

July 30, 2007

Laura L. Rogers, Director
SMART Office - Office of Justice Programs
U.S. Department of Justice
810 7th Street NW
Washington, D.C. 20531
Email: getsmart@usdoj.gov

Re: OAG Docket No. 121--Comments on Proposed
Guidelines to Interpret and Implement the
Sex Offender Registration and Notification Act (SORNA)

Dear Ms. Rogers:

As the U.S. Department of Justice considers how best to interpret and implement the Sex Offender Registration and Notification Act of 2006 (SORNA), the Association for the Treatment of Sexual Abusers (ATSA) welcomes this opportunity to provide feedback regarding the application of SORNA to youth adjudicated within the juvenile court system, and to certain adult offenders.

The Association for the Treatment of Sexual Abusers (ATSA) is a multidisciplinary membership organization comprised up of 2,500 professionals in the various areas of sex offender management. Our membership includes community corrections officers, policy makers, researchers, mental health professionals, law enforcement agents, polygraph examiners, and victim advocates. We have been in existence for over twenty years and our membership includes the world's leading researchers on sexual violence as well as many of the most experienced sex offender management professionals in the United States and Canada. Our members are responsible for the management of all types of sexual offenders, including youth, adults, and those who are developmentally disabled.

ATSA recognizes that sexual assault is a serious social problem with profound effects for victims, their families, and society. ATSA holds public safety as its paramount concern. The purpose of this response should not be misconstrued as a statement of sympathy for sex offenders. Rather, ATSA advocates for evidence based social policies which are most likely to achieve goals of enhanced community protection while minimizing obstacles to successful criminal reintegration and affording offenders opportunities for rehabilitation.

Overview and General Comments:

Though the guidelines to SORNA indicate that it is the result of many amendments to the Wetterling Act, it must be noted that Ms. Wetterling herself has stated serious concerns about the current act and the use of the registry as mandated. She stated in a June 18, 2007 interview that, "We're setting up an environment that is not healthy. It's just anger driven, anger and fear. It's not smart and it does not get us to the Promised Land." ATSA agrees and believes there are more effective and less expensive means to safer communities.

The introduction of the SORNA guidelines makes bold claims about the goals that registration and public notification can achieve. These claims have little foundation given that all available data indicate that registration and notification have had little to no impact on the rates of sex crimes in general or recidivism rates more specifically (Adkins, Huff, & Stageberg, 2000; Schram & Milloy, 1995; Walker, Maddan, Vasquez, VanHouten, & Ervin-McLarty, 2005; Washington State Institute for Public Policy, 2005; Welchans, 2005; Zevitz, 2006). Additionally, the overwhelming numbers of cases that reach the attention of the authorities each year involve offenders with no prior involvement in the criminal justice system. The numbers of cases involving already registered offenders are quite small.

Over-inclusive public notification dilutes the public's ability to identify the most dangerous offenders. A growing body of research demonstrates that public disclosure can disrupt the stability of low-risk offenders in ways that may interfere with successful reintegration and may actually exacerbate risk for criminal offending (Levenson & Cotter, 2005; Levenson, D'Amora, & Hern, 2007; Sample & Streveler, 2003; Tewksbury, 2004; Tewksbury, 2005; Tewksbury & Lees, 2006;2007; Zevitz, 2006; Zevitz & Farkas, 2000). Therefore, from a community safety perspective, Internet disclosure and community notification should be limited to those offenders who pose the highest risk of re-offense.

Additionally, internet disclosure and community notification should be limited to those offenders whose public disclosure does not risk identifying the victim. Without such limitations, victims related to the offender may be less willing to report their crimes.

Summary of Points Addressed:

- Because the majority of sexual offenses against children are committed by perpetrators known to the victim, there are significant limitations to the ability of public disclosure to prevent sex offenses.
- Over inclusive public notification can be harmful to the public by diluting the ability to identify the most dangerous offenders.
- Community education will better benefit the community by providing needed information on how to protect our children.
- SORNA as applied to youth is contrary to the core purposes of our nation's juvenile justice system and will interfere with effective treatment and rehabilitation.
- SORNA will almost certainly decrease parental willingness to report or seek help for children's sexual behavior problems when they understand the result will be lifetime public registration.
- The definition of aggravated sexual abuse (victims under 12) utilized in SORNA will disproportionately place young offenders in the highest tier(s) and place more of them on the public registry.
- If SORNA is to be applied to youth in the juvenile system then judges should be allowed some discretion.
- Registration and public community notification should be waived for those adjudicated in the juvenile court system.

- The guidelines as promulgated will affect the family members of youth and are detrimental to the efforts of the government to support families as the fabric of strong communities.
- The protection of victims' identities and the safety of family members must remain a priority in considering any policy involving registration and notification.
- Numerous studies show that the maintenance of employment, housing, and education are key components to reducing re-offense risk. Registration and notification policies must take these into account.
- Classification systems should utilize empirically derived risk assessments rather than the unproven offense-based categories proposed in AWA.
- The current published guidelines contradict various state supreme court and constitutional decisions, and undermine the careful work some states have done to construct research-based risk assessment procedures.
- As currently structured, SORNA is likely to increase plea bargains to non-sexual offenses, increase the use of jury trials, and further clog the court systems. This will result in some sex offenders going unadjudicated and without punishment or rehabilitation.
- Because residence restrictions are tied to registration status in most states, there will likely be an emergent housing crisis for youth on registries who are prevented from living with their families due to proximity to schools, parks, and places where children congregate.

Guidelines Affecting Youth

SORNA Guidelines Affecting Youth are Contrary to the Research

Research sponsored by the U.S. Department of Justice does not support the application of SORNA to youth. According to the National Center of Sexual Behavior of Youth (NCSBY; a training and technical assistance center developed by the Office of Juvenile Justice and Delinquency Prevention and the Center on Child Abuse and Neglect at the University of Oklahoma Health Sciences Center), juvenile sex offenders engage in *fewer* abusive behaviors over *shorter* periods of time and engage in *less aggressive* sexual behavior (National Center on Sexual Behavior of Youth, Center for Sex Offender Management (CSOM) and U.S. Department of Justice, Office of Juvenile Justice and Delinquency Prevention, (2001). *Juveniles Who Have Sexually Offended; A Review of the Professional Literature Report*). In addition, the recidivism rate of juvenile sex offenders is substantially lower than rates for other delinquent behavior (5-14% vs. 8-58%). In fact, more than 9 out of 10 times the arrest of a youth for a sex offense is a one-time event, although the youth may later be apprehended for non-sex offenses typical of other juvenile delinquents (Zimring, F.E. (2004). *An American Tragedy*. University of Chicago Press).

NCSBY also found that youth are more responsive to treatment than adults and are less likely than adults to re-offend given appropriate treatment. In other words, youth whose conduct involves sexually inappropriate behavior – even when assaultive – do not pose the same threat to public safety as do adults with regard to the duration or severity of sexual offending behavior.

In fact, recent meta-analyses of published and unpublished studies show very similar trends. Policy-makers therefore have an obligation to proceed with registration and notification only under severe circumstances. The scientific data demonstrate that including youth on public sex offender registries for 25 years to life is out of proportion to the risk that the majority of them pose.

Application of the Guidelines to Youth Will Interfere with Effective Treatment and Rehabilitation

SORNA as applied to youth is contrary to the core purposes, functions, and objectives of our nation's juvenile justice systems in that it strips away the confidentiality and the overall rehabilitative emphasis that form the basis of effective intervention and treatment for youthful offenders.

It cannot be too strongly emphasized that youth implicated by the Act have not been convicted of a criminal offense, by deliberate action of the states' legislatures and prosecuting authorities. Rather, they have been adjudicated delinquent and, by virtue of that adjudication, have been found to be amenable to treatment and deserving of the opportunity to correct their behavior apart from the stigma and long-term collateral consequences that typically accompany criminal convictions. Subjecting juveniles to the mandates of SORNA interferes with and threatens child-focused treatment and may significantly decrease the effectiveness of that treatment.

SORNA as applied to youth will hinder the identification and proper treatment of youth who exhibit inappropriate sexual behavior. Parents will be more inclined to hide their child's problem and not seek help when they learn that their child may be required to register for life as a sex offender.

In addition, public registration and community notification requirements can complicate the rehabilitation and treatment of these youth. Youth required to register have been harassed at school, forcing them to drop out (Freeman-Longo, R.E. (2000). *Revisiting Megan's Law and Sex Offender Registration: Prevention or Problem*. American Probation and Parole Association). The stigma that arises from community notification serves to "exacerbate the poor social skills" many juvenile offenders possess, destroying the social networks necessary for rehabilitation. Education itself is vital to reducing the risk of further criminal behavior (Garfinkle, E., Comment, (2003). *Coming of Age in America: The Misapplication of Sex-Offender Registration and Community Notification Laws to Juveniles*. 91 California Law Review 163).

The Definition of Aggravated Sexual Abuse will Disproportionately Place Young Offenders in the Highest Tier(s) and Result in Increasing the Proportion of Youth on the Public Registry

The third item in the definition of aggravated sexual assault regarding a victim under the age of twelve is very problematic in its relationship to juveniles. Utilizing this item will disproportionately push juveniles into the tier three category, which requires lifetime registration. The intent of the original legislation was to give some room to juveniles and the guidelines appear to contraindicate that intent. Given that the above listed data clearly indicates their risk is lower, the increased likelihood of their being placed on Tier

3 is highly questionable, especially given the potential for increased damage done to the juveniles by being labeled at such a young age and the potential for such labeling to interfere with a successful transition to adulthood.

The Guidelines Should Allow for Judicial Discretion in Cases of Youth Adjudicated as Juveniles

If the Attorney General insists on applying SORNA to youth adjudicated within the juvenile court system, the Department should allow judges to exercise some discretion when determining whether and for how long a youth must register as a sex offender.

To date, all 50 states and the District of Columbia allow for the prosecution of serious youthful offenders in adult criminal court. Five states (HI, KS, ME, MO, NH) grant authority to the judge to make the decision to transfer a youth to adult court after a finding of probable cause and a determination that the juvenile court system cannot properly address his or her treatment needs. Fourteen states (AZ, AR, CA, CO, FL, GA, LA, MI, MT, NE, OK, VT, VA, WY) give prosecutors, instead of judges, the discretion to decide whether to charge certain juveniles in adult courts. Twenty-nine states (AL, AK, AZ, CA, DE, FL, GA, ID, IL, IN, IA, LA, MD, MA, MN, MS, MT, NV, NM, NY, OK, OR, PA, SC, SD, UT, VT, WA, WI) automatically transfer juvenile cases for certain types of crimes. Only two states (NY, NC) have lowered the age at which children are considered adults in the criminal system, transferring all crimes by 16- or 17-year-olds to adult courts.

Thus, if a youth is being adjudicated within the juvenile court system, the state legislature, the prosecutor and/or the judge have made a determination that (1) the youth's offense does not warrant criminal prosecution, (2) the youth is entitled to the protections of the juvenile system and, above all, (3) the youth and the public are best served within the juvenile system. The fact that the court has retained jurisdiction argues against broad registration requirements and instead supports a policy of judicial discretion on a case-by-case basis subject to certain criteria.

States that allow for the exercise of judicial discretion in cases of youth who have been adjudicated within the juvenile court system should be deemed to have substantially implemented the SORNA standards with respect to the Registration Requirements and Community Notification Standards.

The Guidelines Should Waive Public Registration and Community Notification Requirements for Youth Adjudicated within the Juvenile Court System

If the Attorney General insists that youth adjudicated within the juvenile court system register as sex offenders under SORNA, the Guidelines should allow for the creation and/or maintenance of a separate juvenile registry that is accessible by the relevant authorities but not by the general public, and should allow for the states, via the courts or some designated agency, to determine whether community notification is required. Such allowances will serve the public safety purposes of the Adam Walsh Act while helping youth in treatment and innocent family members maintain some privacy.

SORNA as applied to youth will disrupt families and communities across the nation because SORNA does not just stigmatize the youth; it stigmatizes the entire family, (including the parents and other children in the home). In the overwhelmingly majority of cases, the address and telephone number the youth has to provide will be the family's. The school information the youth has to provide will be the same school currently (or soon to be attended) by a sibling. The vehicle information the youth provides will include his or her parents' names.

Similarly, the mandates and restrictions associated with SORNA impact not only the youth, but also the entire family, particularly in terms of where registrants can live, e.g., prohibitions against living within close proximity of a school or a park.

In its efforts to support families as the fabric of strong communities, the federal government must be careful not to promulgate policies and promote practices that unnecessarily disrupt family stability or introduce or exacerbate tensions in the home, the school, and between members of the same community. This is particularly true where those tensions center on children and families who need appropriate treatment. Similarly, the mandates and restrictions associated with the Guidelines will affect not only the youth, but also the entire family, including where they can live (e.g., residency restrictions).

Alternatively, the Guidelines should allow for the creation and/or maintenance of juvenile registries that are accessible by the relevant authorities but not accessible by the public. Idaho, Ohio, Oklahoma and South Carolina, for example, currently maintain non-public registries for youth adjudicated within the juvenile court system.

Guidelines Affecting Youth Adjudicated as Adults

Given that waiving youth to the adult system is a legal and not developmental decision, the majority of the above arguments hold true for youth adjudicated as adults. Because today's youth are tomorrow's citizens, ATSA believes that SORNA has an obligation to implement policies that protect the long-term needs of young people as well as the short-term needs of our communities.

One of the most significant barriers to rehabilitation caused for these individuals will be the limitation on their access to education and employment. Education is one of the most important components in increasing the long-term success of young people involved in the criminal justice system.

As with juveniles convicted in the juvenile system, the Guidelines should allow for the creation and/or maintenance of registries available to the relevant authorities but not accessible to the public.

Guidelines Affecting Adult Sexual Offenders

SORNA has the potential to drive victims underground.

Well over 90% of offenders commit offenses against family members. The victims in these instances always want the abuse to stop and typically want the offender to be held fully accountable.

Determining who reaches Tier 3 using an offense based classification system will cause both over and under-assessment of risk. It can allow intra-familial only offenders to be on the highest tier and expose their family (and possibly their victim) to the public, to be viewed in the same manner as extra-familial offenders who pose a greater potential risk to the public. At the same time, given the almost guaranteed increased plea-bargaining away from certain offenses these guidelines will create, it will potentially cause many more serious offenders to escape public notification because of the skill of their attorney. Related to this, many Iowa prosecutors have found that the lifetime residency restrictions in their state have caused a reduction in confessions by offenders and a greater number of plea agreements down to non-sex convictions.

We believe that the tier system should be expanded to allow for an evidence-based risk assessment to be completed to determine likelihood for reoffense, screen offenders into relative risk categories, and therefore determine which tier should be applied to the offender. Additionally, we believe that the conditions of the tiering should be changed to reflect the offender's risk for reoffense as determined by an actuarial risk assessment process. e.g. allowing for tier 2 and 3 offenders to petition for removal from the registry after a certain period of time.

In Contradiction to the goal of increasing community safety, SORNA has the potential to interfere with successful community reintegration and thus may compromise public safety.

Decades of research support the fact that stability, social support, and employment are three of the most robust variables associated with decreased recidivism for criminal offenders (Andrews & Bonta, 2003; Laub & Sampson, 2001; Maruna, 2001; Petersilia, 2003; Sherman, 1993; Sherman, Gottfredson, MacKenzie, Eck, Reuter, & Bushway, 1998; Travis, 2005). Many of the interventions under SORNA will increase instability by limiting employment and education opportunities, aggravating risk factors for reoffense, and undermining the factors associated with successful community reintegration. The criminological literature clearly shows that instability of the offender leads to persistent criminal activity.

Because AWA tier levels are not based on empirically validated risk assessment, many lower risk offenders will be erroneously classified as high risk and thus denied opportunities because of their public listing, while a number of higher risk offenders with more favorable court outcomes will have less limits placed upon them.

It is recommended that in order for the guidelines to minimize their impact on the housing, education, and employment of lower risk, nonviolent, and statutory sex offenders, that risk determinations be made with empirically derived assessment procedures rather than offense based classifications.

Information Included on the Registry

The information that is to be included on the web site includes the name and address of the employer. The name is optional but the address is not. This is counterproductive to offenders getting jobs and remaining employed. Research shows employment is one of the most significant variables related to the long-term success of criminal offenders. (The AWA itself does not require this information to be on the registry). Employers will be less likely to hire sex offenders if the employer's information will appear on the public registry. This impedes community reintegration. Because unstable, transient offenders who cannot meet their basic needs are at greater risk for resuming a life of crime, any aspect of the guidelines that lessen the likelihood of employment or housing has the potential to increase rather than mitigate risk.

The Published Guidelines and Position of the SMART Office Director do not Comport with the Adam Walsh Child Safety Act as Passed

Title 1, Section 125(b) of the Adam Walsh Act makes clear that "When evaluating whether a jurisdiction has substantially implemented [the SORNA], the Attorney General shall consider whether the jurisdiction is unable to substantially implement this title because of a demonstrated inability to implement certain provisions that would place the jurisdiction in violation of its constitution, as determined by a ruling of the jurisdiction's highest court." However, the SORNA Guidelines, as well as Laura Rogers, Director of the SMART Office, express that the USAG will make such a consideration only about decisions made by a jurisdiction's highest court **before** July 27, 2006 when the Adam Walsh Child Safety and Protection Act was passed.

The position expressed in the Guidelines and by Laura Rogers in a June 15, 2007 discussion with ATSA staff does not comport with the Adam Walsh Child Protection and Safety Act as passed. The statute, at Section 125(b), in no way specifies that the a state's highest court decision(s) must have been handed down prior to July 2007 (or at any other specific point in time). Indeed, the AWA contemplates consultation by DOJ with the Governor and Attorney General of each state regarding the proper interpretation of that state's constitution whenever there is an assertion by the state that compliance would, based on one or more state supreme court decisions, prevent implementation of any AWA provision.

Conclusion

ATSA supports efforts to hold offenders accountable, protect vulnerable populations, and improve the overall public safety for communities across the nation. For the above reasons, however, we believe that the Act and the Proposed Guidelines negatively and unnecessarily impact the short- and long-term rehabilitation of youth adjudicated within the juvenile court system and add to the destabilization of adult offenders. As both of these outcomes will decrease the protection of vulnerable populations and decrease overall community safety, we urge the Attorney General to amend these guidelines or, alternatively, to limit their application in the ways articulated above.

Thank you for the opportunity to comment on the Proposed Guidelines to interpret and implement the Sex Offender Registration and Notification Act, and we trust that our comments will be given serious and thoughtful consideration.

Respectfully,

Robin McGinnis, President
David Prescott, President-Elect
Association for the Treatment of Sexual Abusers

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