



**Statement on Civil Commitment of Sex Offenders:
Senate Bill S6325 and Assembly Bill A09282**

Legislation permitting civil commitment of some sex offenders following completion of their prison sentences, under statutes directed at sex offenders specifically rather than general civil commitment laws, has been passed or is on the verge of being passed this year by both the New York State Assembly (A09282) and the Senate (S6325). The undersigned committees of the Association of the Bar of the City of New York¹ are extremely concerned about these measures. Our committees do not believe, on balance, that such legislation is necessary or well-advised. Instead, we remain of the view that both civil rights and public safety are best protected by appropriate, but aggressive use of extant civil commitment statutes, combined with good post-release supervision and treatment plans. We also are concerned that this legislation would exacerbate the venomous and discredited² stigma associating mental illness with violence, thereby effectively deterring people from seeking mental health treatments that are available in their communities.

However, we do share the Legislature's concern for community safety, and its doubts that incarceration and currently available sex offender treatment are adequate to prevent some number of sex offenders from committing future acts of sexual violence. We also recognize that

¹ The Association of the Bar of the City of New York (the "Association") is a professional association with more than 22,000 members, including judges, prosecutors and defense attorneys.

² See The MacArthur Violence Risk Assessment Study; Steadman HJ, Mulvey EP, Monahan J, et. al. Violence by people discharged from acute psychiatric inpatient facilities and by others in the same neighborhoods. *Archives of General Psychiatry* 55:393-401, 1998; *Mental Health: A Report of the Surgeon General* on December 13, 1999.

there is a substantial body of opinion to the effect that some form of civil commitment statute for sex offenders is one important mechanism for preventing some types of recidivism.

It cannot be overstated how readily sex offender civil commitment laws may be abused. Unwarranted community fears can produce statutes that allow civil commitment of sex offenders who in fact have no diagnosable mental illness or mental abnormality, or who do not present a real risk of serious sexual re-offense. The same misplaced fears can easily cause massive overuse of such statutes, effectively incarcerating many offenders for years past expiration of their criminal sentences, when community based-treatment and effective post-release monitoring could serve the same purpose at a far lower cost in dollars and civil liberties.³ Should a statute ultimately enacted by the Legislature lack the necessary standards and procedural protections to prevent such abuses, it will surely be successfully challenged in the state and federal courts. The toll in uncertainty, time and money misspent, not to mention lost liberty, will be significant. Any measure the Legislature enacts should meet tests of constitutionality and sound policy at the outset. In order to assist the Legislature in crafting a sex offender civil commitment statute that meets these standards, the undersigned committees offer the following comments on A09282 and S6325.

At the outset, both bills are seriously flawed in a most basic respect: their definitions of offenders eligible for civil commitment are too sweeping to meet state or even the broader federal due process standards. Loosely modeled on a statute held constitutional by the United States Supreme Court in Hendricks v. Kansas, 521 U.S. 346 (1997), both bills target as

³ We question the extent to which funds currently allocated to the State Office of Mental Health (OMH) will be used to house and care for these offenders, many of whom may lack any treatable diagnosis under the DSM-IV-R. The limited resources the Legislature has allocated to OMH currently are insufficient to provide community-based services and treatment for people with mental illnesses.

candidates for commitment “sexual predators,”⁴ who are persons suffering from a “mental abnormality,” who have committed a predicate sex offense.

S6325 defines “mental abnormality” as “a congenital or acquired condition, disease or disorder that affects the emotional or volitional capacity of a person in a manner that predisposes him or her to the commission of an act or acts constituting a sexually violent offense and that results in serious difficulty in controlling behavior to a degree that the person is a menace to the health and safety of others.” The predicate sex offense that is a threshold requirement for commitment is, under S6325, a “sexually violent offense,” which, in turn, is simply any felony sex offense under Article 130 or other provisions of the Penal Law (including low level felonies such as statutory rape or surreptitiously recording someone in a dressing room), or another designated violent felony found to have been “sexually motivated,” which term is not further defined.

A09282 has a similar definition of “mental abnormality,” the standard being that a mental disease or disorder “creates serious difficulty for the person to control his or her unlawful sexual behavior [so that it is] likely that he or she will commit a felony sex offense in the future.” Like the Senate bill, the Assembly version makes the predicate conviction a conviction for any Article 130 felony offense or a designated felony that was sexually motivated. There is some attempt to define “sexually motivated,” and, unlike the Senate bill, youthful offender findings do not qualify.

First, it is doubtful that committing people with a personality disorder, but no other diagnosable mental illness, is permissible under New York State law, and even less clear whether

⁴ We do not approve of the pejorative term “sexual predator”, because it is both vague and unnecessarily defines a person by behavior which may be correctable. We suggest, instead, that the term “sexual offender” or “serial sexual offender” (where appropriate) be used.

an “emotional impairment” will suffice. The Court of Appeals has stated that dangerous propensity is an insufficient basis for commitment. In re Torsney, 47 NY2d 667, 684 (1979).

Moreover, although the language of these bills is identical in large part to that in the Kansas statute upheld in Hendricks v. Kansas, the Supreme Court has subsequently made clear that in order to meet due process standards, the offender must suffer from a “special and serious lack of ability to control” his or her unlawful behavior that “must be sufficient to distinguish the dangerous sexual offender...from the dangerous but typical recidivist convicted in an ordinary criminal case.” Kansas v. Crane, 534 U.S. 407, 413-414 (2002). While the language of a “predisposition to commission” of a sexually violent offense or “likely” to commit a felony sex offense may, on its face, be minimally adequate to pass this test, it is also clearly susceptible to much looser interpretation. Many jurisdictions have responded to this concern by employing more restrictive language, such as “substantially probable,” in describing the likelihood that, as result of the mental abnormality, the offender will commit a dangerous sex offense. New York’s statute should do the same, in order to remove any doubts about its constitutionality in this respect.

Nor are the predicate crimes that serve as the commitment threshold sufficiently narrowed, under either version, to demonstrate the requisite dangerousness or threat to safety. A number of the crimes of conviction that could result in commitment proceedings involve no violence or abuse of children at all. For instance, a 22 year-old first felony offender who was convicted of the statutory rape of his 16 year-old girlfriend would be a candidate for civil commitment, notwithstanding that his real likelihood of reoffense was non-existent, and the conduct entirely consensual. Even the Kansas statute in Hendricks involved a far more nuanced listing of predicate offenses; New York’s should do the same.

Having noted our objection to the basic definition of an eligible offender in both versions of the sex offender commitment statute, we find A09282 preferable in many respects to the Senate version. A09282 is a comprehensive statute that, while affording potential committees necessary procedural protections, is crafted to ensure that it targets those dangerous offenders who require treatment in restrictive settings and it provides for such treatment. Its failure to make any provision for discharge procedures and planning is very troubling, however, both from a public safety and a civil liberty standpoint, and should be remedied. It is also problematic that A09282 permits the Attorney General to file a commitment petition even where a case review committee composed primarily of mental health experts has recommended against it, and we urge that such unjustifiable discretion be eliminated. We are concerned that in light of the Attorney General's expansive authority to file over the recommendation of professional with expertise in this area, the "strict and intensive supervision" alternative to residential commitment may be used to assure restrictive monitoring of the majority of sex offenders after completion of their sentences, even though they do not in fact meet constitutional standards for commitment.

Nonetheless, in (1) mandating pre-commitment in-prison treatment, governed by professional standards; (2) providing for pre-commitment assessment by independent qualified professionals and for use of scientifically validated tools for that purpose; (3) establishing a comprehensive post-commitment treatment regimen subject to widely recognized mental health standards; (4) providing for counsel with expertise in this specialized area, at an early, pre-petition phase of the proceedings, and according the offender important rights in respect of discovery and presence, the Assembly bill represents, in many ways, a serious effort to balance the need for civil commitment of dangerous sex offenders who suffer from a mental illness with constitutional safeguards and appropriate treatment for such offenders.

S6325 is contrastingly deficient in these areas. It contains no provision at all for treatment of convicted sex offenders while they are still serving their sentence, one important way of avoiding, through early intervention, unnecessary post-sentence restrictions on liberty as well as unnecessary expenditure of money. The process for assessing offenders to determine if a petition should be filed is strikingly tilted toward a law enforcement rather than a mental health professional perspective. The initial notification is made by corrections authorities rather than OMH. The bill establishes “multidisciplinary teams” to review each cases, but the professional composition of those teams is completely unspecified as is the method they are to use to make the evaluation. The final decision whether to recommend that a petition be filed is made by a committee of prosecutors (the “prosecutors review committee”). Psychiatric examination of the offender is conducted not by a court-appointed expert, but by one chosen by the prosecuting agency, the Attorney General. Counsel is not provided until the petition is filed, and there is no requirement and no funding to ensure that counsel has specialized expertise in this area should MHLS not serve as counsel. Venue is established in the county of incarceration rather than of conviction, depriving potential committees of support from their families and community members. Once committed, a person has no right to be present at subsequent proceedings. While the bill contains detailed provisions for security at the newly established facilities that will house committees, it is devoid of any reference to the treatment to be provided them. This omission alone is an invitation to successful litigation. See Selig v. Young, 531 U.S. 250 (2001).

There are many other objectionable features in S6325.⁵ Without enumerating them all in detail, their combined effect is to undermine the constitutionality of the proposed legislation, and

⁵ For instance, as noted above, S6325 provides that at any time after receiving notice that the agency with jurisdiction believes a person to be a sexually violent predator, the attorney general may request that the court in which the petition could be filed order the person to submit to an evaluation by a psychiatric examiner “chosen by

to cast serious doubt on it as a legitimate tool for identifying the small group of genuinely dangerous offenders. By dramatically weakening, if not eliminating, the role of experts in favor of law enforcement officials and by unjustifiably refusing to accord committees basic procedural protections and qualified counsel, this version of a civil commitment statute is a recipe for failure.

Respectfully Submitted,

Sex & Law Committee
Mental Health Law Committee
Criminal Law Committee
Criminal Justice and Operations Committee

the attorney general” (§ 10.05[e]). A09282, which provides that the case review team may, during its assessment, order a psychiatric evaluation of the person at issue by a qualified psychiatrist, who “shall not be employed by the state or the person being evaluated” (§ 10.05[e][3]), is much more in keeping with procedural fairness and would likely result in more reliable findings.