

Statement on Actuarial Risk Assessment and Data Collection Offered by SORB and Joined by Commissioners Bennett, Brownsberger, Brodeur, Connolly, Kennedy, Hayden, and Ryan

Sex Offender Registry Board's Statement Regarding Development of an Actuarial Instrument and the Collection of Outcome Recidivism Data

The Sex Offender Registry Board (SORB) operates under the Executive Office of Public Safety and Security (EOPSS). SORB's primary function is the registration and classification of more than 11,000 sex offenders who reside, work, and/or attend an institution of higher learning in the Commonwealth. Its classification of sex offenders determines different levels of access to offender information made available to the community. When classifying an offender, SORB considers factors related to risk of reoffense, as well as factors related to the degree of dangerousness to the community upon reoffense. Thus, SORB's classification determinations are not merely an assessment of statistical likelihood of reoffense. The Sex Offender Recidivism Commission has focused its attention, in part, on whether to make recommendations that SORB should: 1) change its current classification process to a mechanized actuarial system which would result in an empirically validated numeric value to determine a sex offender's level of classification, and 2) engage in an ongoing analysis of outcome data for the purpose of studying sex offender recidivism in the Commonwealth.

Development of an Actuarial Instrument:

By statutory enactment required pursuant to the Federal Sex Offender Registry Notification Act ("Adam Walsh Act"), our legislature mandated that the Commonwealth's mechanism for the registration of sex offenders necessitated a highly individualized classification process utilizing a detailed quasi-legal analysis of an individual sex offender's history and personal circumstances. The process currently involves the application of 38 factors, which are a blend of up-to-date scientific research and statutory requirements. The application of the factors must be sufficiently supported by evidence, every offender is entitled to a full evidentiary hearing with representation by counsel, and final classification decisions are now determined under the "clear and convincing evidence" standard. SORB classification decisions are further subject to appellate review in the courts. Every offender classified in the Commonwealth is afforded exhaustive due process rights designed to ensure fairness and equity in their final classification.

SORB recognizes that a mechanized, actuarial approach to determine sex offender recidivism is favored by some statisticians, clinicians and researchers. However, research has shown such measures to be only moderately predictive of recidivism at best. The non-numerical decision making analysis used by the SORB provides an appropriate, fair and just balance of science and public policy, and is buttressed by exhaustive due process for every offender. SORB's mandate and primary mission to inform the public about the presence of convicted sex offenders that live, work or go to school in their neighborhoods overlaps, but does not and should not align perfectly with known recidivism rates. While some may criticize the structured clinical judgment and quasi-judicial analysis SORB employs in classifying offenders, SORB and EOPSS still consider it to be the best balance of science and public policy.

The Supreme Judicial Court (SJC) has repeatedly upheld SORB's classification methodology. Recently in January 2016, SORB answered the SJC's call to update its regulatory risk factors to

appropriately recognize and implement current scientific research along with statutory requirements. However, the SJC has never suggested a wholesale overhaul to the system and process by which classification is performed. *See, e.g., Doe v. Sex Offender Registry Board, No. 3844*, 447 Mass. 768, 777 (2006) (“Although there may be other possible methodologies used to determine the risk of reoffense by offenders, . . . the Legislature mandated the Board to designate and implement a specific, detailed methodology to be used in deciding offender classifications in this jurisdiction pursuant to G.L. c. 6, ss. 178C-178O . . . The regulations ensure adequate procedural safeguards and do not violate constitutional due process. Thus, because both the initial and final classification conformed to the regulations and guidelines properly promulgated by the board pursuant to G. L. c. 6, § 178K, presumptive or quantitative analysis in the decision-making process to identify the appropriate classification was not required.”).

Empirically validating an actuarial tool that could be used by the Commonwealth for purpose of classifying sex offenders would be an extensive and complex process. Validation of such a tool would take an estimated eight to ten years (perhaps longer). There is little guarantee that it would significantly change the classification level distribution, would be more than moderately predictive, or would reduce sexual recidivism in any meaningful way. Respectfully, we have not been persuaded that an overhaul of our statutory process is necessary, or that the current classification process is ineffective in its mission to provide information to law enforcement and the public about sex offenders within the Commonwealth’s jurisdiction.

Collection and Analysis of Outcome Data on Recidivism:

Since SORB classifications are not merely an assessment of the risk or likelihood of reoffense, any direct correlation between classification level and reoffense rates will be attenuated. The consideration of dangerousness, or harm likely to befall a victim in the event of reoffense, is an equally important part of the SORB’s legislative mandate and is critical to public safety concerns. An offender with a very high risk of reoffense (such as a repetitive exhibitionist) might not receive a Level 3 designation given the lower risk of harm upon reoffense, whereas an offender with a single offense, but who committed a violent act against a stranger or raped a young neighborhood child might be classified at a higher level based upon his risk of significant harm should he reoffend (dangerousness).

In addition to erroneously tying the Registry Board’s effectiveness to known recidivism rates, an outcome study on sexual recidivism across classification levels would be unable to reveal whether registration and classification of sex offenders prevents further sex crimes from occurring. Moreover, recidivism rates are not the same as true offense rates. Depending on how a study defines and measures recidivism (e.g., by rearrest, by reconviction, by self-report, by credible allegation, by probation/parole violation, etc.), the duration of the follow-up period (e.g., five years, ten years, twenty years), and the risk level of the sample followed, different estimates of reoffense rates are produced. Offenders who have reoffended after twenty or more years and/or who have been reoffending without having been charged or reconvicted often appear before the SORB, but are rarely included as recidivists in scientific studies. These offenders clearly present a long-term risk to public safety.

It is also undisputed that it is impossible to collect all relevant reoffense data. Many sexual assaults are not reported or prosecuted, and records of investigations of sexual offenses, which do not result in criminal charges, are typically unavailable. While it cannot be determined exactly how many

offenders reoffend without detection, there is reason to believe that number is substantial. Furthermore, many sex offenses are resolved with guilty pleas to non-sexual offenses and would be absent from a criminal record or unidentifiable as a sexually motivated offense. A recidivism study would not capture the large number of sexual assaults that are not detected, reported, or did not result in criminal charges or convictions.

Given the scope and magnitude of any worthwhile process of data collection, analysis, and study of recidivism, SORB, in consultation and collaboration with EOPSS, would first have to engage in an exhaustive feasibility study as to the ability to collect data amidst its ongoing classification process, particularly the logistics and resources involved, the type of data to be collected, and any impact on caseload and timely classifications. In light of SORB's recent promulgation of new risk factors incorporating current scientific research and recognized distinctions between juvenile, female and adult male offenders, and the SJC's recent decision raising the standard of review in classifications proceedings to clear and convincing evidence, SORB maintains that the undertaking of data gathering at this time would be neither feasible nor worthwhile. Furthermore, SORB maintains that any data gathering regarding sex offender recidivism would necessarily have to go beyond SORB and would have to include the gathering of statistics and information from other agencies and entities, including but not limited to, the Trial Court, Juvenile Court, the Probation Department, Parole, the Correction Department and the Department of Youth Services, district attorney's offices, the U.S. Attorney's Office, other law enforcement agencies, various EOHSS agencies, and rape crisis centers.

SORB will continue its focus on the importance of information sharing, critical to assessing re-offense risk and determining classification level, by entering into MOUs with stakeholder agencies that have data relevant to sexual misconduct and recidivism. In addition, SORB will continue in its efforts to proactively engage with agency and community stakeholders on public education initiatives about sexual abuse prevention. Lastly, SORB is also committed to a routine and regular update of its regulatory risk factors to appropriately recognize and implement evolving and current scientific research with regards to sex offending and recidivism, along with its statutory requirements just as critical to reoffense assessment and determining classification level.