



STATE OF NEW YORK
DIVISION OF CRIMINAL JUSTICE SERVICES
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July 31, 2007

Ms. Laura L. Rogers
Director
SMART Office
Office of Justice Programs
U.S. Department of Justice
810 Seventh Street, NW
Washington, DC 20531

Dear Director Rogers:

Thank you for the opportunity to comment on the proposed Guidelines on the Adam Walsh Act. In preparing the comments set forth below, advice was solicited from a number of State agencies that regularly deal with issues affecting sex offenders, including the Division of Criminal Justice Services, the Division of Probation and Correctional Alternatives, the Office of Mental Health, the Department of Correctional Services, the Division of Parole, the Office of Children and Family Services, and the Board of Examiners of Sex Offenders.

I. Retroactivity

The current guidelines provide that a state will have substantially complied with the Sex Offender Registration and Notification Act (SORNA) standards when it registers three categories of sex offenders who were convicted prior to the state's implementation of those standards: (1) those who are incarcerated or under supervision, either for the predicate sex offense or for some other crime; (2) those who are already registered or subject to a pre-existing sex offender registration requirement under the jurisdiction's law; or (3) those who thereafter re-enter the state's criminal justice system because of a conviction for some other crime (whether or not it is a sex offense).

This provision of the guidelines should be amended to allow states greater flexibility in determining the retroactive applicability of the SORNA standards. When each state first created its sex offender registry, it made a choice about how the registration requirements would be applied to previously convicted offenders. In some states, like New York, eligible offenders would be required to register if they were then in custody or on parole or probation. *See, e.g.*, Ark. Code Ann. § 12-12-905; 11 Del. Code § 4121(a)(4); Mich. Comp. Laws Ann. § 28-723. Other states required all previously convicted sex offenders to register even if they were no longer in custody or under supervision at the time the registry became effective. *See, e.g.*, Alaska Stat. § 12.63.100(5); Ca. Penal Code § 290.

The decision on retroactive applicability raises substantial practical and policy concerns that are more appropriately addressed by the individual states. The first and third guideline

categories will greatly expand the pool of registerable sex offenders in New York State. It will also require the State to search the prior criminal history of each person entering the criminal justice system to determine whether, at any time in the past, he or she was convicted of, or adjudicated for, a qualifying sex offense. This is both burdensome and unworkable because in many cases older records will no longer be available, or they will be incomplete or inaccurate. Some juvenile delinquency and youthful offender records will have been sealed or expunged. See N.Y. Fam. Court Act §§ 375.2, 375.3 (juvenile delinquency records); N.Y. Criminal Procedure Law § 720.35(2) (youthful offender records). This is consistent with New York's long standing policy that recognizes that young offenders have a strong potential for rehabilitation, and can be more effectively redirected into becoming productive citizens if they are not stigmatized as criminals or registered sex offenders.

Moreover, the expansion of the pool of registerable sex offenders will only exacerbate the difficulties that states are now facing in finding appropriate housing for sex offenders. In New York and in some other states, there are state or local restrictions that bar registered sex offenders from living in certain areas. See Joseph L. Lester, Off to Elba! The Legitimacy of Sex Offender Registration and Employment Restrictions, 40 Akron L. Rev. 339, 351-352 (2007) ("Nineteen states and many other local communities have enacted residence restrictions on former sex offenders, prohibiting them from living a certain distance away from schools, child-care facilities, public swimming pools, public playgrounds, churches, or any area where minors congregate,"). Even apart from such legal restrictions, placement of offenders is often made more difficult by community opposition. As a result, there is already a shortage of housing for the existing pool of sex offenders, which in New York consists of those who have committed a sex offense more recently. Any extension of the registration requirements to those who have committed sex crimes in the distant past will exacerbate this housing shortage. In addition, it may have the unintended consequence of undermining public safety by forcing offenders to become homeless or to go underground, thus making it difficult to track their whereabouts.

Finally, we have grave concerns that the retroactive expansion of the registration obligations to juvenile delinquents and youthful offenders will likely be constitutionally challenged under the ex post facto clause of the federal constitution, and/or various provisions of the State constitution. Past judicial decisions have upheld these requirements for adult sex offenders. However, for youths who are already under supervision following a non-criminal adjudication – entered without all of the procedural safeguards attending a criminal conviction (see, e.g., N.Y. Family Court Act § 342.2) – the lengthy period of registration, the onerous reporting requirements and the upsetting of sealing and expungement provisions leading to public disclosure of their acts and of other personal information about them would be cited in serious court challenges to a state statute compliant with the currently proposed guidelines.

II. Substantial compliance

SORNA vests the Attorney General with the authority to determine whether states have passed legislation that "substantially implement[s]" the Act. According to the guidelines, the SMART Office will make a case-by-case determination whether deviations from a requirement of SORNA or the guidelines "will or will not substantially disserve the objectives of the requirement." The guidelines also recognize that states will have "some latitude" in meeting SORNA's "substantial" compliance standard, but the examples that are given of potentially acceptable deviations from the SORNA requirements concern relatively minor administrative deviations. This definition of "substantial" compliance should be broadened to allow states

greater latitude in deviating from SORNA, in particular with respect to the decision whether or not to require registration of juvenile delinquents.

SORNA requires states to register all juveniles over the age of 14 who are found to have committed a qualifying sex offense, and to include information about them and their offenses on the state's publicly available website. For many states, including New York, this will require a substantial change in the treatment of juvenile delinquents.

New York and almost half of the other states do not require registration of juvenile delinquents. To the contrary, juvenile delinquency records are explicitly protected from public disclosure by laws requiring that these records be kept confidential and/or that they be sealed or expunged. See N.Y. Family Court Act §§ 375.2, 375.3, 380.1, 381.2; N.Y. Criminal Procedure Law § 720.35. Shielding these juvenile delinquents from public scrutiny recognizes that adolescents do not appreciate the consequences of their actions in the same manner as adults, and that stigmatizing them as criminals will undermine their ability to redirect their lives, through education and employment, into becoming fully functioning, law-abiding adults. Branding such youths as sex offenders – through registration requirements and public posting of their identities on the Internet – would be a paradigmatic shift in the state's treatment of such offenders. And, in combination with the residency restrictions discussed above, it could prevent juveniles from reuniting with their families or reintegrating into their communities.

By the same token, New York also has a unique law that allows fourteen and fifteen year old offenders who commit certain serious, sexually violent acts to be prosecuted as adults.¹ If convicted, these “juvenile offenders” will receive sentences of imprisonment that eventually will require their transfer to the adult correctional system, and require them to register as sex offenders. See N.Y. Criminal Procedure Law § 1.20(42); N.Y. Penal Law § 30.00(2); N.Y. Correction Law § 168-a(1). While this juvenile offender option already requires registration of those youths who commit the most serious sex offenses, it will not require that all juveniles over the age of fourteen who commit qualifying sex offenses to register because persons adjudicated to be juvenile delinquents, instead of being prosecuted as adults, are not subject to registration requirements.

The guideline definition of “substantial compliance” should be broadened to allow states to make these types of policy choices with respect to juvenile registration. Indeed, because such a large number of states have recognized that youths may be better served by such non-disclosure, the guidelines should be amended to recognize that a state may substantially comply with SORNA, even if it chooses not to register juvenile delinquents whose cases have been adjudicated in a Family Court rather than the criminal courts.

Additional flexibility should be written into the substantial compliance definition to permit states to maintain a risk-based, rather than a strict offense-based, tier system. In New York, most criminal charges are resolved by plea negotiations, which typically will include bargaining for the particular offense to which the defendant will plead guilty. If the offense of conviction is the only determinant of which tier will control an offender's registration obligations, it is anticipated that defendants will be less likely to agree to plead guilty to more serious sex offenses. In a case with a vulnerable victim, which a prosecutor will often be reluctant to bring to trial, this could result in


¹ In addition, the age of criminal responsibility in New York is sixteen. N.Y. Penal Law § 30.00(1). As a result, New York already routinely registers sixteen and seventeen year old sex offenders.

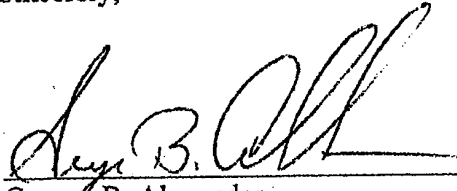
the prosecutor agreeing to allow the defendant to plead to a low-level sex offense, and there would be no opportunity to have the offender's registration obligation turn on the seriousness of his or her actual conduct. This would be an unfortunate and unintended consequence of a strict offense-based tier system. An expanded definition of "substantial compliance" would, however, allow states the flexibility to accommodate those features of their own criminal justice systems that, while serving the purposes of SORNA, require different procedural and policy choices.


Finally, to the extent that the goal is to encourage all states to adopt SORNA in order to facilitate the creation of a more uniform federal registry, it seems likely that a rigid and inflexible definition of substantial compliance that requires states to deviate from long-standing procedural and policy choices will create disincentives for states to do so, especially when coupled with what appear to be the extraordinary administrative and resource burdens created by SORNA. Giving states more leeway in these areas will, by contrast, encourage them to pass legislation that will serve the public safety objectives of SORNA, while still respecting and accommodating their own state policies and procedures.

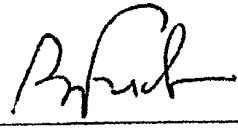
Once again, we appreciate the opportunity to comment on the proposed Guidelines on the Adam Walsh Act. Although we strongly support sex offender registration, and doing everything possible to protect our families and communities from sexual crimes, we have substantial concerns about some aspects of the Adam Walsh Act. We hope that our concerns will be given serious consideration, and that the final version of the Guidelines will address the issues discussed above.

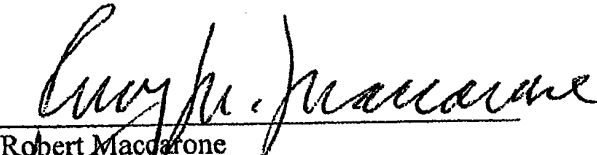
Sincerely,



Denise O'Donnell
Commissioner
NYS Division of Criminal Justice Services


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Chairman and Chief Executive Officer
NYS Division of Parole


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