

“NRSO” To Be Made Public: Balancing The Protection Of Vulnerable Members Of Society And Employment Rights



The recent announcement by the Minister of Justice and Constitutional Development, Mmamoloko Kubayi, that the National Register for Sex Offenders (“NRSO”) will be made public by the first quarter of 2025 has sparked both significant debate and positive reception nationwide.

The NRSO was originally established under the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (“**the Criminal Act**”). Its purpose is to record the names of those found guilty of sexual offences against vulnerable persons, to protect vulnerable groups from these individuals and to ensure that offenders do not work with vulnerable persons. To date, access to the NRSO has been restricted, requiring employers to apply for the records and the clearance certificates from the Department of Social Development. With its impending public release, employers across various sectors may begin using it as a standard screening tool in hiring decisions or to assess employees who may be part of the NRSO list.

While this move is widely regarded as necessary to protect vulnerable groups, it also raises some legal concerns for employers and businesses, particularly regarding the potential implications if their employees, or candidates for employment, appear on that list.

The definition of “employer” is wide and encompasses both government and other types of organisations (including companies, other forms of undertakings, and institutions).

One of the purposes of the Criminal Act and as read with the NRSO is to ensure that offenders, specifically offenders employed in roles of authority, supervision or care, do not work or engage with vulnerable persons. In terms of section 40 of the Criminal Act, a “person who is vulnerable” includes:

- A child or a person with a mental disability;
- A female under the age of 25 years who receives tuition at an institution of higher learning or vocational training (our view is that this specifically refers to young women attending universities, colleges, vocational training or learnership programs at an institution and that may also be an employee of an organisation or otherwise exposed to an employee on the NRSO list);

- A person being cared for in a shelter that provides services to victims of crime;
- A person with a physical, intellectual, or sensory disability receiving community-based care and support services;
- Older persons over the age of 60 receiving community-based care and support services.

Section 45(2)(d) of the Criminal Act mandates that an employer must take reasonable steps to prevent an existing employee (in such roles as described above) whose particulars are recorded in the NRSO list from continuing to gain access (including interaction or other forms of engagement) to vulnerable persons during their employment. This may include transferring the employee to another position or, if necessary, terminating the employment relationship. To the extent that an employer embarks on a process of transfer, or, terminates the employment relationship (if this is applicable), an employer is still required to comply with South African labour laws, including in relation to procedural and substantive fairness.

Employers of course have a duty to take reasonable care for their employees' safety as well as other individuals in instances where such risk exists (as is the case under the Criminal Act regarding *vulnerable persons*), and in which extends beyond merely protecting them from physical harm. The public release of the NRSO accordingly presents a significant development in protecting vulnerable groups from potential harm (pertaining to an employment context).

Non-compliance with the provisions of the Criminal Act in terms of section 45(3) will result in employers being held liable on conviction to a fine, or, to imprisonment not exceeding seven years, or to both.

Additionally, and for purposes under South African employment laws, section 60 of the Employment Equity Act ("**EEA**"), and as read with the Code of Good Practice on the Prevention and Elimination of Harassment in the Workplace ("**the Code on Harassment**"), also imposes *vicarious liability* on employers. This is in circumstances in which employers are held liable for not taking the necessary steps to prevent or eliminate unfair discriminatory conduct brought to its attention in relation to an employee(s) discriminatory conduct within the scope of their employment. In our view, it would include even *such conduct that is likely to occur given the allegations or knowledge on risk*. In the premise relating to the article bulletin, and which should be borne in mind, are those discriminatory grounds under the EEA pertaining to *sex, gender, disability, age*, amongst other grounds, including on *any other arbitrary ground*.

In the converse but still relating to the EEA and that of unfair discrimination, there is also legal authority which addresses the complexities of hiring individuals with criminal histories and the potential for *unfair discrimination* including that based on an *arbitrary ground* (in relation to an employee or candidate with such criminal history). This also highlights an employer's adherence to the Code of Good Practice on the Integration of Employment Equity into Human Resource Policies and Practices ("**the Code on HR Policies**"), which states, "*An employer should only conduct integrity checks, such as verifying the qualifications of an applicant, contacting credit references, and investigating whether the applicant has a criminal record, if **this is relevant to the requirements of the job***" (own emphasis for purposes of this article bulletin).

The Code on HR Policies certainly assists on how employers should navigate the complexities of employment offers contingent on background checks, including criminal checks, and the broader implications from an employment equity law standpoint. Particularly on whether, amongst other factors, it is relevant to the inherent requirements of the job. However, our view is that the Criminal Act, and as read with

the NRSO, is unique in its nature and has an intended legislative purpose to protect vulnerable persons (if such vulnerable persons are exposed to employees referred to on the NRSO list as part of their employment).

In terms of compliance, the legislator under the Criminal Act, and as read with the NRSO, of course requires employers to specifically comply with such provisions when it relates to an offender who is employed by it.

Over and above such requirements under the Criminal Act, it will be interesting to note upon the NRSO's publication how hiring practices for purposes of background checks and general vetting, or, even those who are existing employees, may be impacted. Especially whether this may lead to an increase in labour disputes, particularly that of *unfair discrimination or other unfair/unlawful conduct*, and whilst noting to the extent applicable the legal requirements under the Criminal Act. This could apply to a candidate applying for a job, an existing employee, or an employee who is considered vulnerable, or is in an otherwise analogous position, and would require an employer to take such steps against an employee or other person that may pose a risk (flowing from the NRSO's publication).

Employers must in its assessment, in conjunction with balancing the interests of all who may be impacted, including vulnerable individuals (as a priority), justify their hiring decisions or continued employment (for existing employees). This must, indeed, be in line with the Criminal Act, EEA and in conjunction with the Code on HR Policies, Code on Harassment, and other laws.

As the NRSO's public rollout approaches, HR professionals, legal teams, and policymakers ought to refine, to the extent applicable, hiring protocols to align with legal obligations to appropriately be equipped in order to comply as well as mitigate against legal risks in view of maintaining a safe workplace and to protect those vulnerable individuals.

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The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.

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