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Memo

To: Rhode Island House Finance Committee

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

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Re: Constitutional concerns with RI H 5557 (Adam Walsh Act bill)

The following is a short summary of the constitutional concerns and fatal flaws with 2013 House Bill S 5557 (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. We currently have a system of registering sex offenders with authorities, and also providing community notification of sex offenders in the area, classified by the individual offender's likelihood of re-offending and degree of dangerousness in 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.

Under our current system, sex offenders also undergo several risk assessment tests, including the Static-99, Static-2002 and Stable-2007 for adults, and the J-SOAP for juveniles. Such tests are seen as validated tools to determine the likelihood a particular sex offender is to re-offend in the future based on his or her past. Such tools would be disregarded under the AWA, and would serve no function in determining an offender's classification level.

Last year, several knowledgeable researchers in the field published an article entitled A Multi-State Recidivism Study Using Static-99R and Static-2002 Risk Scores and Tier Guidelines from the Adam Walsh Act, Research Report Submitted to the National Institute of Justice (2012), available at https://www.ncjrs.gov/pdffiles1/nij/grants/240099.pdf. The study looked at states that had implemented the Adam Walsh Act, and found that its offense-based classification system is "unrelated to sexual recidivism, except in Florida, where it was **inversely associated with recidivism**." Id. at 1 (emphasis added).

More significantly, the authors noted that "[t]he findings indicate that the current AWA classification scheme is likely to result in a system that is **less effective in protecting the public than the classification systems currently implemented** in the states studied." Id. (emphasis added). On that point, the study found that Tier 2 SOs under the AWA actually had higher rates of recidivism and/or presented a greater risk to the community than Tier 3 SOs. Id. at 3.

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 19 ½-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.

Strangely, under this bill, someone convicted of possession of child pornography under federal law would be a Tier I, while those convicted of the same offense under state law would be a Tier II.

The State has identified a **significant** number of Level 2 offenders under the current system who would be re-classified as Tier III offenders under the AWA. They would be re-classified as the highest risk of offenders for no other reason than the crime they have been convicted of, and after they have been assessed by the Sex Offender Board of Review and/or the Superior Court as posing a moderate risk to the community.

According to SMART Office employee Scott Matson, only one state has fully implemented AWA to date, and approximately fifteen others are in "substantial compliance." In comparison, at least nineteen states use risk assessments (as we currently do) to classify offenders.

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 would violate separation of powers by vacating judicial decisions regarding classification levels and replacing them with legislatively-mandated classification levels

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.

While the State often makes the argument that cites a portion of the Germane decision suggesting that an offense-based system would not violate procedural due process, the question remains whether the same would be true as applied to those already classified under our current system and re-classified under the AWA.

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.

[1] It should be noted that Ohio was the first state to implement the AWA, and has at this point severely limited its effectiveness due to several court decisions finding it unconstitutional. See In re C.P., 967 N.E.2d 729 (Ohio 2012) (finding the lifelong, automatic registration and notification requirements on juvenile offenders violated their constitutional rights to due process and against cruel and unusual punishment); State v. Williams, 952 N.E.2d 1180 (Ohio 2012) (finding the AWA amendments violated the state constitutional prohibition against retroactive statutes).

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," involuntary servitude and murder of a juvenile are listed as sex offenses triggering registration. With no way of differentiating between a sex-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.

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 a loss of 10% of Federal Byrne Grant money, which under recent 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.org/images/upload/08-08_FAC_SORNACosts_JJ.pdf.

Yet the cost for RI to implement the AWA has been estimated at $1,715,760 for the first year. Id. Under its provisions, the executive branch will have to look at *every single person* current under a criminal sentence in Rhode Island (whether that be a suspended sentence, probation, parole, home confinement or incarceration) 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), in addition to all those already registering as sex offenders.

The state will have to spend money on:

- Potential 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)
- Department of Public Safety costs (monitoring sex offenders and verifying their information)
    - Longer and more frequent periods of registration (instead of once a year for 10 years for most offenders under the current system, DPS employees will have to re-register offenders every 3, 6 or 12 months for 15, 25 years or life, depending on the offender's new tier; most Level 2s under the current system will be re-classified as Tier IIIs under AWA, requiring lifetime registration)
    - 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
    - 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

    - 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)

While the State often cites the aid of federal funds to combat some of these costs, there is a significant question pending as to what the true costs of implementing this bill would be.

In summary, 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 House Finance Committee to recognize these fatal flaws and to not allow this damaging piece of legislation to be passed into law.