and that they have specific and unique interests. Over and above the specific recognition afforded to children in section 28, children are also entitled to the general protections afforded to everyone by

9 Robinson "The Right Of Child Victims Of Armed Conflict To Reintegration And Recovery"2012

10 M v S (Centre for Child Law as Amicus Curiae) 2008 (5) BCLR 475 (CC);

11 Devenish *A Commentary on the South African Bill of Rights* (1999) 375

the Constitution. They are therefore equal holders of rights extending beyond section 28 of the Bill of Rights, including the right to life,[12] human dignity,[13] equality[14] and more specifically: freedom and security of person.[15]

8.2.7 Section 28 of the Constitution states the following:

1. *Every child has the right*
   a. *to a name and a nationality from birth;*
   b. *to family care or parental care, or to appropriate alternative care when removed from the family environment;*
   c. *to basic nutrition, shelter, basic health care services and social services;*
   d. ***to be protected from maltreatment, neglect, abuse or degradation;***
   e. *to be protected from exploitative labour practices;*
   f. *not to be required or permitted to perform work or provide services that*
      i. *are inappropriate for a person of that child's age; or*
      ii. *place at risk the child's well-being, education, physical or mental health or spiritual, moral or social development;*
   g. *not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be*
      i. *kept separately from detained persons over the age of 18 years; and*

12 S11 of the Constitution.
13 S10 of the Constitution.
14 S9 of the Constitution.
15 S12 of the Constitution.

ii. *treated in a manner, and kept in conditions, that take account of the child's age;*

h. *to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result; and*

i. *not to be used directly in armed conflict, and to be protected in times of armed conflict.*

2. ***A child's best interests are of paramount importance in every matter concerning the child.***

3. *In this section "child" means a person under the age of 18 years.*

8.2.8 Against this background, section 8 (1) of the Constitution specifies the binding nature of the Bill of Rights on all organs of state. This sub-section reads that the Bill 'applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.'

8.2.9 Section 28, and more specifically section 28(1) (d) therefore has both horizontal and vertical application. The State consequently has a clear and direct obligation to protect children from abuse and neglect, as read with the obligations arising from the CRC and ACRWC. These responsibilities are realised through the implementation of measures for their protection, which **measures must be effective in realizing implementation.**

8.2.10 The judgment of the Constitutional Court in **Grootboom v Oostenberg Municipality and Others** 2000,[16] elaborated on the nature of the State's obligation in relation to section 28 rights. Yacoob J stated that where children are in parental or familial care, the State's obligation would normally entail **passing laws and creating enforcement mechanisms** for the

16 Grootboom v Oostenberg Municipality and Others 2000 (3) BCLR 277 (C).

maintenance of children and for their protection from abuse, neglect or degradation.

8.2.11 Section 28(2) of the Bill of Rights provides a useful yardstick in the approach to matters concerning the child, in that the **"best interests of the child"** principle, as advocated by the Constitution is of paramount importance in interpretation. The State is therefore obliged to test whether **a measure or system that is being implemented will serve the best interests of the child**, as this consideration must be taken into account in matters affecting the child.

8.2.12 According to Skelton[17] however, the Constitutional Court has made it clear that the "paramountacy principle"[sic] in relation to section 28(2) of the Bill of Rights, is not an absolute trump *vis-à-vis* other rights. The rights of the child may be limited where constitutionally permissible on the basis that the limitation is both reasonable and justifiable.

8.2.13 On the basis of the international and regional commitments and their constitutional interpretation, the State is said to have clear obligations to **protect and advance the interests of children by according them with protection against abuse and maltreatment** through the measures it implements to ensure the protection of children. The State must ensure that the best interests of children are expressly taken into account when implementing any such programme or measure.

8.3 Domestic Legislation

8.3.1 Background of the CPR

17 Skelton "Child Rights Jurisprudence In Eastern And Southern Africa" (2009)

8.3.1.1 The concept of a register based on mandatory reporting of child abuse was introduced in South African law in April 1998, in the new Regulations under the Child Care Act.[18] **The primary purpose of this register was the protection of children**. Information for this register was obtained from three sources:

8.3.1.1.1 Criminal Court convictions;

8.3.1.1.2 Children's Court findings; and

8.3.1.1.3 Notifications received in terms of section 42(1) of Child Care Act.

8.3.1.4 Although the 1998 amendments to the Child Care Act brought some clarity to the reporting of the abuse of children, many uncertainties remained.

8.3.1.5 The South African Law Reform Commission [SALRC], was subsequently requested to investigate and review the Child Care Act and to make recommendations to the Minister for Social Development for the reform of this particular Act, and therefore, the ever evolving aspect of children's rights. **The SALRC proposed the establishment of the CPR as part of the new reformed legislation**. This recommendation was based on research undertaken in the United Kingdom, Australia, the United States of America and New Zealand. In support of its recommendation the SALRC recognised the value of the proposed CPR as providing "***protective potential for children as well as being a prospective source of data for planning, policymaking and resourcing purposes***"

8.3.1.6 The SALRC therefore recommended that provision be made for the registration of offenders, **solely for purposes of preventing their entry into positions of responsibility for, or close contact with, children**.

[18] The Child Care Act 74 of 1983 - hereafter referred to as the Child Care Act.

8.3.1.7 On the 1st of April 2010 the Act repealed the earlier Child Care Act in its entirety. Through the new Act, the provisions for a CPR in Chapter 7 came into force. The CPR under the Act consists of two parts. Part A and Part B records inter alia offences against children and names of persons unsuitable to work with children respectively.

8.3.2 **The CPR under the Children's Act 38 of 2005**

8.3.2.1 The object of the Act is to **give effect to the constitutional rights of children.** This includes protection from maltreatment, neglect, abuse or degradation; and the giving of effect to the Republic's obligations concerning the well-being of children in terms of international instruments binding on the Republic. The objects also include the **making of provision for structures, services and means for promoting and monitoring the sound physical, psychological, intellectual, emotional and social development of children**;

8.3.2.2 **Part A**

8.3.2.2.1 Section 113 of the Act records the purpose of Part A of the CPR to be the following:

113. The purpose of Part A of the Register is-

(a) to have a record of abuse or deliberate neglect inflicted on specific children;

(b) to have a record of the circumstances surrounding the abuse or deliberate neglect inflicted on the children referred to in paragraph (a);

(c) ***to use the information in the Register in order to protect these children from further abuse or neglect;***

(d) to monitor cases and services to such children;

(e) to share information between professionals that are part of the child protection team;

(f) to determine patterns and trends of abuse or deliberate neglect of children; and

(g) to use the information in the Register for planning and budgetary purposes to prevent the abuse and deliberate neglect of children and protect children on a national, provincial and municipal level.

8.3.2.2.2 **Section 114 expands the parameters of Part A from mere inclusion of information about the abuse and neglect of children, to require the mandatory recording** of all **convictions** of **all persons** on charges involving the abuse or deliberate neglect of a child.

8.3.2.2.3 Part A therefore has a powerful function in preventing the abuse and deliberate neglect of children, as well as protecting them.

8.3.2.3 **Part B**

8.3.2.3.1 Part B is intended to be a record of **persons who are unsuitable to work with children.** The names of such persons are entered into Part B of the CPR. Any person may inquire whether his or her name appears on Part B of the CPR. Employers may also inquire whether the names of their employees appear on Part B of the CPR.

8.3.2.3.2 Section 119 of the Act states the following:

119. Part B of the Register must be a record of persons found in terms of section 120

(a) the full names, surname, last known physical address and identification

(b) the fingerprints of the person, if available;

(c) a photograph of the person, if available;

(d) a brief summary of the reasons why the person was found to be unsuitable to work with children;

(e) in the case of a person convicted of an offence against a child, particulars of the offence of which he or she has been convicted, the sentence imposed, the date of conviction and the case number;

(f) such other prescribed information.

8.3.2.3.3 As indicated supra,[19] section 120 lists the categories of persons who must be found unsuitable to work with children, and whose names must therefore be entered into Part B of the CPR. Section 120 of the Act states the following:

(4) In criminal proceedings, a person ***must be found unsuitable to work with children****-*

(a) On conviction of murder, attempted murder, rape, indecent assault or assault with intent to do grievous bodily harm with regard to a child; or

(b) If a Court makes a finding and gives a direction in terms of section 77(6) or 78(6) of the Criminal Procedure Act, 1977 (Act No. 51 of 1977) that the person is by reason of mental illness or mental defect not capable of understanding the proceedings so as to make a proper defence or was by reason of mental illness or mental defect not criminally responsible for the act which constituted murder, attempted murder, rape, indecent assault or assault with the intent to do grievous bodily harm with regard to a child.

8.3.2.4 Before the name of a person who has been convicted of the abovementioned crimes can be included in Part B of the CPR, the person must be **found to be unsuitable to work with children** as provided for under section 120 of the CPR. A finding that a person is unsuitable to work

19 See FN 2.

with children is made by a Children's Court, any other Court in criminal or civil proceedings in which that person is involved, or any forum established or recognised in law in any disciplinary proceedings concerning the conduct of that person relating to a child.[20]

8.3.2.5 In criminal proceedings, in order for a person's name to be added to the CPR in terms of section 120(4), he/she must have been convicted of the crime of murder, attempted murder, rape, indecent assault or assault with intent to do grievous bodily harm with regard to a child, and, found unsuitable to work with children. **The conviction in itself is not an automatic finding of unsuitability as the legislature's intent clearly requires two separate acts from criminal courts: the conviction, and the finding.**

8.3.2.6 In addition, it is important to note that from the wording preferred by the legislature, it would appear that no **discretionary power is** bestowed on the Courts in terms of the duty to make a finding. Convicted persons in terms of section 120(4) of the Act **must** be subjected to an unsuitability finding in criminal proceedings upon conviction.

8.3.2.7 **An inference may therefore be made that the exact number of persons convicted in South African Courts for the above-mentioned crimes against children, should also be reflected on Part B of the CPR when compared over a similar period of time.**

8.3.2.8 In addition, Part B of the CPR also records findings of unsuitability made by civil Courts and other fora. The number of persons reflected on Part B of the

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20 Although the Act also stipulates that a conviction is not a prerequisite for an unsuitability finding, there is a duty to make a finding of unsuitability when a person was convicted of murder, attempted murder, rape, indecent assault or assault with intent to do grievous bodily harm with regard to a child.

CPR will therefore be **more than the number of persons convicted of crimes** against children, should these fora have also made and submitted such findings.

8.3.2.9 **In summary Part A of the CPR includes convictions of persons found guilty of abuse or deliberate neglect of children. For their names to be specifically recorded in Part B, an unsuitability finding with regard to their contact with children by the Courts is made and submitted for entry into Part B. Part B however is not limited to convictions and will include names of persons found unsuitable to work with children by other fora.**

8.3.2.10 In order to fulfil the objectives of the CPR, **it follows that both Parts of the CPR must be populated with information** in order to, amongst others, prevent persons found unsuitable to work with children, from entry into positions of responsibility for, or close contact with children.

8.3.3 The framework for the protection of the rights of child with specific regard to **the CPR therefore is rationally connected both in terms of necessity, and state responsibility to international and constitutional obligations.**

8.4 **Abuse, neglect and violence against children in South Africa**

8.4.1 Children by their very nature are extremely vulnerable, particularly to abuse. To fully appreciate the value of a mechanism such as the CPR, a brief contextual analysis of abuse and neglect in South Africa warrants recording.

8.4.2 In its 2011 Review of Equity and Child Rights in South Arica, the Commission indicated that violence against children is pervasive in the country and that

many crimes remain unreported. It was also indicated that people closest to children perpetrate the majority of cases of child sexual and physical abuse.[21]

8.4.3 Inequality, poverty and HIV and AIDS are major challenges which mark the South African society and severely increase the vulnerability[22] and conditions within which children in our country live. The United Nations Children's Fund reports that two-thirds of all children living in South Africa live in poverty.[23] Crimes against these children occur at a much higher rate than in countries where children are not subjected to such adverse poverty.

8.4.4 In the 2010/11 financial year, the South African Police Service reported that **54 225 children under the age of 18 years, fell victim to crimes such as murder, attempted murder, sexual offences, assault, and assault to do grievous bodily harm.**[24]

8.4.5 In the 2011/12 financial year, this number was reported to have decreased to 50 688 for the period under review.[25] It is noted however that crimes against children remain underreported and the statistical data presented represent only formally registered complaints to the SAPS.

8.4.6 In total, for the period of review relevant in this investigation, it is calculated that **104 913 serious crimes against children were reported to the South African Police Service.**

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21 South Africa's Children: A Review of Equity and Child Rights 6

22 For example in 2002 the World Health Organisation reported that child maltreatment is more likely in communities with high rates of poverty and fewer of the social networks and neighbourhood support systems that have been shown to protect children.

23 See http://www.unicef.org/southafrica/children.html

24 Crime Report 2010/11 South African Police Service 11.

25 Crime Statistics Overview 2011/12 South African Police Service 36.

8.4.7 According to the 2010/11 Annual Report from the National Prosecuting Authority, an average of 1 673 high and lower Courts finalised 331 045 cases with a conviction rate of 88.7% within that year.[26] During 2012, an average of 1 685 High and Lower Courts finalised 316 098 cases, **achieving an 88.8% conviction rate**.

8.4.8 The data reflected in the National Prosecuting Authority annual reports did not assist in making an accurate correlation between the convictions and the number of crimes reported **against children specifically.**

8.4.9 **Data analysis** on the number of convictions in matters where a child was the victim of a serious offence is however concerning. For example, specific crimes of sexual offences were only measured in all Courts since 2011/12. There is no formal historical data specifically in this regard. Nevertheless, during 2011/12, the National Prosecuting Authority reported a 65% conviction rate which resulted in approximately 4500 convictions for sexual offences in general.

8.4.10 According to the South African Police Service, **more than 40% of sexual offences reported, are committed against children**. The statistics as reported by the SAPS and NPA do not provide a remotely reasonable comparator of statistics provided for the CPR.

8.5 Based on international frameworks, comparative jurisdictional information, domestic statutory and constitutional frameworks and a contextual analysis it is clear that the CPR was adopted by the State with a clear purpose to serve as a measure to optimize protections for children. The measure therefore

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26 The Commission notes in this regard that not all reported matters would result in a prosecution for a variety of reasons. Further to this, of the number prosecuted, not all prosecutions would result in convictions.

serves a valuable purpose within the broad range of protections put in place by the State in efforts to meet its constitutional obligations.

9. **Application**

9.1.1. In terms of section 124, if a person's name is added to Part B of the CPR, such person **must disclose this to his or her employer should he or she work, or be in contact with children**. What is important to note is that disclosure is subject to the person's name being added to Part B of the CPR, and not simply upon being convicted. A person whose name has therefore been erroneously or otherwise **omitted from being added to Part B of the CPR has no duty to disclose a conviction** akin to those referred to in section 120(4)(a).[27]

9.1.2. In terms of section 126, before a person is allowed to work or have access to children, an employer **must establish whether or not that person's name appears in Part B of the Register.** Should the name of a person who has been convicted in terms of section 120(4)(a) therefore not appear on Part B of the CPR , the employer will not be in a position to confirm that the person is allowed to work with children.

9.1.3. An accurate, complete and timely population of the CPR is therefore imperative for the protection of children from persons found unsuitable to work with them. The administrative inclusion onto the CPR of a person unsuitable to work with children will determine whether such person who may pose a risk to the safety and wellbeing of a child, will be allowed to work and care, or continue to work and care for vulnerable children. Should

[27] Section 124 states that if the name of a person is entered in Part B of the Register and that person must disclose that fact to the person who manages or operates the institution, centre, facility, shelter or school etc.

the name of such person not be added to the CPR as prescribed for by law, the protection envisaged in the form of reducing and preventing contact with children by such persons is completely lost. As a result, both the **measure and mechanism fail to effectively protect** against and mitigate the risk faced by children, as well as their families.

9.2. Data Integrity

9.2.1 In order to successfully implement the CPR and abide by the responsibilities as set out in the Act, Constitution and International jurisprudence, the DSD must consequently **efficiently populate** the CPR with data for it to function in terms of its intended purpose i.e. to allow for this information to be used in protecting children from maltreatment, abuse, neglect and degradation.

9.2.1.1 Data on Part A of the CPR

9.2.1.1.1 For purposes of populating Part A of the CPR with information contained in a form 22, the DSD has highlighted various challenges relating to the existing information management system [EDMS – Electronic Document Management System]. Poor lack of connectivity, lack of human resource support as well as the deployment of a dual system approach have all been cited as contributing to the DSD's challenges in population Part A of the CPR to meet the requirements of the Act.

9.2.1.1.2 Further to this, according to the information furnished by the DSD, the CPR **record reflects 270 convictions**[28] on Part A of its database, for the period under review.

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28 The DSD provided the SAHRC with printed data. The number was established through a manual count of entries made, including information on Court orders and sentences.

9.2.1.1.3 The data reflects convictions added to the CPR Part A between **the periods of 2010 to March 2013**. The entry includes details of persons convicted in this regard, the crime committed, the sentence imposed, as well as reference to the Court order issued. These convictions are added by means of **form 25** of the General Regulations Regarding Children.[29] Regulation 39(2)(a) states that the Director-General must be notified in writing of the conviction of a person on a charge as contemplated in section 114(1)(b) of the Act, or of a finding as contemplated in section 114(1)(c) of the Act, by the registrar or clerk of the Court concerned, as the case may be, **within 14 days of such conviction or finding.**[30]

9.2.1.1.4 Should a conviction fall into the category of section 120(4), **it is trite that this name must also appear on Part B of the CPR, as such a person convicted in terms of this section will almost always be unsuitable to work with children.**[31]

9.2.1.1.5 According to the data provided by DSD, 118 convictions added to Part A of the CPR were the result of the offence of rape of a child.[32] **It should follow that at the very least 118 names ought to appear on Part B of the CPR**, merely reflecting the information available regarding rape, on Part A. These names however, although fitting the criteria as set out by section 120(4) of the Act, cannot be added to Part B of the CPR until a Court **has**

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29 See par 7.2.1.3 supra. The Regulations specifically require all convictions of all persons on charges involving the abuse or deliberate neglect of a child; and section 114(1)(c) refers to all findings by a children's Court that a child is in need of care and protection because of abuse or deliberate neglect of the child.

30 The Commission saw no value in testing compliance with submission dates since the issue of poor submission rates in itself made this enquiry unnecessary for the purposes of the finding.

31 See section 120(4)(a) of the Act.

32 The Commission has highlighted the crime of rape, as included in section 120(4) of the Act, in order to illustrate its finding below.

made the necessary finding of unsuitability with regard to the convicted person.

9.2.1.1.6 Bearing in mind that form 25 serves as a mere **notification of convictions**, no finding of unsuitability can be added to the CPR by means of form 25. As a result, the 118 persons convicted of rape which appear in Part A, and ought to appear in Part B because they meet the unsuitability criteria, do not do so because **the finding of unsuitability is not done, submitted, or alternatively not recorded.**

9.2.1.2 **Data for Part B**

9.2.1.2.1 In submitting his complaint to the Commission, the Complainant indicated that at the time of submitting his complaint and according to his knowledge, there were only **26 names** included on Part B of the CPR.

9.2.1.2.2 For Part B of the CPR to be populated, a form 28 must be issued to the Director-General of DSD. The form 28 records a finding that a person is unsuitable to work with children. The Act states that the registrar of the relevant Court, or the relevant administrative forum, or, if the finding was made on application in terms of section 120(2),[33] the person who brought the application, must notify the Director-General of DSD in writing of any finding that a person is unsuitable to work with children.[34]

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33 Section 120(2) states that a finding may be made by a court or a forum of its own volition or on application by-
(a) an organ of state involved in the implementation of this Act;
(b) a prosecutor, if the finding is sought in criminal proceedings; or
(c) a person having a sufficient interest in the protection of children.

34 According to Regulation 42 of the General Regulations Regarding Children, this is done by means of a **Form 28**.

9.2.1.2.3 In responding to the Commission's request for updated confirmation of names relating to unsuitability findings in Part B of the CPR, the DSD initially submitted three (3) sets of data, presented below.

9.2.1.2.4 The DSD submitted a **list of 27 entries named "Database on Unsuitability."** All names on this list have a "CPRB" reference number, information relating to the crime committed, the date of the unsuitability finding, as well as the date of entry.

9.2.1.2.5 In relation to "Persons found to be unsuitable to work with children", the DSD further submitted the following information:

9.2.1.2.6 48 entries of persons found to be unsuitable to work with children between 2010 and March 2012 was submitted. These 48 entries **do not bear a CPR B reference number nor are there findings adjacent to the entry indicating that these people were found unsuitable to work with children.**[35] The information provided herein reflects mere convictions with dates ranging between 2009 and 2011(after the Act came into operation).

9.2.1.2.7 A further 40 entries of persons are listed as unsuitable to work with children from April 2012 to March 2013. Once again, these entries do not have CPRB reference numbers nor do they have unsuitability findings recorded.

9.2.1.2.8 The mere **inconsistencies in recording and presentation** of the information contained in the three (3) data sets described above reflect discrepancies relating to data integrity.

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35 The CRPB reference refers to data added onto Part B of the CPR.

9.2.1.2.9 In attempting to reconcile the various sets of data, the Commission contacted the DSD to provide clarity about the exact number of entries on Part B of the CPR. The DSD was also requested to clarify why the reference numbers differed in their submission under "Persons found unsuitable to work with children". In an email dated 26 March 2013, the DSD sent information indicating that a total of 45 Form 28's had been received by it. Even this number **differed from the list of 27 entries reflected on their initial submission.** The DSD was once again requested to clarify this discrepancy, to which it responded on the 24th of May 2013, that the data base on persons found unsuitable to work with children contains 305 entries, each bearing the acronym CPRB then followed by the number such as 001, 002, etc.

9.2.1.2.10 The Commission therefore received three (3) inconsistent sets of information at each opportunity provided to the DSD for clarity. A possible reason for this could be that some time had elapsed since the submission of the initial information to the Commission and that further entries had been made which caused the numbers to increase from 27 to 305 between March 2013 and May 1013. To this effect, the Commission noted that of the 305 entries submitted to the Commission in May, 189 were added to Part B of the CPR after the Commission received the DSD's formal submission on the 7th of February 2013. 268 entries of findings were made by the DSD since the Commission's initial request for the information in November 2013. In the face of the number of inconsistencies in the various data sets provided **the Commission accepts the DSD's initial submission of 27 names on the Part B of the CPR as being the DSD's formal intended response to its requests.**

9.2.1.2.11 At the time of submission therefore, it is accepted that the database on unsuitability reflected only 27 entries of persons unsuitable to work with

children, *vis a vis* the 270 convictions reflected of Part A of the CPR. (Should information submitted by the DSD in March 2013 be considered, this number may rise to 116[36] *vis a vis* 270 convictions reflected on Part A of the CPR.)

9.2.1.2.12 In responding to the Commission's request regarding the number of form 28's submitted to Part B of the CPR by Regional Courts, the DOJ&CD indicated that **110 form 28's had been submitted by magistrates and regional Courts for the period 1 April 2011 to 30 September 2012** as per paragraph 7.2.3.1. Due to the fact that there is no differentiation between data collection tools of Magistrate and Regional Courts, it is not possible for the Commission to determine which entries were made by courts dealing only with matters of a criminal nature (and therefore in the course of criminal proceedings) and which were made by the different types of Magistrate Courts such as Children's Courts.

9.2.1.2.13 A discrepancy once again arises regarding the number of form 28's alleged to have been submitted by the DOJ&CD, to the number recorded on Part B of the CPR for the same period by the DSD. On the basis of the 110 form 28's having been submitted to Part B of the CPR by the DOJ&CD, a number of at least a 110 names, or close to a 110 names should have been reflected Part B of the CPR. This was not the case as according to the data provided by the DSD, by the 30th September 2012, only 27 entries were made on Part B of the CPR, *vis a vis* the DOJ&CD's 110 submissions.

9.2.2 In the circumstances it is clear that data **cannot be said to be an accurate reflection of statistics relating to persons found unsuitable to work with children**, based on the contradictory evidence submitted.

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36 This inference is made when the Commission takes into account that out of the 305 entries submitted to the Commission in May 2013, 189 were recorded only after the DSD made their formal submission.

9.3. **Submission of Data**

9.3.1. In terms of the framework for the submission of data to Part B of the CPR as described above, submissions of findings of unsuitability are a condition for the population of Part B of the CPR. If these findings are not made, or if they are not adequately submitted, Part B cannot be populated by DSD.

9.3.2. Whilst the DSD is the lead department in the implementation of the CPR, there is a **clear obligation on all relevant organs of state to cooperate** in the establishing of a uniform manner in realising aspects on the Act. This duty of cooperation in terms of section four (4) of the Act requires an **integrated, co-ordinated and uniform manner in the implementation of the Act by relevant departments**. This duty becomes more pronounced where they have a direct obligation to assist in the functioning of measures such as the CPR. An overlap of jurisdictional obligations is therefore envisaged and is inevitable for the DOJ&CD with the primary responsibility of the DSD.

9.3.3. The DOJ&CD is central to the provision of information for the population of the CPR to DSD. It follows that if these submissions are **lacking (as is evident from the record of only 110 submissions made by all Courts in the period under review), the CPR cannot be an accurate reflection of persons found unsuitable to work with children.**

10. **Findings**

10.1.1. **Analysis**

Notwithstanding the admission to the Commission by the DSD and DWCPD that the population and updating of the CPR posed challenges**, on the Commission's own analysis** relying on a consideration of international legal frameworks and obligations, an interpretation of their impact on the state; domestic legislation and judicial precedent, the Commission makes the following findings**:**

10.1.2. In terms of international obligations, South Africa **must take all appropriate administrative and legislative measures to protect children from harm.**[37] This obligation is consonant with the "best interests of the child" measure in the Constitution.

10.1.3. The responsibility of the State in so far as its international obligations are concerned with regard to the rights of children is expanded specifically to require the State to put in place **effective administrative measures to address the protection of children against abuse, neglect and maltreatment.**[38]

10.1.4. In summary the State's obligation in terms of its international obligations, the Constitution and case law is to pass laws and create enforcement mechanisms for the protection of children, particularly when the child is in the care of the State.[39]

10.1.5. While the CPR is clearly a measure envisaged to meet the State's obligations, it cannot be said to be effective in its current implementation. It is clear that the intended purpose of the CPR was to create real and **potential protections for children,** and to provide a prospective source of data for

37 See par 8.1.2 supra

38 See par 8.1.3 supra.

39 See par 8.2.8 supra.

planning, policymaking and resourcing purposes. It is also clear that Part B of the CPR was **to prevent persons who have been convicted of harming a child, to work or have close contact with children.**

10.1.6. Both Parts A and B of the CPR have **a broader purpose** intended to protect children from abuse. To this end, an accurate, complete, and accessible register is vital. The collation of information and management of the CPR is therefore central **to the legislation meeting its intended purpose to effectively protect children from abuse from persons who may have been convicted of crimes against children.**

10.1.7. On the evidence before the Commission it appears that not all Courts are making findings. It is also evident that no system exists in the management of information to enable one to determine which courts are in fact not making findings and to enable measures to be put in place to address this concern. The sum effect is that the aim and objective of the CPR is negated, and rendered **ineffective.**

10.1.8. In this sense the **protective potential** of the measure is also negated as employers do not have an accurate and fully updated data source in the form of the CPR against which to vet **prospective and current employees.** The likelihood of a potential or current employee, who has been convicted in terms of Part A of the CPR, working with children, and thus posing a risk to their wellbeing, consequently increases drastically as the check in the form of a Part B unsuitability entry would not be possible. Similarly risk cannot be mitigated through cross references of Part B with Part A as no measures are in place for such referencing.

10.1.9. Having established a clear duty on the statutory functionary of the State to maintain the CPR, the Commission is obliged to consider the responses

tendered by the DSD explaining the current state of the CPR. In this regard the **Commission takes cognisance of the various challenges** submitted by the DSD in response to its enquiries testing the effectiveness of the implementation of the CPR. It is noted further that in recognition of the significance of the CPR the DSD persevered in its attempts to implement the CPR despite these challenges. In this regard the challenges which the DSD has put to the Commission are recorded in summary below:

10.1.9.1. One of the primary challenges experienced by the DSD as alleged is that of human resource constraints. It was put to the Commission that **although costing was done in relation to the implementation of the CPR initially in 2007, a moratorium was placed on the filling of posts** in the 2009/2010 financial year. This led to existing staff being inundated with the implementation of the CPR as applications for screening against the CPR increased in 2011. Although additional staff has since been allocated to the Directorate addressing the implementation of the CPR, the DSD contends that ***"the current staff is unable to cope with the increasing demand for screening and to meet the requirements of the Act."***[40]

10.1.9.2. The manual determination of data accuracy submitted to the CPR requires time as well as other resources. Due to the **significant number of incorrect or incomplete submissions received by the DSD**, the details contained in some of these submissions are verified telephonically. This in turn has an impact on human as well as financial resources.

10.1.9.3. The DSD's **dependency** on the supply of information by other stakeholders further frustrates the population of the CPR as the accuracy

40 Para 3.2.1.3 of the DSD's initial submission to the SAHRC

of the CPR is largely dependent upon the accurate submission of notifications and findings from stakeholders.

10.1.10. Section 4 of the Act indicates that government should take reasonable measures to the ***maximum extent of their resources*** in order to realize the rights contained in the Act, and thereby reflecting the rights contained in section 28 of the Constitution. No further elaboration is given aside from this qualification. However, section 8 provides that:

The rights which a child has in terms of this Act ***supplement the rights which a child has in terms of the Bill of Rights.***

10.1.11. Without pronouncing on the reasonableness of any state programme, judicial precedent provides a valuable yardstick to the interpretation of reasonableness. In **Grootboom**[41] the Constitutional Court expressly stated that in order for a government programme to qualify as reasonable, measures must cater for the urgent needs of the most vulnerable sectors of society.[42] Judge Yacoob stated on behalf of a unanimous Court that:

To be reasonable, measures cannot leave out of account the degree and extent of the denial of the right they endeavour to realise.[43]

10.1.12. Although it is noted that convictions and unsuitability findings were only submitted to the CPR since 2010, the Commission is of the view that **more than a reasonable amount of time has elapsed from the time the first part of the Act was signed into law in 2006**. The second part of the Act was signed into law in March 2008 which gave all relevant

41 See Fn 15 supra.

42 Grootboom para 39-44; 46; 66; 68; 82.

43 Grootboom para 44.

stakeholders two years to prepare for the full implementation of the Act in April 2010. Additionally, since the commencement of its respective obligations in terms of the CPR, the DSD has had **almost three (3) years to take appropriate steps** to remedy what constitutes a clear violation of the its constitutional and statutory duty to protect the rights of children.

10.1.13. On the basis of the reasoning above, the DSD and National Parliament must therefore determine whether the **lack of sufficient resources, is reasonable and commensurate to the effect such constraints have** on the rights of children to be protected from abuse and neglect in the South African context. This is seen particularly in the context of the exceptionally high rates of crimes against children and their vulnerability as described in paragraph 8.4.

10.1.14. While the ambiguity, inaccessibility and inaccuracies in the CPR appears to be attributed to a range of reasons and actors, the role of **ensuring that all relevant officials are fully aware and capacitated to fulfil their obligations** cannot be gainsaid. The DOJ&CD, in playing a key role in the implementation of the CPR, has disclosed that training programmes for presiding officers in general had been **"inexorably" delayed** due to the migration of all training programmes from the DOJ&CD to the South African Judicial Education Institute (SAJEI). It is therefore likely that all **presiding officers may not be fully aware of their duty in terms of the CPR.** Insufficient awareness contributes to poor application in respect of findings of unsuitability being made and on which updating of the CPR is dependent. Furthermore, no **evidence of a needs assessment of training and awareness for judicial officers appears to have been undertaken or planned.** The responsible department has also not fully considered the role of **other officials involved in the chain of submission.** In this regard,

no work study, needs assessment or intention to include such officials in training have been provided.

10.1.15. The CPR is **not the sole register** capturing details of persons convicted of offences against children.

10.1.16. The **National Register for Sex Offenders (NRSO)** came into operation on 16 June 2009. In terms of the Criminal Law (Sexual Offences and Related Matters) Amendment Act[44] persons who are convicted of sexual offences against a child or a person who is mentally disabled may not work with, supervise or have access to a child or a person with a mental disability in the course of his/her employment. **The aim of the NRSO is therefore much the same as the CPR, and includes the details of persons convicted of sexual offences against children, as with the CPR.**

10.1.17. For the period under review, the number of registered names of sex offenders on the National Register for Sex Offenders (NRSO) **increased from 978 in 2010/11 to 2 340.** This figure indicates a progressive increase in the registration of offenders on the NRSO.

10.2. Although the full operation of **the NRSO falls outside of the ambit of this complaint**, it should be noted that **the number of names registered on Part B of the CPR pales in comparison to the number of names captured on the NRSO**. This is even more concerning when taking into account that the same clerks or registrars of Court submitting information to the NRSO carry the responsibility of submitting these convictions to the CPR.

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44 The Criminal Law (Sexual Offences and Related Matters) Amendment Act No. 32 of 2007

10.2.1. On a consideration of the facts of this matter, both international norms and domestic legal frameworks as well as the South African context, as discussed above, the Commission therefore finds as follows:

10.2.1.1. Having established that the CPR is a mechanism created by statute as a measure designed to prevent and protect children from abuse and neglect; and to realise the constitutional protections afforded children, the resulting **failure to adequately maintain and populate** the CPR as is required by its founding legislation, **violates the rights of children** in terms of section 28 of the Constitution.

10.2.1.2. Based on the information submitted by the DSD and stakeholders, the responsible departments **have been aware of challenges with the updating of the CPR for a period of time.**

10.2.1.3. Reports submitted by DSD indicate that interdepartmentally, some **efforts have been made to improve the effectiveness as well as accuracy of the CPR.**

10.2.1.4. Effectiveness can however only be measured when the CPR is accurately populated, implemented and monitored. This has clearly not occurred.

10.2.1.5. In the light of the contextual considerations of the extreme vulnerability of children, high levels of abuse and neglect of children in South Africa, as well as data captured by the SAPS, and the NRSO, the CPR **cannot be accepted to be a true reflection of crimes committed against children, or to constitute an accurate record of persons found unsuitable to work with children;**

10.2.1.6. The State, in so far as the CPR is concerned is therefore **not fulfilling its objective** of protecting children from abuse and neglect, as set out in section 113 and 118 of the Act, for reasons set out in paragraph 9.2 and 9.3 supra. **The CPR, can therefore not be said to be effectively implemented;**

10.2.1.7. Proper information collation is key to harness the **protective potential the CPR has for children.** Current information management processes including the collation of submissions, receipt and recording of data in so far as the CPR is concerned is inadequate within the DSD as well as between departments.

10.2.1.8. **Training** of all relevant officials for the purposes of fulfilling obligations and responsibilities in respect of the Act, does not appear to have taken account of needs, been planned for, or sustained in any co-ordinated form or manner.

10.2.1.9. Current means of **monitoring, evaluating and general oversight** of implementation needs to be developed further to ensure a cooperative, integrated and cohesive approach to fully implement the CPR in terms of the duty of cooperation between public bodies as prescribed by the Act itself as well as the Constitution.

11. Recommendations

Section 184(2) of the Constitution empowers the Commission to investigate and report on the observance of human rights in the country. In addition to the latter is its duty to **take steps to secure redress where rights have**

been violated. Accordingly, the Commission makes the following recommendations:

11.1. The DSD is required to put in place **urgent measures** to ensure the CPR is accurately and fully populated with available information. This recommendation is made on the basis that the DSD has demonstrated a capacity to increase the capturing of data on Part B of the CPR by **more than 1000%** since the date of the Commission's initial request in September 2012. To this end, the Commission therefore requests that:

11.1.1 The updated CPR is submitted to it within the **next 4 months** for the period commencing 2012 to date.

11.2 The DSD is required to conduct an urgent and **comprehensive audit** of challenges and needs across relevant business units to inform its needs, within the next 3 (three) months. A report of the audit is to be provided to the Commission on completion thereof.

11.3 It is recommended that the DWCPD increase its frequency in **monitoring implementation** of the CPR.

11.4 The DOJ&CD is required to develop a comprehensive programme **for training and sustained awareness** of **all relevant Court officials** regarding their duties under the Act to facilitate and support the accurate, timely updating of the CPR.

11.5 To this end, it is further recommended that in the interim the DOJ&CD take **urgent steps to ensure Court managers and Registrar's are in a position to fulfil compliance obligations on an urgent basis.** The plan referred to in 11.4 above is to be provided to the Commission within

4 months of date hereof. A report detailing the interim steps taken to secure compliance is to be provided to the Commission within 60 days hereof.

11.6 In light of the pending review of the Act, the Commission recommends that the DSD as the leading department in this regard, **consult on possible reforms to the Act with a view to increasing practical efficiencies, accuracy and accessibility.** In this regard **section 120 (4)** of the Act could be considered for reform directed at reducing the administrative burden currently being experienced by the Courts by allowing Courts to deem a person unsuitable to work with children upon the relevant conviction in criminal proceedings:

> *(4) In criminal proceedings, a person must be ~~found~~ **(DEEMED)** unsuitable to work with children -*
> *(a) On conviction of murder, attempted murder, rape, indecent assault or assault with intent to do grievous bodily harm with regard to a child;*

The recommended amendment may **address the need for a second and separate administrative finding of unsuitability from having to be made**, allowing the names of persons so convicted to be added to the CPR without the requirement of an unsuitability finding.

11.7 It is recommended further that the DOJ&CD consider a **review of the CPR *vis a vis* the operation of the NRSO.** There appears to be a number of levels of overlap between the two registers which have the potential to duplicate resources. In this regard the viability of a binary register system must be explored.

12. Appeal

12.1 You have the right to lodge an appeal against this decision. Should you wish to lodge such an appeal, you are hereby advised that you must do so in writing within 45 days of the date of receipt of this finding, by writing to:

The Chairperson, Adv M.L. Mushwana

South African Human Rights Commission

Private Bag X2700

Houghton, 2041

Signed in BRAAMFONTEIN **on the** 15TH **day of** October **2013.**

Commissioner Lindiwe Mokate

South African Human Rights Commission

Submitted by the Gauteng Provincial

Date: June 2013