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This week, after a series of closed-door sessions among legislators and the Governor's office, the Legislature adopted the Sex Offender Management and Treatment Act (Assembly Bill A6162 and Senate Bill S3318), which permits civil commitment of some sex offenders following completion of their prison sentences. The undersigned committees of the Association of the Bar of the City of New York[1] recognize that this Act addresses many of the issues raised in our March 6, 2006 Statement[2] opposing prior versions of this legislation. Unfortunately, legislators and the Governor's office negotiated the details of the Act without the opportunity for public comment, and the Association continues to have concerns about the legislation as adopted by the two houses.

The Association commends the Legislature for improving on previous proposals in many significant ways. For example, the Act mandates that convicted sex offenders have access to treatment from the outset of their sentences; gives mental health officials, rather than law enforcement officers, the primary role in selecting offenders for possible civil confinement, and states that except in "extreme" cases involving the "most dangerous" offenders, judges presiding in civil commitment proceedings should impose conditions of "strict and intensive supervision"

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[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] Statement on Civil Commitment of Sex Offenders: Senate Bill S6325 and Assembly Bill A09282, New York City Bar, January 2006 (signed by the Sex & Law Committee, Mental Health Law Committee, Criminal Law Committee and Criminal Justice and Operations Committee) (attached as Exhibit A).

rather than confinement in secure institutions. In addition, the legislation looks to the future by providing stiffer, determinate sentences for felony sex offenses committed after the bill becomes law, followed by much longer periods of strict post-release supervision by parole officers. These provisions respond to the public's feeling that sex offenses are so damaging to victims, and so frightening to potential victims, that offenders should be sternly punished and closely watched for many years, even if the offenders are emotionally disturbed, otherwise law-abiding individuals.

Although the drafters did a commendable job in addressing many of the problems with prior drafts of the legislation, the Association remains concerned about a number of aspects of the Act. For example, the Act applies not only to (a) persons who are repeat offenders, (b) persons who commit "sexually violent" crimes as defined in the Sex Offender Registration Act, and (c) persons who committed crimes against young children, but the Act also permits civil commitment proceedings to be applied to first-time offenders whose crimes are not violent, such as a 22-year-old who has consensual sexual relations with a 16-year-old. The Act further permits civil commitment of persons who commit non-sexual crimes like robbery, or non-violent offenses like "disseminating indecent materials to minors," if a jury finds, often well after the fact, that the offense was motivated by a desire for the actor's "sexual gratification." In other words, if a person sends indecent material to a minor's computer for profit, he cannot be committed beyond the end of his sentence, but if he does so to satisfy a sexual impulse, he can be. One can only hope that mental health officials, and the Attorney General, will use their wide discretion wisely and sparingly, applying the law only to the worst, clear-cut cases of "dangerous mental abnormality."

In addition, the Act allows a person already released from his prison sentence to be re-detained and held for more than 60 days without any finding that he is a dangerous sex offender. This is too long to detain a person, otherwise entitled to liberty, without a judicial determination that he is dangerous, or a flight risk. The Act also permits civil commitment of currently imprisoned offenders who never had the opportunity for the comprehensive in-prison treatment that the new law now mandates for newly-committed prisoners.

While the State's newly vigorous commitment to treat sex offenders is laudable, the critical importance of co-operation in treatment, by a prisoner or committee who hopes for release, raises an additional concern. The bill provides that statements made by Respondents during court-ordered psychiatric examinations are inadmissible in evidence against them in a criminal action or proceeding. However, no such explicit protection is given to statements made in the course of sex offender treatment, and existing law on this subject is not entirely clear. Given that, (a) refusal to participate in treatment is likely to have highly adverse consequences; (b) participants in treatment are expected to admit all of their past sexual offenses, whether charged or uncharged, and (c) the Legislature recently repealed the Statute of Limitations for serious sex offenses, making prosecutions possible even if the crime occurred many years in the past, there should be an explicit provision that admissions made in treatment may not be used in criminal prosecutions. Otherwise, there will be a self-defeating incentive for many offenders not to co-operate in treatment.

Another important concern is the inadequacy of the provisions for appointment of counsel to indigent offenders facing commitment proceedings. As the Association has stated previously, attorneys handling these specialized proceedings should have specialized expertise in the field. Knowledge of both mental health law and criminal law is needed. While the Mental

Hygiene Legal Service has expertise in its field, its attorneys may not have the requisite criminal-law experience. Moreover, in contrast to last year's Assembly bill (A09282), the Act as adopted contains no assurance that attorneys who are appointed will be adequately trained and experienced in cases where MHLS cannot undertake representation. To address this concern the State should either greatly expand MHLS's capacity, fund a separate office to undertake this representation, or create a funding arrangement in which criminal defense attorneys would act as co-counsel with MHLS.

Finally, advocates must keep close watch on the implementation of this legislation to ensure that the State keeps two important promises: to conduct cutting-edge research, through the new "Office of Sex Offender Management," into the best methods for assessing, monitoring and treating sex offenders, and, to meet its substantial new financial commitment without dipping into funds allocated to maintain the mental health of persons who are not involved in the criminal justice system. There remain urgent unmet needs for mental health services, particularly in New York's poorer communities, and these needs must not be sacrificed to the more attention-getting goal of addressing the dangers posed by sex offenders.

Respectfully submitted,

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

March 13, 2007