



STATE OF WASHINGTON

Sex Offender Policy Board

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TO: Sex Offender Policy Board

FROM: Registration and Community Notification Committee

DATE : January 15, 2009

RE: Washington State and the federal Adam Walsh Act/SORNA

Summary:

The federal government enacted the Adam Walsh Child Protection and Safety Act of 2006 (P.L. 109-248) (AWA), which includes a federal plan for establishing a comprehensive national system of sex offender registration and community notification. States are not obligated to comply, but unless granted an extension, states have until July, 2009 to be in “substantial compliance” with the requirements of SORNA or face a 10% reduction of federal justice assistance funding under 42 U.S.C. 3750 *et seq* (Byrne Grants).

While the stated goals of AWA are essentially the same as those provided in the original 1990 Washington Community Protection Act, Washington’s laws differ greatly. Adopting many of the requirements of the AWA here in Washington would have a profound effect on the current system. The cost of implementing AWA in Washington is yet to be determined but likely would require significantly increased law enforcement and correctional resources. The Adam Walsh Act also contains different definitions of offenses, registration and notice requirements.

In 2008, the Sex Offender Policy Board was assigned the task of reviewing Washington’s adult and juvenile sex offender registration systems, and directed to make recommendations to the legislature in November 1, 2009. By that time Congress may well have changed the Adam Walsh Child Protection and Safety Act of 2006 and we will know if Byrne Grants continue to exist and/or be impacted by this law. Numerous legal challenges to the act are underway and may also have been resolved by them.

For these reasons, the Sex Offender Policy Board recommends that Washington State not comply with this act at this time; but that the legislature await the Board’s review.

Background: The Adam Walsh Act

The federal government enacted the Adam Walsh Child Protection and Safety Act of 2006 (P.L. 109-248) (AWA). The AWA's Title I Sex Offender Registration and Notification Act (SORNA) evinces the federal goal of establishing a comprehensive national system of sex offender registration and community notification. It also intended to create a unified system for registering and tracking sex offenders who move between states or between the federal and state criminal justice systems. It provides a detailed scheme regarding sex offender registration and notification that contain "minimum national standards" states are required to meet.

States have until April, 2009 to submit compliance packets to the federal government asserting one of the following: (1) that the state is in compliance with the requirements of the AWA, accompanied by supporting documentation of state laws and other efforts; (2) that the state is not in compliance and will not be making efforts to do so; or (3) that the state requests an extension to come into compliance, accompanied by supporting documentation of activities the state is undertaking or will undertake to become compliant. The U.S. Attorney General may provide up to two one-year extensions for states seeking to become compliant.

While the federal law cannot trump state laws regarding the specific aspects of a state's sex offender registration and notification system, it can provide incentives to comply with the federal law and disincentives not to. In the case of the AWA, unless granted an extension, states have until July, 2009 to be in "substantial compliance" with the requirements of SORNA or face a 10% reduction of federal justice assistance funding under 42 U.S.C. 3750 *et seq* (Byrne Grants). The DOJ's SMART Office (Sex offender Monitoring, Apprehension, Research and Tracking) is responsible for determining whether a jurisdiction has substantially implemented the requirements.

Cost of Implementation in Washington State

In Washington, the Byrne Grants are used primarily to fund local drug task forces. Washington received Byrne Grant funding in 2006 totaling \$3,538, 836 and thus a 10% cut to that funding would total approximately \$353,800 at the currently funded rate. By contrast, one estimate by the Justice Policy Institute avers that it would cost Washington State \$10,491,519 to comply with the provisions of the AWA.

The cost of implementing AWA in Washington is yet to be determined but likely would require increased law enforcement and correctional resources. The retroactive component would increase workload: (1) increased number of offenders required to register because their requirement had previously expired; (2) offenders re-entering state or local criminal justice systems would need to be reviewed for potential criminal histories requiring registration under the AWA; and (3) as in other states, there would likely be offender due process and ex post facto challenges to reclassification.

The AWA and Washington's Sex Offender Laws

The Adam Walsh Act's SORNA provisions were intended to facilitate tracking of sex offenders from state to state and system to system given that states' laws vary greatly and that some states have not had comprehensive sex offender registration and community notification systems. Consistency across states is one of the stated goals of the federal law. The public safety purpose of AWA is stated as: "in order to protect the public from sex offenders and offenders against children, and in response to the vicious attacks by violent predators against the victims listed below, Congress in this Act establishes a comprehensive national system for the registration of those offenders."

Major provisions of the AWA include:

- (1) requiring a crime-based leveling system to distinguish between I, III and III Tiered offenders (Tier III the most serious offenders, Tier I the least);
- (2) retroactivity, requiring any sex offender to register even when predicate sex offense convictions occur prior to a jurisdiction's implementation of the Act as long as the sex offender is currently incarcerated, under supervision or reenters the justice system because of conviction for any other crime;
- (3) requiring posting of all offenders on the public website regardless of risk level;
- (4) limiting disclosure requirements and registration for juveniles (compared to Washington law): juveniles are included if they were prosecuted as adults or age 14 or older and convicted of a "most serious sexually assaultive" crime;
- (5) providing for frequency and duration of registration requirements based on the Tier system of the crime of offense;
- (6) expanding information required for registration, including employer address, internet identifiers, palm prints, passport and immigration documents, professional licensing information, temporary lodging information, vehicle license plate number and description;
- (7) expanding information required to be available to the public including employer address, school address, vehicle(s) license plate number and description;
- (8) establishing an automated system capable of sending automated email notifications to neighbors, places serving children, citizens requesting notification; and
- (9) expressly permitting tribes to enter into cooperative agreements with their state for the purposes of discharging their registration and/or notification duties.

These requirements are a "floor" and states are free to make requirements more stringent, such as requiring all offenders to be subject to lifetime registration and check-in with law enforcement every three months. In fact, the SMART office has suggested that this is the most simple solution to bringing all states' policies into compartment with each other. Unless that occurs, it is certain that differences between the states' systems will remain and the goal of AWA to reduce confusion and increase efficiency will remain uncertain.

While the stated goals of AWA are essentially the same as those provided in the original 1990 Washington Community Protection Act, Washington's laws differ in implementation of the goals. Adopting many of the requirements of the AWA here in Washington would have a profound effect on the current system. Most especially, Washington's system for classifying sex offenders is risk-based while SORNA is strictly crime based. Currently, of the 20,000 registered sex offenders in Washington, 70% are level I, 30% are level II and III. Registration based on crime alone would nearly invert those statistics. It would be a major conceptual change from current, long-standing

practice which is based in large measure on individualized risk assessments. It would also dramatically increase the number of Level III offenders and therefore those requiring 90 day visits/check-ins, notice to neighborhoods and communities at large, and would dramatically increase the number of offenders required to be posted on the website.

For the better part of two decades the legislature and executive branch, together with community organizations and law enforcement, have worked to educate citizens about Washington's registration and notification system. This one change to a crime-based system would also require extensive community reorientation and education.

National Issues Regarding Compliance

Since the enactment of the Adam Walsh Act, several states have passed legislation to implement the provisions of the federal law in an attempt to be in "substantial compliance." Despite this, to date, no state has been determined by the SMART office to be in substantial compliance. States enacting legislation include Delaware, Florida, Louisiana, Mississippi, Nevada, New Hampshire, Ohio and Utah. Forty-two states have not enacted legislation to implement the AWA.

In the states that have passed legislation, constitutional challenges by offenders are plentiful. Many challenges are specific offenders challenging their specific reclassification under new crime-based classifications systems. The constitutional arguments challenging the laws include: ex post facto/retroactivity violations; separations of powers; double jeopardy, due process, equal protection, right to contract violations and cruel and unusual punishment. Successful challenges have primarily been in the area of arguing against retroactive application via ex post facto challenges. For example, in Ohio several courts have held that the new Ohio law violates the ex post facto clause of the Constitution and that its provisions are not sufficiently tailored to meet a non-punitive purpose. The Alaska Supreme Court reached much the same conclusion in *Doe v. Alaska*, (Supreme Court No. S-12150, July 25, 2008). In reaching the characterization of the new Alaska law as punitive, it noted the disclosure of information to the public without limitation, compulsion of intrusive affirmative conduct, and the adoption of a crime-based tiered system because that system does not distinguish between classes of sex offense on the basis of risk.

Additionally, in Florida, a federal district court ruled that SORNA violates Congress' power under the Commerce Clause and is, therefore, unconstitutional, noting that "a worthy cause is not enough to transform a state concern (sex offender registration) into a federal crime." *USA v. Powers* (M.D. Fla., April 18, 2008). Furthermore, in the 4th Circuit a recent ruling has struck down a component of AWA which authorized the federal government to hold sex offenders for an indefinite period of time for the purposes of civil commitment. Although the decision noted the legitimate policy concern, it found, "congress must instead seek alternative, constitutional means of achieving what may well be commendable objectives," (US District Court No. 07-7675, January 8, 2009).

Conclusion

During its examination of the AWA and Washington law in recent months, the Board has noted great uncertainty, both in Washington and across the United States, regarding implementation of the AWA. This uncertainty includes the following major issues:

- (1) Washington's sex offender classification, registration and notification system by law, and as understood by law enforcement, elected officials and the general public, is based primarily on an offender's individualized risk for reoffense and risk to the community at large rather than the crime of conviction only;
- (2) the dramatic increase in Level III offenders would dilute community notification, lessening the public's awareness of those who they most should be aware of;
- (2) multiple state courts across the country have struck down state provisions adopting the AWA finding them to be in violation of the ex post facto clause of the U.S. Constitution, including a highest court in a state in the 9th circuit (Alaska);
- (3) of the several states that have passed a state version of the AWA to comply with the federal law, none have been found to be in substantial compliance according to the SMART office;
- (4) in the several states that have passed a state version of AWA thousands of offenders have challenged their reclassification or new registration requirements in court (a likely scenario if Washington were to switch to a crime-based system), causing massive congestion on already overloaded court systems;
- (5) at least one federal court (Florida) has struck down the entire AWA for being in violation of the U.S. Constitution's commerce clause, effectively denying that Congress has the power to regulate states in this manner;
- (6) the 4th Circuit has struck down the portion of AWA that allows for lifetime civil commitment for sex offenders, indicating that Congress overstepped its authority when it enacted a law allowing the federal government to hold sex offender indefinitely beyond their prison terms;
- (7) studies of Washington's sex offender registration and notification laws and risk-based system, such as those conducted by the WSIPP, have demonstrated positive effects on public safety while there is no evidence or reliable articulation that a strictly crime-based system as provided by the AWA would improve public safety to any greater degree; and
- (8) the existence of a new executive administration at the federal level, including at the Department of Justice which may lead to a revision of provisions of the AWA delegated to the Attorney General, such as determining by AG guidelines what constitutes a state's "substantial compliance" with SORNA.

Recommendation

The adoption of AWA would be a major reorganization of Washington State's registration and community notification laws as well as a significant shift away from evidence based policy. The Sex Offender Policy Board recommends that Washington **choose not to adopt AWA at this time**. The Sex Offender Policy Board will review the system as required by the legislature ~~continue its effort to improve our current processes surrounding~~ registration and community notification laws for the state. We believe that, given the myriad of practical, legal, financial and public safety concerns that are involved, this is a responsible and reasonable position to adopt.