Legislative Backgrounder
Amendments related to the National Sex Offender Registry

***An Act to amend the Criminal Code, the Sex Offender Information Registration Act and the International Transfer of Offenders Act* (S.C. 2023, c. 28)**

2024

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Introduction

Introduced as Bill S-12, *An Act to amend the Criminal Code, the Sex Offender Information Registration Act and the International Transfer of Offenders Act* (the Act), received Royal Assent on October 26th, 2023.

This Backgrounder describes the policy intent behind the Act as it relates to the sex offender registration regime and provides a detailed examination of changes made to the regime by the Act. It does not contain information about other key provisions of the Act, such as those relating to publication bans and those enhancing victims' rights to post-sentencing information, which were enacted to empower victims and survivors of crime. This document should not be considered legal advice.

Former Bill S-12 enacted a targeted set of reforms with two primary objectives related to the National Sex Offender Registry (NSOR):

(1) to respond to the October 28, 2022 Supreme Court of Canada (SCC) decision in *R v. Ndhlovu*;
(2) to strengthen the NSOR regime by addressing challenges relating to its operation and enforcement that have been identified by federal, provincial, and territorial partners responsible for its administration.

For further information on the former Bill, readers may wish to consult the LEGISinfo website, which includes links to major speeches and to committee proceedings in the Senate and the House of Commons, available at: https://www.parl.ca/legisinfo/en/bill/44-1/s-12. For further information relating to publication bans and other victim-related issues, readers my wish to refer to the Justice Canada website's page on Victims of Crime: https://www.justice.gc.ca/eng/cj-jp/victims-victimes/factsheets-fiches/pdf/pb-eng.pdf

Background

1. National Sex Offender Registry

The National Sex Offender Registry (NSOR) was created in December 2004 through the *Sex Offender Information Registration Act*, S.C. 2004, c. 10 (SOIRA). It is a national database that provides police with access to current and reliable information on registered sex offenders in order to help them prevent or investigate sexual offences. As of April 18, 2023, there were 43,707 individuals required to register on the NSOR.

The *Criminal Code* (sections 490.011 to 490.032), in combination with SOIRA, create the legislative framework for the NSOR. The *Criminal Code* establishes the legislative scheme to require individuals to comply with an order to register on the NSOR, sets the duration of reporting obligations, and provides a process to apply for the termination of an order. The SOIRA sets out the reporting obligations of registered sex offenders, including the frequency of the reporting and the type of information required, such as their name, aliases, date of birth, gender, passport and driver's licence information, addresses, place of work or volunteer activities, phone numbers, addresses of schools they are enrolled in, photos and physical description, and information on any vehicle they own or use regularly.

In addition to annual in-person reporting at a registration centre managed by law enforcement, offenders must also report any change in their address, name, employment or volunteer information, or the fact that they have received a driver's licence or passport within seven days. In most jurisdictions, they may provide the latter information by electronic means or registered mail. Offenders must also report any absence from their main or secondary residence of seven days or more, and offenders convicted of a child sex offence must also report any international travel of any duration. Individuals who fail to comply with their obligations under the SOIRA can be charged with a criminal offence and, if convicted, sentenced to a maximum of two years of imprisonment.

Access to the information contained in the NSOR is strictly controlled. It is not publicly available and can only be accessed by members of law enforcement for the purposes of preventing or investigating a crime of a sexual nature.

There are multiple avenues through which a person can be required to register on the NSOR. The most common way a person is required to register is as a result of being convicted or found not criminally responsible on account of mental disorder (NCR) for a designated offence in Canada.

There are other mechanisms to require registration, including for offenders who have committed sexual offences abroad (referred to in this document as "international offenders") and those who are being transferred to Canada for sexual offences through the *International Transfer of Offenders Act* (referred to in this document as "ITOA offenders").

When the NSOR was created in 2004, a prosecutor could apply to the court for an order that an offender be required to register. The application would be made following sentencing or an NCR verdict for a designated offence. The judge would then decide whether to make the order and could decline to make an order if they were satisfied that the impact of an order on the offender, "including on their privacy or liberty, would be grossly disproportionate to the public interest in protecting society through the effective investigation of crimes of a sexual nature, through the registration of information relating to sex offenders under the SOIRA" (former subsection 490.012(4)).

During a 2009 review of the NSOR by the House of Commons Standing Committee on Public Safety and National Security (SECU), evidence revealed that only 50% of sex offenders were being required to

register. This was understood to primarily stem from the exercise of prosecutorial discretion to not seek a SOIRA order, including as part of a plea agreement. In light of this evidence, the Committee recommended law reform to provide for automatic registration for the majority of designated offences, but keeping limited judicial discretion for cases where registration would be grossly disproportionate to the purpose of registration. In 2011, Parliament enacted the *Protecting Victims from Sex Offenders Act* S.C. 2010, c. 17, which enacted reforms that removed discretion for both the prosecutor and the judge, meaning everyone who is convicted or found NCR of a designated offence has been automatically required to register on the NSOR since these amendments came into force on April 15, 2011.

Context

1. *R. v. Ndhlovu,* 2022 SCC 38

On October 28, 2022, the SCC in *R.* v. *Ndhlovu* struck down two *Criminal Code* provisions relating to the NSOR. Specifically, the Court struck down mandatory registration on the NSOR (former section 490.012) and lifetime registration of individuals convicted of more than one designated offence in the same proceeding (former subsection 490.013(2.1)).

The SCC found that the provisions violated the right to life, liberty and security of the person as protected by section 7 of the Canadian *Charter of Rights and Freedoms (Charter)*. The Court held that these provisions deprived these offenders of their section 7 right to liberty in a way that did not comply with the principles of fundamental justice, in particular overbreadth. Specifically, the Court held that requiring automatic registration for individuals who are not at an increased risk of reoffending had no connection with the objective of helping police prevent or investigate sexual crimes and was therefore unconstitutionally overbroad. The Court also struck down the mandatory lifetime registration provision in subsection 490.013(2.1). The Court found that this provision was also unconstitutionally overbroad because it could capture circumstances where the multiple offences were not associated with a higher risk of reoffending.

The SCC gave Parliament one year, until October 28, 2023, to respond to the issue of mandatory registration and struck down the mandatory lifetime provision immediately and retroactively.

Overview of Reforms

1. National Sex Offender Registry

Criminal Code

I. Designated offences (section 490.011)

There are two categories of designated offences that can lead to offenders being ordered to register on the NSOR. The first category of designated offences are current and historical sexual offences. The second category are those that are committed with the intent to commit an offence listed in the first category of offences. These offences are not sexual in nature.

The Act aims to simplify the designated offence provisions in the *Criminal Code* by defining the first category as "primary offences" and the second category as "secondary offences". This is not a substantive change, nor does it affect the way in which the two categories of designated offences operate. It is intended to simplify the description of each category in the *Criminal Code*.

New offences

The Act also adds additional existing *Criminal Code* offences to the two lists of designated offences.

First, the Act adds non-consensual distribution of intimate images (section 162.1) to the list of "primary" offences, and clarifies that the offence of aggravated sexual assault of a victim under the age of 16 (paragraph 273(2)(a.2)) is also a "primary" offence.

Second, the Act adds the offences of overcoming resistance to an offence by choking (paragraph 246(a)), administering a noxious thing (section 245), and extortion (section 346) to the list of secondary offences. These offences, while not sexual in nature, are often committed in a sexual context. The addition of extortion to the list of secondary offences in particular allows courts to consider registration on the NSOR for cases involving the growing trend of "sextortion" but excludes cases involving extortion with no sexual intent.

II. Registration on the NSOR (section 490.012)

In *R. v. Ndhlovu*, the SCC struck down the automatic requirement for individuals to register on the NSOR without exception if they were convicted of, or found NCR for, a "primary" designated offence.

To respond, the Act retains mandatory registration in a narrower set of circumstances and enacts a form of judicial discretion in all other circumstances by creating a presumption of registration that can be rebutted if the offender can satisfy the prescribed test.

Mandatory registration (subsections 490.012(1) and (2))

Mandatory registration continues to apply to two categories of offenders: (1) repeat sexual offenders who have previously been convicted of a primary designated offence or who have previously been required to register on the NSOR (subsection 490.012(2)), and, (2) offenders who commit a sexual offence against a child that was prosecuted by indictment and received a sentence of imprisonment of two years or more (subsection 490.012(1)). According to risk factors established by social science evidence, discussed in more detail below, these groups of offenders pose a higher risk of re-offending sexually.

Courts do not have discretion to exempt offenders who fall under either of these categories from registration.

Presumption of registration (subsection 490.012(3))

In all other circumstances, there is a presumption of registration, but the judge retains discretion not to make a SOIRA order if the individual can establish that the order would be grossly disproportionate in its effects on them, or that making the order would be overbroad because it would have no connection to the NSOR's purpose of helping police prevent or investigate sexual offences.

The amendments do not reinstate prosecutorial discretion. This means that orders to register on the NSOR are not dependent on the prosecution bringing an application. Courts are required to consider making an order in all cases.

Factors guiding the application of the presumption (subsection 490.012(4))

In order to help guide courts in deciding whether to make an order, the Act provides a list of factors that are to be considered in assessing an offender's risk of sexual re-offending. This list incorporates well-established risk factors based on empirical social science research. The factors are:

(a) The nature and seriousness of the designated offence

While the seriousness of the sexual offence in question is not in and of itself a predictor of sexual recidivism, it can be relevant in predicting the seriousness of any re-offending if it does occur. For example, there is evidence to suggest that an individual who used force or violence when committing a designated offence has an increased probability of using the same level of violence again if they do reoffend. In addition, a history of non-sexual violence is associated with increased likelihood of sexual recidivism.

The nature of the offence can be useful in assessing the offender's risk of recidivism. Individuals who commit offences against children, animals, or offences involving sexualized violence such as sadism, present a higher risk of sexual recidivism than other individuals[1]. In addition, individuals who commit non-contact sexual offences where there is no direct contact with the victim, such as voyeurism, exhibitionism, or possession of child pornography, have a higher risk of sexual re-offending than individuals who commit sexual offences involving contact with the victim[2].

(b) The victim's age and other personal characteristics

Sexual offending against a victim under the age of 12 is a well-established predictor of sexual recidivism[3]. In addition, research has shown that male individuals who have offended against male victims sexually re-offend at a higher rate than their male counterparts who commit sexual crimes against female victims exclusively[4].

(c) The nature and circumstances of the relationship between the offender and the victim

Individuals who sexually offend against victims outside of their immediate family (i.e., unrelated victims) show higher sexual recidivism rates compared to those who offend solely against family members. In addition, individuals who sexually offend against strangers pose a higher risk of sexual recidivism than those who offend against acquaintances or someone otherwise known to them[5].

(d) The personal characteristics and circumstances of the offender

There are numerous traits in an offender than can assist in determining the risk of re-offending. Individuals who have committed sexual offences share many risk factors that have been found to predict general and violent recidivism such as age, antisocial orientation, impulsivity, and instability in relationships[6]. Indeed, many of the major risk factors used to predict general and violent recidivism are also applicable to the prediction of sexual recidivism. These include impulsive and reckless behaviour, employment instability, aimless or inappropriate use of leisure time, and having negative social influences (i.e., antisocial peers). Certain conditions including antisocial personality disorders including psychopathy are relevant to the risk of recidivism. Other psychological attributes such as anger, hostility, and resentment are also reliable predictors of general, violent, and sexual recidivism[7]. The current age of the offender is particularly relevant in predicting sexual recidivism and is a factor incorporated into mainstream risk assessment tools designed to predict sexual reoffending. The older an offender, the lower their risk of recidivism. Several empirical sources indicate that risk to sexually reoffend is significantly lower for offenders over the age of 60 relative to their younger counterparts[8].

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[1] Evidence of R. Karl Hanson. *R. v. Ndhlovu* (April 10-11, 2017). Edmonton 110548831Q1 (ABQB).

[2] *Ibid.*

[3] Cantor, J. M., & McPhail, I. (2015). *Sensitivity and specificity of the phallometric test for hebephilia*. Journal of Sexual Medicine, 12(9), 1940-1950. .

[4] Helmus, L. M., & Thornton, D. (2015). *Stability and predictive and incremental accuracy of the individual items of the Static-99R and Static-2002R in predicting sexual recidivism: A meta-analysis*. Criminal Justice and Behavior, 42(9), 917-937. https://doi.org/10.1177/0093854814568891.

[5] *Supra* note 1.

[6] Hanson, R. K., & Morton-Bourgon, K. E. (2005*). The characteristics persistent sexual offenders : A meta-analysis of recidivism studies.* Journal of Consulting and Clinical Psychology, 73(6), 1154-1163. https://psycnet.apa.org/doi/10.1037/0022-006X.73.6.1154; Mann, R. E., Hanson, R. K., & Thornton, D. (2010*). Assessing risk for sexual recidivism: some proposals on the nature of psychologically meaningful risk factors.* Sexual Abuse, 22(2), 191–217. https://doi.org/10.1177/1079063210366039.

[7] *Supra* note 1.

[8] Helmus, L., Thornton, D., Hanson, R. K., & Babchishin, K. M. (2012). *Improving the predictive accuracy of Static-99 and Static-2002 with older sex offenders: Revised age weights*. Sexual Abuse, 24(1), 64–101. https://doi.org/10.1177/1079063211409951

In contrast, some risk factors are unique to sexual offending, including emotional congruence with children, sexual preoccupation, and holding negative or sexist attitudes towards women.[9]

Moreover, individuals who have never established a stable, long-term, intimate relationship, or who are in conflictual relationships, present a higher risk of sexual re-offending[10].

(e) The person's criminal history, including the age at which they previously committed any offence and the length of time that they have been in the community without committing an offence

An offender's criminal history is one of the strongest risk factors associated with recidivism[11]. There is strong evidence that a history of sexual offending increases the likelihood that an individual will commit another sexual offence in the future. First-time sexual offenders are significantly less likely to sexually re-offend than those with previous sexual convictions. A history of non-sexual offending will also increase the risk of sexual recidivism, albeit less so than a history of sexual offending.

The age at which an individual started offending (as opposed to the age at which the offence in question is committed) is also relevant. In general, the earlier the onset of crime, the greater the risk of persistent criminal behaviour including sexual offending[12].

The length of time in the community without offending is also relevant. The longer offenders remain offence-free in the community, the less likely they are to re-offend sexually. After 20 years in the community without committing a sex offence, almost all sexual offenders pose no more risk of sexual recidivism than individuals who have never been arrested for a sex-related offence but have been arrested for some other offence[13].

(f) The structured assessments of experts who have examined the person, including the use of validated tools designed for the prediction of sexual recidivism

Structured risk assessment tools have been developed to systematically assess risk in specific populations by minimizing subjective bias. For example, in Canada, the Static-99R is the most commonly used actuarial scale to predict sexual offending. While unstructured professional opinions can be given some consideration, they are not as accurate in predicting recidivism as structured risk assessment tools. Structured risk assessment tools take into consideration the factors listed above in categories (a) to (e).

[9] Mann, R. E., Hanson, R. K., & Thornton, D. (2010). *Assessing risk for sexual recidivism: some proposals on the nature of psychologically meaningful risk factors.* Sexual Abuse, 22(2), 191–217. https://doi.org/10.1177/1079063210366039.
[10] *Supra* note 7.
[11] Bonta, J., & Andrews, D. A. (2017). *The psychology of criminal conduct* (6th ed.) Routledge.
[12] *Supra* note 6.
[13] *Supra* note 1.

It is important to note that while other factors may appear to be relevant to sexual recidivism, they are not supported by empirical research evidence[14]. As such, they should **not** be considered when assessing an offender's risk of sexual recidivism. These include:

- Poor social skills
- Low victim empathy
- Depression
- Guilty plea
- Lack of motivation for treatment
- Major mental illness (severe disorders, such as hallucinations and delusion)
- Low self-esteem
- Denial (tendency to claim that they did not perpetrate the sexual criminal acts)
- Loneliness/isolation

It is also important to be mindful that the evidence referred to in the risk factors described above are most applicable to male offenders. Risk factors and risk assessment tools identified in the research may not be suitable to assess the risk of sexual recidivism among female offenders.[15] Research has shown that women who commit sexual offences have significantly lower rates of sexual recidivism than their male counterparts.[16] Current data indicate that 99% of all offenders in the NSOR are male.

Offences committed abroad and ITOA (subsection 490.02905(2) and section 490.029111)

Under the *Criminal Code*, offenders who travel to Canada with a conviction or NCR finding outside Canada for an offence that is the equivalent of a designated sexual offence can be served with a notice to register on the NSOR by the Attorney General of a province or the Minister of Justice of a territory.

Under the *International Transfer of Offenders Act* (ITOA), offenders who are serving sentences abroad for an offence that is the equivalent of a designated sexual offence and who are transferred to Canada to serve the remainder of their sentence can be served with a notice to register on the NSOR by the Minister of Public Safety.

Given that these offenders are not ordered to register on the NSOR by a court, but rather through a notice to comply with the NSOR that is served on them when they arrive in Canada, the discretion to be exempt from the NSOR operates differently in this context.

Exemption orders

All international and ITOA offenders who otherwise meet the criteria for inclusion in the NSOR will continue to be served with a notice to comply. However, the Act allows them to subsequently apply (within one year) to a court for an order exempting them from their obligation to register. Like individuals in Canada, they have to establish that the impact of registering on the NSOR would be grossly disproportionate in its impact on them or that it would be unrelated to the purpose of helping police prevent or investigate crimes of a sexual nature. The same guiding factors as described above apply to exemption decisions. By having their application for exemption considered by a court, rather than by the

[14] *Supra* note 7.
[15] Marshall, E., Miller, H. A., Cortoni, F., & Helmus, L. M. (2021). *The Static-99R Is Not Valid For Women: Predictive Validity in 739 Females Who Have Sexually Offended.* Sexual Abuse, 33(6), 631–653. https://doi.org/10.1177/1079063220940303.
[16] Cortoni, F., Hanson, R. K., & Coache, M.-È. (2010*). The Recidivism Rates of Female Sexual Offenders Are Low: A Meta-Analysis.* Sexual Abuse, 22(4), 387–401. https://doi.org/10.1177/1079063210372142.

provincial Attorney General, territorial Minister of Justice, or Minister of Public Safety who serves them with their initial notice to comply, as the case may be, this approach places these offenders on the same footing as domestic offenders whose orders to register on the NSOR are always considered by a court.

III. Duration of registration obligations (section 490.013)

Orders to register on the NSOR can be made for varying lengths of time, namely 10 years, 20 years, or for life depending on the circumstances. If the offence for which the order is made carries a maximum penalty of two or five years imprisonment, or if the offence was prosecuted by summary conviction, the order must be made for 10 years. If the offence for which the order is made carries a maximum penalty of ten or fourteen years imprisonment, the order must be made for 20 years. Orders are made for life when the offence for which the order is made carries a maximum penalty of life imprisonment, or if the individual is a repeat offender.

The 2011 amendments also created mandatory lifetime orders for offenders convicted of, or found NCR for, more than one primary designated offence in the same prosecution, which were ultimately struck down by the Supreme Court of Canada in *Ndhlovu*.

The Act addresses the lifetime order provision that was found unconstitutional in *Ndhlovu* (former subsection 490.013(2.1)) but does not impact the duration of other orders. As such, for offenders convicted of multiple offences in the same prosecution, the Act requires judges to impose a lifetime order if they are satisfied that the offences show a pattern of behavior that demonstrates a higher risk of re-offending sexually. This approach is designed to ensure that only individuals who pose a higher risk of re-offending are ordered to register for life.

Offences committed abroad and ITOA (sections 490.029051 and 490.029112))

Variation order

Given that offenders who commit sexual offences abroad and those who are transferred under the ITOA are not ordered to register on the NSOR by a court, but rather through a notice to comply that is served on them when they arrive in Canada, the approach to lifetime orders for offenders convicted of more than one offence operates differently in this context.

All international and ITOA offenders who were convicted of or found NCR for more than one foreign offence that is equivalent to a primary designated offence in the *Criminal Code* will continue to be served with a notice to comply with the SOIRA for life. However, in order to comply with the decision in *Ndhlovu*, the Act allows them to apply to a court for an order varying the duration of their obligation. They are subject to the same test as domestic offenders and will have to satisfy the court that their offences do <u>not</u> show a pattern of behavior that demonstrates a higher risk of re-offending sexually. When a court grants a variation order in these cases, it will determine the new duration based on the designated offence listed in the notice that has the longest maximum term of imprisonment provided for in Canadian law.

By having the duration of their obligation considered by a court, rather than by the provincial Attorney general, territorial Minister of Justice or Minister of Public Safety who serves them with their initial notice to comply, as the case may be, this approach places these offenders on the same footing as domestic offenders whose orders to register on the NSOR are always considered by a court.

IV. Applications for individual relief (April 15, 2011 to coming into force of Bill S-12) (sections 490.04 to 490.07)

In *Ndhlovu*, the SCC indicated that individuals who are currently subject to SOIRA orders as a result of the unconstitutional provisions should be able to apply to a court to seek to be removed from the NSOR. The Act created a statutory framework for applications by individuals who were subject to the unconstitutional provisions between April 15, 2011 (the date on which the previous provisions came into force) and October 26, 2023, when the new provisions enacted by Bill S-12 came into force. Individuals whose obligations to comply with the SOIRA pre-date 2011 are not impacted by the decision in *Ndhlovu*.

Exemption orders (section 490.04)

The Act enacted provisions that allow individuals who are currently registered on the NSOR to apply to be relieved from registration and associated obligations. This provides them with an opportunity to seek individual relief consistent with the SCC's decision. The test for an exemption is the same test that applies at the time of registration, including the list of factors. The court must consider the application for exemption based on the circumstances at the time the order was made.

Where the court makes the exemption order, it is also required to order that all information relating to the individual in the NSOR as a result of the original registration order or obligation be permanently removed.

Exemptions are not available for individuals who were convicted in Canada of sexual offences against children where the offence was prosecuted by indictment and for which a prison sentence of two years or more was imposed, or for repeat offenders. This makes the exemption mechanism consistent with the Act's retention of automatic registration for these two groups of offenders.

International offenders and offenders subject to the ITOA who applied for an exemption order within one year of the start of their obligation under sections 490.02905 or 490.029111, are also permitted to apply, as long as they have not already made an application for an exemption order under those other provisions. Exemptions for international offenders and offenders subject to the ITOA are not subject to the same limitations as domestic offenders in the case of sexual offences against children and repeat offending because these offenders' convictions will have originated from different legal systems around the world, which may be based on a wide range of different traditions, principles and sentencing regimes, and which may not be comparable to the Canadian justice system. When considering exemption applications from these offenders, it is expected that courts will apply the entirety of the new statutory framework, including the list of factors, to their decision-making.

Without this framework, these individuals would have their cases for individual relief considered pursuant to the *Ndhlovu* decision only, which struck down mandatory registration as unconstitutional without proposing an alternate framework for courts to consider when determining whether an individual should be registered on the NSOR. As such, courts would not have the benefit of the approach to mandatory registration or the risk factors that are intended to inform judicial discretion that were enacted in former Bill S-12.

Variation orders

In the context of lifetime orders, the provisions provide a framework for seeking relief for those individuals who have mandatory lifetime orders under former subsection 490.013(2.1), and who have not sought or received individual relief prior to the coming into force of the reforms. Individuals applying to have the length of their order changed after the reforms came into force on October 26, 2023 can only have their order adjusted if the court is satisfied that the multiple offences do not demonstrate a pattern of behaviour that would justify a lifetime order. When a court grants a variation order in these cases, they will determine the new duration based on the designated offence listed in the notice that has the longest maximum term of imprisonment provided for in Canadian law.

V. Termination orders (sections 490.015, 490.016, 490.026, 490.027, 490.02912, 490.02913)

Under the *Criminal Code*, individuals who are required to register on the NSOR can apply to a court for an order to terminate their obligations under the SOIRA if a certain amount of time has elapsed since the order was made. For 10-year orders, individuals can apply for a termination order five years after the initial order was made. For 20-year orders, individuals can apply for a termination order 10 years after the initial order was made. For lifetime orders, or in cases where an individual is subject to more than one order, individuals can apply for a termination order 20 years after the initial order (or the most recent order in cases of multiple orders) was made. Individuals can also apply for a termination order immediately upon receiving a pardon or record suspension. Individuals whose applications are refused can re-apply for termination if 5 years have elapsed since their previous application, as long as no new order is made in that time.

Under the previous law, in order to be granted a termination order, the individual had to establish that the impact on them of continuing their obligations, including on their privacy or liberty, would be grossly disproportionate to the public interest in protecting society through the effective prevention or investigation of crimes of a sexual nature through the registration of information relating to sex offenders under the SOIRA. The court considered the application for termination based on the circumstances at the time of the application before it.

To ensure consistency throughout the NSOR regime in the *Criminal Code*, the Act amended the test for granting a termination order to align it with the test that applies at the time of sentencing or NCR verdict. The court is authorized to grant the termination order if continued registration would be grossly disproportionate in its impact for the person, or if continued registration would not be connected to the objective of helping police investigate or prevent crimes of a sexual nature. In making that determination, the court is required to consider the same factors that apply at the time of sentencing or verdict.

The Act also permits NCR accused to apply for a termination order immediately upon receiving an absolute discharge from a court or Review Board. An absolute discharge can only be granted where the individual is deemed to not pose a significant threat to the safety of the public. If a termination order is granted, the NCR accused is relieved from their obligation to comply with the NSOR.

This amendment responds to the decisions of the SCC in *Ontario (Attorney General) v. G* (2020) and the Ontario Court of Appeal in *G. v. Ontario* (Attorney General) (2019). These decisions involved section 15 Charter challenges to both Ontario and Canada's sex offender registration legislation. The courts in both decisions held that accused found NCR were treated more harshly, as compared to offenders convicted of the same conduct, and that this violated the equality guarantee in section 15 of the *Charter* because it discriminated on the basis of mental disability. The harsher treatment arose from the fact that convicted offenders were eligible to apply to be relieved of their registration obligations upon receiving a pardon or record suspension. By contrast, there was no comparable mechanism available to individuals found not criminally responsible – who are not eligible for pardons or record suspensions – when they receive an absolute discharge from a *Criminal Code* Review Board.

VII. Appeals (sections 490.014, 490.02906, 490.029113, 490.06)

Prior to the enactment of the Act, there was no mechanism to appeal an order for mandatory registration except for orders made as a result of the commission of secondary offences. The appeal provision had been significantly limited when mandatory registration was enacted, as it was understood that there would be no reason to appeal an order for which there was no discretion. However, without a general appeal mechanism, it was challenging in many jurisdictions for parties to remedy some errors, in particular to the duration of mandatory orders. For example, an order may have been imposed for 20 years even though the underlying designated offence only carried a maximum penalty of two years imprisonment and therefore should have only been imposed for 10 years.

The Act now allows all orders made under section 490.012 of the *Criminal Code* and all decisions relating to the duration of an order under section 490.013 to be appealed. This responds to the concerns raised by some provinces and territories about the inability to address some judicial errors, but also to reflect the reinstatement of limited judicial discretion to the regime. The Act provides that variations of lifetime orders and orders granted under the individual relief provisions can also be appealed. All these decisions can be appealed on any ground that raises a question of law or of mixed law and fact.

VIII. Compelling the offender's appearance

Summons (section 490.0132, form 6.3)

The Act enacts a new summons provision to fill a gap in the *Criminal Code* that occurs in a situation where the court inadvertently fails to consider the issue of a SOIRA order at the sentencing hearing, or when issuing an NCR verdict. Previously, subsection 490.012(4) of the *Criminal Code* provided that the court retained jurisdiction over the matter for 90 days, but there was no mechanism for the court to compel the individual to return to court for the consideration of the issue, and therefore the order could not be made if the individual did not appear voluntarily.

The summons provision in the Act addresses this issue, and also ensures that failure to comply with this summons is a criminal offence, punishable pursuant to the general offence of failure to comply with a court order under subsection 145(3).

Warrant to compel compliance (section 490.03121, subsection 703(2), form 6.4)

The Act enacts a new warrant to help facilitate compliance with the NSOR. The effectiveness of any registry is enhanced when compliance with the requirements is high. Currently, it is estimated that up to 20% of individuals with SOIRA obligations are non-compliant in some way, such as by failing to register on an annual basis, or by failing to update some of the required information as necessary. The only legislative mechanism to facilitate compliance with the Registry under the previous regime was to arrest an individual and lay a charge for failure to comply under section 490.031 of the *Criminal Code*. This was time consuming, resource intensive, and would not always result in compliance.

The Act creates a compliance warrant scheme (similar to that which exists in Ontario's *Christopher's Law*) that authorizes police to seek a warrant to arrest someone who is non-compliant with their SOIRA obligation and bring them to a reporting centre. If, at the reporting centre, they provide the relevant and necessary information, a police officer is not permitted to lay a charge for non-compliance. If the offender still does not comply, it is open to law enforcement to exercise their discretion to lay a charge for non-compliance. This warrant can be executed anywhere in Canada.

This warrant is expected to increase compliance with the NSOR, without increasing the burden on the courts to deal with an increased volume of administration of justice offences.

IX. Offences committed abroad – obligations on offenders (section 490.02911)

The *Criminal Code* requires international offenders to advise a police service of their arrival in Canada within seven days, and to provide their name, date of birth, gender and address. However, the obligation under the previous law did not require the offender to provide enough information to allow police to determine if the foreign offence was equivalent to a Canadian designated offence, and thus whether the individual should be required to register on the NSOR.

To address this challenge, the Act requires international offenders to provide additional information to police upon their arrival in Canada, namely the country in which they were convicted or found NCR, the offence for which they were convicted or found NCR, their phone number, and the dates of (1) the commission of the offence, (2) the conviction or NCR finding and (3) the imposition of sentence, if different from the date of conviction.

Sex Offender Information Registration Act

X. Reporting of travel (paragraphs 6(1)(a) and (b))

Under the previous law, the SOIRA required registered offenders to provide notice to the police before travelling, either domestically or internationally, from their primary residence for more than seven days. However, it did not specify when this notification must be given. This frustrated the ability of the police to conduct a risk assessment and to notify other law enforcement agencies who may have needed to be advised of the offender's travel. In addition, offenders were able to choose to provide either the "address" or "location" where they would be staying during their absence, which enabled them to simply provide a general location rather than a specific address.

In order to enhance public safety and increase the regime's effectiveness, the Act made a number of amendments to the travel notification provisions in the SOIRA. First, it requires an offender to provide 14 days' notice to the police before their travel departure. This includes an exemption for exceptional

circumstances that could not reasonably be foreseen. In such cases, police can request verification of the exceptional circumstances from the offender. Second, it specifies that offenders must report every address at which they will be staying and that they can only provide a general location if no specific address is available.

XI. Operational amendments

The need to respond to the *Ndhlovu* decision also provided an opportunity for other reforms to strengthen the NSOR to address ongoing operational and enforcement challenges identified by provincial and territorial partners and the Royal Canadian Mounted Police (RCMP).

Notice to provincial police (subparagraph 490.018(1)(d)(iv))

The *Criminal Code* describes what courts must do when providing notice to law enforcement when it makes an order for an offender to register on the NSOR. Among other obligations, they are required to send a copy of the order to the RCMP, which is the agency responsible for the registration of offenders in all jurisdictions except Québec and Ontario. In these jurisdictions, the Sûreté du Québec and the Ontario Provincial Police are responsible for the registration of offenders. However, they were not previously named in the *Criminal Code* as recipients of orders to register on the NSOR. The Act makes an amendment to ensure that orders are sent to the appropriate police force in each case.

Retention of information (subsection 15(1))

Previously, the SOIRA dictated that information stored in the NSOR database had to be retained indefinitely, subject to authorization to remove it in very limited circumstances, such as when the individual in question receives a pardon. This indefinite retention period did not serve a connection to the purpose of the Act. It also created challenges from a technological perspective. In order to ensure that unnecessary information is not stored in the database, the Act changed the retention period to fifty years after the offender's death.

Disclosure of information (paragraph 16(2)(b), subsection 16(4))

The SOIRA lists specific circumstances in which information contained in the NSOR can be disclosed. The Act makes amendments to this list to allow the NSOR regime to operate efficiently. This includes amendments to allow information to be disclosed to police, prosecutors or judges in the course of obtaining a compliance warrant, and to police to enable them to verify an offender's compliance with their reporting obligations.

2. Coming into Force

The amendments came into force on the day they received Royal Assent, October 26, 2023, except the amendment to section 743.2 of the *Criminal Code*, which is to come into force on a day or days to be fixed by the Governor in Council.