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# Memo

To: Rhode Island Senate Judiciary Committee

From: Katherine Godin, Esq., *on behalf of the Rhode Island ACLU*

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Re: Constitutional concerns with RI S 2572 (Adam Walsh Act bill)

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The following is a preliminary list of the constitutional concerns and fatal flaws with 2012 Senate Bill S 2572 (proposing the implementation of the Adam Walsh Act, hereafter the "AWA").

In summary, Megan's Law was enacted in 1996 to warn/inform citizens about the risk sex offenders pose to the community. The AWA sadly takes affirmative steps to undermine the effectiveness of sex offender registration and community notification. Most importantly, the AWA makes it less likely to accurately predict sex offense recidivism, and would be quite costly to implement (compared to what the State would save in Federal funding by enacting the legislation), in addition to the glaring constitutional violations inherent in the proposed Act.

## The Adam Walsh Act is *not* an effective and accurate way to predict sex offender recidivism

### 1. The *only* factor considered in classifying an offender is what crime he or she has been convicted of

First of all, the AWA would eradicate the current classification and registration system for sex offenders and would replace the system with a classification process in which sex offenders are classified based *solely* by the offense he or she is convicted of. Under the AWA, factors such as age, mental health issues, psychological profiles (such as pedophilia) and participation in sex offender treatment, which have all been suggested to have an affect on an offender's risk of recidivism, will be irrelevant to an offender's classification level. Therefore, a sex offender will have little to *no* incentive to participate in sex offender treatment.

**2. More stringent registration requirements under the AWA are unnecessary, counter-productive and will not accurately predict recidivism rates**

Second of all, the AWA would eliminate the 10 year, once per year registration requirement for most sex offenders and would replace it with the following registration requirements:

Tier I – 15 years, once ever year
Tier II – 25 years, once every 6 months
Tier III – life, once every 3 months

These excessively stringent registration requirements may very well lead sex offenders to re-offend because there will be little to no incentive to rehabilitate. See Tewksbury, Richard & Lees, Matthews, Perceptions of Sex Offender Registration: Collateral Consequences and Community Experiences, 26 Sociological Spectrum 309-334 (2006) (Stringent sex offender laws have been found to actually create an incentive *not* to conform because of the social stigma and collateral consequences of being labeled a sex offender).

As it is, recidivism rates for sex offenders are *far* lower than recidivism rates for non-sex offenders. According to the most recent recidivism rates collected by the U.S. Dept. of Justice, 43% of sex offenders in state prisons were re-arrested within three years of release from incarceration (compared to 69.5% of non-sex offenders). As for re-convictions, sex offenders had a 24.8% recidivism rate, whereas non-sex offenders came in at 48.9%. See U.S. Dept. of Justice, Bureau of Justice Statistics, "Prisoner Recidivism," available at http://bjs.ojp.usdoj.gov/index.cfm?ty=datool&surl=-/recidivism/index.cfm; Matthew R. Durose, Patrick A. Langan, Erica L. Schmitt, Recidivism of Sex Offenders Released from Prison in 1994, BJS No. NCJ 198281 (Nov. 2003). Some researchers have found that recidivism rates are higher for registered sex offenders than for unregistered sex offenders. See Prescott, JJ & Jonah Rockoff, Do Sex Offender Registration and Notification Laws Affect Criminal Behavior? (2008), available at http://www.law.virginia.edu/pdf/olin/0708/prescott.pdf. Others have found no statistically significant difference between the recidivism rates for registered sex offenders and unregistered sex offenders. See Adkins, G., D. Huff, and P. Stageberg, The Iowa Sex Offender Registry and Recidivism (2000); Schram, Donna and Cheryl D. Milloy, Community Notification: A Study of Offender Characteristics and Recidivism (1995).

More importantly, 95-96% of sex offenders arrested have no prior sex offense convictions. Therefore, there is no effective way to predict who will commit a sex offense. See Sandler, Jeffrey et al., Does a Watched Pot Boil?: A Time-Series Analysis of New York State's Sex Offender Registration and Notification Law 14 Psychol. Pub. Pol'y & L. 284, 297 (2008); Prescott & Rockoff (2008), *supra*. Despite the fact that various jurisdictions throughout the U.S. have had some kind of registration and/or notification system in place for at least fifteen years, there was just a news article released yesterday in Wisconsin noting that 93% of felony sex offense cases charged in one county involved first-time offenders. See Karen Madden, "Analysis: Most sex offense charges involved first-time offenses," *Wisconsin Rapids*

*Tribune* (April 28, 2012), available at: http://www.wisconsinrapidstribune.com/apps/pbcs.dll/article?AID=2012204280579,

In fact, this community notification system distorts the fact that most sex crimes are not committed by some scary man lurking in the bushes. Instead, **97%** of child sex abuse victims up to 5 years old knew the offender prior to the offense. For those victims 6-11 years old, 95% knew the offender previously. For those 12-17 years old, the statistic is 90%. In general, for sexual assault victims under 18 years of age, 93% knew their offender before the incident. Howard N. Snyder, Ph.D., Sexual Assault of Young Children as Reported to Law Enforcement: Victim, Incident, and Offender Characteristics 10 (July 2000), National Center for Juvenile Justice, NCJ 182990. The same study found that over 72% of adult victims knew their offender prior to the incident. Id. Parents would do better to teach their children about "good touch-bad touch" and make their children feel more comfortable to report abuse to their parents.

Instead of more accurately informing the public of the risk each sex offender poses to the community, the AWA will unnecessarily alarm (and scare) citizens for no reason. Inextricably, statutory rape (i.e., third-degree sexual assault) is listed as a Tier III offense, meaning that the offender will be required to register every three months for the rest of his or her life. Under the AWA, an 18-year old who has sex with his 15-year old girlfriend will be branded a sex offender for the rest of his life, and will be seen as posing the same threat to the community as someone who commits rape or first-degree child molestation.

**3. The AWA will cause unnecessary and damaging harm to sex offenders**

Sadly, stricter registration and notification requirements will also create significant harm to those labeled as sex offenders. More stringent registration requirements (including longer registration periods) will lead to even more difficulty finding employment, housing and stable social connections, and will make it more likely that sex offenders will be harassed and/or assaulted. See State v. Krieger, 163 Wis.2d 241, 257-58 (1991) (A survey of the Wisconsin prison system revealed that sex offenders were at a greater risk for various forms of physical, sexual and psychological abuse than inmates not convicted of sex offenses); see also 42 U.S.C. §§ 15601-02 (the Prison Rape Elimination Law); 103 DOC 519.01-11 (the Dept. of Corrections' Sexually Abusive Behavior Prevention and Intervention Policy); Farmer v. Brennan, 511 U.S. 825, 833 (1994) ("Being violently assaulted in prison is simply not part of the penalty that criminal offenders [should] pay for offenses against society"); No Escape: Male Rape in U.S. Prisons, Human Rights Watch, p. 59 (April 2001) (prisoners convicted of sexual offenses against minors are more likely to be targeted for sexual assault in prison than other offenders); see also Doe v. Attorney General, 426 Mass. 136, 144 (1997) (noting the possible harm of public dissemination to the offender's earning capacity); Tweksbury (2006), *supra* (discussing the social stigma and collateral consequences endured by registered sex offenders).

## The Adam Walsh Act is unconstitutional on several grounds

### 1. It violates separation of powers

In 2010, the Supreme Court of Ohio[1] ruled that the AWA violated the separation of powers doctrine. In the decision, the Court found that the executive branch was unconstitutionally allowed to open final judgments of the Superior Court in order to re-classify sex offenders. State v. Bodyke, 933 N.E.2d 753 (Ohio 2010). The same problem will occur in this state. Under the proposed AWA, the executive branch will be allowed to vacate judgments from the Superior Court and re-classify those sex offenders. Such tampering with final orders of the court is unconstitutional and violates separation of powers.

### 2. It violates procedural due process

In 2009, the Rhode Island Supreme Court considered the current registration and community notification system in State v. Germane, 971 A.2d 555, 578 (2009). In the Germane decision, our Supreme Court found that sex offenders have a protected liberty interest in being classified, and noted in dicta that denying sex offenders the opportunity to challenge their classification levels would deprive them of procedural due process. Id. at 580.

### 3. It may violate substantive due process and constitute an *ex post facto* law

While courts have been hesitant to find a substantive liberty or privacy interest in not being subjected to sex offender registration and notification requirements, and has not yet found the requirements to constitute an *ex post facto* law, given the U.S. Supreme Court's recent decision of Padilla v. Kentucky, in which the Court found that a criminal defendant has a constitutional right to be advised of the immigration consequences of a conviction, courts may find that the AWA requirements are so invasive, stringent and unnecessary that they violate an offender's substantive due process rights and constitute an *ex post facto* punishment.

### 4. Part of the AWA is overbroad

The AWA is supposed to warn citizens of the risks *sex offenders* pose. Yet in the proposed bill, kidnapping (with no sexual element), as well as "failure to file factual statement about an alien individual" are listed as sex offenses triggering registration. With no way of differentiating between a sexually-related kidnapping and a non-sex related kidnapping (as the current system theoretically does), the inclusion of these non-sex offenses constitutes an unconstitutionally broad portion of the AWA.

[1] It should be noted that Ohio was the first state to implement the AWA.

**5. Part of the AWA is unconstitutionally vague**

Part of the registration requirements require an offender to list where he or she "habitually lives or sleeps," with no clarification for what constitutes "habitually." Such a requirement is unconstitutionally vague and may lead to an offender unknowingly violating the registration requirements (and thereby be charged with a felony offense for failing to register).

**The Adam Walsh Act is being introduced to prevent the loss of Federal grant money, yet will be far more costly to implement**

This bill has been introduced to prevent the continued[2] loss of 10% of Federal Byrne Grant money, which under current estimations will equate to approximately $100,000-$200,000 per year. See Justice Policy Institute, "What will it cost states to comply with the Sex Offender Registration and Notification Act?," available at http://www.justicepolicy.o-rg/images/upload/08-08_FAC_SORNACosts_JJ.pdf.

Yet the cost for RI to implement the AWA is estimated at $1,715,760 for the first year. Id. Under its provisions, the executive branch will have to look at *every single person* incarcerated at the ACI and Wyatt, as well as *every person* convicted of a felony to determine if he or she qualifies as a sex offender required to register (even if the triggering offense was from 30 or 40 years ago). Under the Retroactive registration," anyone currently incarcerated for any offense, or on parole/probation for a felony, who has previously been convicted of a "sex offense" (even if the individual is currently under no obligation to register and is not currently incarcerated or on probation or parole for a sex offense) must be identified and classified as a sex offender.

The state will have to spend money on:

- New employees (trained to enforce/maintain this legislation)
- Software (installing and maintaining the electronic database)
- Additional prison space (for all those charged with failing to register)
- Court and administrative costs (with litigating the constitutionality of the legislation, as well as litigating failure to register cases)
- Law enforcement costs (monitoring sex offenders and verifying their information)
    - Police officers/employees of the "Department" (i.e., Department of Public Safety or "designee") will have to track down those sex offenders who fail to update their information or fail to register
    - Under proposed R.I.G.L. § 11-37.3-17, if a sex offender fails to update their registration, the "Department" must notify the RI State Police, any other law enforcement agency that is "appropriate," and if necessary, the U.S. Marshal's Service and/or Interpol

[2] The Rhode Island State Legislature has rejected various versions of this bill for several years now, and as a result of last year's refusal to implement the AWA, missed the last deadline to comply before being denied the grant money.

    - The dept. must not only collect DNA samples, but also ID all schools he "will" be attending, where he'll receive temporary lodging, whenever he'll be gone from his residence for a week or longer
    - Unless the sex offender's appearance has not changed "significantly," the dept. must take new photos of all offenders every three months to a year (depending on the tier the offender is assigned to)
- Legislative costs (fixing all of the problems with the legislation)

The AWA is not only costly and unconstitutional, but it is damaging and unnecessary for all parties involved. I, on behalf of the Rhode Island ACLU, urge the Senate Judiciary Committee to recognize these fatal flaws and to not allow this damaging piece of legislation to be passed into law.