

Special Commission to Reduce the Recidivism of Sexual Offenders Summary of Presentation to the Commission

Swimming Against The Tide: A Developmental Perspective on Juvenile Sexual Offenders

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Overview of the Issues

Both sexual and non-sexual behaviors which may bring a youth under age 18 before a Juvenile Court begin to increase during middle school, peak during mid-adolescence, and then begin a path of self-desistance as youth enter late adolescence and early young adulthood. Even youth who have been chronic and violent offenders typically show this pattern of self-desistance as they mature. This trajectory of self-desistance as they enter late adolescence and early young adulthood has posed significant challenges in identifying which youth adjudicated² of sexual or non-sexual offenses will continue harming others and end up within the adult criminal justice system.

There is growing recognition of the problem of sexually abusive behavior among adolescents. Sexually abusive behavior by adolescents has a significant impact upon victims, families and communities. There will always be some sexually abusive youth who will require facilities-based containment during which they receive intensive specialized treatment to address and lower their risk of sexual recidivism.

Sexually abusive behavior by adolescents warrants an effective, research-based response. Research³ suggests that approximately a quarter of known sexual offenses are committed by persons under age 18 and comprise approximately a third of all sexual offense cases known to the police in which the victim is a minor. One in eight of these youth are under age twelve and

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² Youth charged and adjudicated delinquent by virtue of a sex crime are Juvenile Sexual Offenders (JSO). Being a JSO is a legal status. Sexually abusive misconduct involving a "hand-on" victim or other problematic sexual behaviors may or may not be detected, and if detected it may not be charged or result in an adjudication.

³ Finkelhor, et al (2009).

cases involving adjudicated early adolescent juvenile sexual offenders (JSO) more commonly involve both younger perpetrators and younger victims. Sexual offenses committed by mid-adolescents and older youth more commonly harm peer-aged youth and fewer younger children. Approximately seven percent of JSO are females who offend more commonly as younger teens and are more likely to have younger, male family members as victims.

Framing a Response to Adolescents Adjudicated for Sexually Abusive Conduct

Framing a response to adolescents who have been adjudicated delinquent on charges involving sexual abuse/aggression must be guided by research-based principles described below. All youth who engage in sexually abusive behavior must be held accountable and, as noted above, there will always be a small percentage of youth whose sexual aggression or repeated acts of sexual abusive behavior warrant placement in a secure setting while they receive intensive specialized assessment and treatment.

However, adolescents who engage in sexually abusive behavior vary widely in terms of their sexually abusive behavior, their motives for that behavior, their individual characteristics, and characteristics of their families and communities, and their stage of development. One may be a developmentally delayed 13 year-old with cognitive disabilities who functions like a much younger child and as he enters puberty engages with a younger child for sexual experimentation. Another may be a mid-adolescent in a peer group involved in “sexting” who violates child pornography laws by sending a “sext” of a 14 year-old boyfriend or girlfriend. Yet another may be an adolescent who engages with peers in a sexual assault during a party when they are very intoxicated.

None of this sexual conduct is acceptable but the responses most likely to effectively address the abusive behavior will differ from case to case. Except for the fact that all of these cases would be heard before a Juvenile Court if the youth is charged, Massachusetts law does not currently distinguish among child, adolescent or adult sexually abusive/aggressive behavior in the way that many other states do. The existing framework in Massachusetts is essentially a “one size fits all” approach that fails to take into account important differences among children and adolescents, and between youth and adults.

This Commission affords an opportunity to review the Massachusetts framework for responding to sexually abusive/aggressive behavior by youth in light of the following research-based principles:

1. Youth are in ***developmental flux***—especially during adolescence—and the nature and meaning of their sexual offense, their responses to intervention and management, and their likelihood of sexual recidivism must be understood developmentally. As a result, ***effective assessment, intervention and management of JSOs requires a developmental perspective highly individualized*** to the risks, needs and characteristics of each JSO.

Developmentally-informed assessment prompts attention to the history and current status of each JSO along the following dimensions:

- Attachment and relationships
 - Capacities for emotional regulation
 - Cognitive capacities (including “executive functioning” and learning style)
 - “Social intelligence” (ability to take the perspective of others, capacities for empathy)
 - Social contexts (e.g., peers, family, school, community) shaping development
 - Adaptiveness of coping skills
 - Learning about human sexuality and sexual behaviors
 - History and current point along normal child and adolescent development
 - Special needs, characteristics, or talents
 - Nature of the sexual offense(s), victim(s), trajectory towards offense(s), function served
2. JSO have ***significantly lower risks of sexual recidivism than do adult sexual offenders***. Most adolescents desist upon detection and confrontation growing up to live healthy and safely in the community. .

The best research available indicates that 85% – 95% of JSO had no prior arrests and no subsequent arrests for a sexual offense. Youth adjudicated of a sexual offense do not sexually reoffend. However, if they are arrested again they typically are arrested for non-sexual crimes such as property or drug offenses. Research-based rates for JSO sexual recidivism consistently report rates of 7 – 13%. A landmark meta-analysis study⁴ involving 11,219 JSO across 63 data sets follow for an average of over four years found a sexual recidivism rate of 7.08%. This compares to a recidivism rate of 43.4% for youth adjudicated delinquent on non-sexual offenses.

3. Sexual recidivism rates are sufficiently low that ***researchers have not been able to generate the same kinds of robust actuarial tools that are available for adult sexual offenders***. As a result, it is not possible to confidently assign risk ratings or probabilities for sexual recidivism relying primarily on those tools, and existing tools for JSO are plagued by high rates of “false positives” (rating of a youth as at high or very high risk of sexual re-offense but the youth does not sexually re-offend), especially for youth deemed most concerning and at-risk.

The Juvenile Sexual Offense Recidivism Risk Assessment Tool (JSORRAT-II)⁵ is a good example of the challenges involved. This widely used JSO assessment tool was devised assuming a 13.%

⁴ Caldwell, M. *Int J Offender Ther Comp Criminol*, published online January 23, 2009.

⁵ Epperson, et al (2006).

sexual recidivism rate and establishes cut-off scores for identifying JSOs as posing sexual re-offense risk on this continuum: Low-Moderately Low-Moderate-Moderately High-and High. One reviewer⁶ of this tool observed that it placed 70% of youth in the Low-Moderately Low risk groups which had a reported sexual recidivism rate of 2.7%. It placed 30% of youth in Moderate-Moderately High-High risk groups where there was a reported sexual recidivism rate of 37%. However, in the High risk group 63% of those rated as high risk did not sexually reoffend. As a result, this tool is useful in broadly distinguishing those youth at lowest risk from those youth at highest risk but is wrong more than half the time for youth deemed “High” risk.

Tools certainly have their place in JSO assessments and their use is certainly much better than relying upon “unstructured” clinical interviewing and judgment due to their many vulnerabilities to bias and error. However, at their current state of development, tools are still blunt instruments in differentiating among youth deemed moderate to high risk for sexual recidivism and they should be used in the context of a broader developmentally-informed evaluation.

Nonetheless, being identified as “high risk” on a tool or when applying various factors has substantial potential consequences including commitment to the Department of Youth Services as a delinquent, potential exposure to adult correctional supervision or incarceration if tried as a Youthful Offender, intensive community-based tracking and monitoring removal from the community and placement in facilities-based residential care, specialized high-intensity JSO treatment, and registration obligations with the Sexual Offender Registry Board. Each of these can, in turn, have collateral impacts upon where a JSO can live, current and future employment or educational prospects, and/or ability to enlist in the military.

4. A ***developmentally-informed application of the Risk-Needs-Responsivity model*** can guide understanding of each youth in this very heterogeneous group, identify risk factors to address as well as protective or mediating factors to support, and help tailor interventions to take into account the individual characteristics of each JSO and their social context (e.g., peers, family, school, community)

The Risk-Needs-Responsivity (RNR) model was originally developed for adult offender populations to better target assessments and more effectively match interventions to the needs and individual characteristics of each offender. It has been adapted for use with juvenile offender populations and is best used when it is also developmentally informed.

⁶ DiCataldo, F. *The Perversion of Youth: Controversies in the Assessment and Treatment of Juvenile Sex Offenders* (2009)

For example, the “Risk” category should include both evidence-based risk factors for general and/or sexual recidivism and evidence-based positive youth development factors in efforts to support a trajectory of desistance from sexual and non-sexual offenses.

The “Needs” category in adults focuses on so-called “criminogenic needs” such as housing, employment and substance abuse. The “Needs” category in youth should include both juvenile “criminogenic” needs to be met but also identification of positive youth development assets⁷ which can be incorporated into treatment and risk management strategies.

The “Responsivity” category allows for an individualized response tailored as much as is practicable to each youth. Youth who commit sexual offenses are a very heterogeneous group and the only significant thing that some youth may have in common is that they committed an act of sexual misconduct for which they were charged and adjudicated a JSO. In every other relevant aspect of their functioning they may vary greatly. This includes multiple domains including cognitive capacities, developmental maturity, learning styles, ethnic and cultural background, socio-economic status, peer group characteristics, the nature and characteristics of their sexual offense(s) and other offending, and the kind(s) of intervention they may need.

The RNR model holds that “treatments are most likely to be effective when they treat offenders who are likely to reoffend (moderate or high risk), target characteristics that are related to reoffending (criminogenic needs), and match treatment to the offender’s learning style and abilities)....”⁸ The model also emphasizes the importance of evidence-based models of assessment and intervention, the need to focus available resources upon those most likely to reoffend, and the need to avoid “over-intervention” among those less likely to reoffend. This is consistent with research and innovation in juvenile justice seeking to address the negative consequence of ***inadvertently increasing recidivism*** when youth are unnecessarily detained, subject to prolonged periods of facility-based care or incarceration, are poorly matched with interventions, or fail to have basic behavioral health, educational or other needs met.⁹

5. ***Assessment, treatment and management of Juvenile Sexual Offenders has dramatically changed in recent years*** with the emergence of research and innovations in policy and practice.

⁷ These include: positive school engagement and climate, developmentally appropriate parenting, activities that support a sense of community engagement and contribution, basic physical safety at home and in the community, active and positive involvement of adults in the life of a youth, and others.

⁸ Hanson, et al. *The principles of effective correctional treatment also apply to sex offenders*. Crim Just and Beh, vol. 6, no. 9 (September 2009).

⁹ The Department of Youth Services in Massachusetts is among the national leaders in juvenile justice in attempting to drive down unnecessary detention, rely upon best-practices interventions in its secure treatment settings, create an infrastructure for community-based supervision and intervention for most youth committed to them, and develop re-entry strategies to lower risks of early or deep penetration into the criminal justice system.

Assessment and treatment for juvenile sexual offenders was largely taken from—and shaped by—assumptions and practices relied upon in treatment of incarcerated adult sexual offenders. Twenty years ago, practice was shaped by assumptions that are now demonstrably either not accurate or yield a poor practice model for work with JSOs. These assumptions and practices have been increasingly replaced by other approaches. These include:

Traditional Model	Emerging Model
JSO have very high sexual recidivism rates	Recidivism is about 7 – 13%
JSOs are driven by deviant sexual arousal	JSO rarely involves deviant sexual arousal
JSO are about “power and control”	Sometimes, but other motivations exist
Treatment is to replace JSO behaviors	Yes, but also teach replacement behaviors
Only “relapse prevention”(RP) works with JSO	RP –without more-largely ineffective in JSO
Ignore trauma—it will be the “abuse excuse”	Address trauma immediately and ongoing
“One size fits all” JSO treatment in groups	Individualize treatment (Responsivity)
Assessment not tied to scientific support	Assessment guided by evidence-base
Assess and treat individual JSO	Assess/treat JSO’s within social ecology
Offense-driven treatment/case planning	“Whole child” lens on treatment/case plan

The established and emerging evidence-based models for JSO have moved from facilities-based intervention and management strategies to ones which target the social ecology of the JSO. Evidence- based interventions for JSO include Multi-Systemic Therapy (MST), Functional Family Therapy (FFT), and the Oregon Model of Therapeutic Foster Care. These community-based interventions have demonstrated effectiveness for higher-risk delinquents, including youth adjudicated with JSOs.

Massachusetts has not incentivized community-based providers to develop capacities for evidence-based interventions with higher risk delinquents/JSOs and so current access to these services is extremely limited or non-existent.¹⁰

6. *Policies and practices regarding registration and community notification for JSO have come under increasing scrutiny nationally* and warrant review in Massachusetts

Other than hearing delinquency or Youthful Offender cases involving alleged sexual offenses in Juvenile Court, Massachusetts law has not followed other states in distinguishing adolescents and children from adults. This is particularly the case for post-adjudication registration and management of youth.

The information below was derived from the Center for Sexual Offender Management (CSOM) and downloaded on 10.17.14 in anticipation of the presentation before the Commission.

¹⁰ For example, we are aware of one MST program but it is contracted through DCF and youth must reportedly be in the custody of DCF to be eligible.

The original goals for creating systems for registration and community notification of sexual offenders included deterring potential sex offenders, reduce sexual offense recidivism, make information available to law enforcement, and share information with communities about known sexual offenders so they could take protective measures collectively and individually.

Almost from their inception, concerns were raised about including adolescents in registration and notification systems. These concerns included the potentially negative consequences of “labelling” adolescents, absence of research regarding efficacy of these systems when applied to youth, and the failure of some states to differentiate which offenses trigger registration and notification requirements for JSO. Concerns were also raised that the potential consequences of registration or notification requirements may skew charging decisions or plea bargaining to avoid these outcomes.¹¹

In response, five states created separate registration laws governing juveniles or adopted other approaches to differentiate responses to JSO. For example, Texas amended its statutory scheme to permit Juvenile Courts to waive registration requirements, to terminate registration requirements for JSOs already registered, or to limit information on registered JSOs to be used only by law enforcement investigating a subsequent investigation of a new sexual offense. Oregon permits juveniles to petition the court for relief of registration two years after the end of the term of probation or other supervision. Idaho and Missouri maintain JSO information in separate databases which have limits upon access. In Alabama, JSO are not subject to automatic community notification but are required to receive treatment and register upon release from facility-based care; prior to release an assessment is provided guide in each case the most limited yet effective notification process is to be used.

Implications for Policy and Practice and Recommendations for Consideration

The substantial differences between youth and adults has been increasingly recognized over the past decade, fueled in part by emerging developmental neuroscience, research regarding the general trajectory of self-desistance among all types of delinquent offenders, and increasing recognition that adapting approaches for adult offenders to juvenile offenders often does not yield intended results and, in fact, may inadvertently increase recidivism and thereby undermine public safety. Massachusetts has an opportunity to rely upon the best available research and practice regarding JSOs, consider what other states have done, and to consider a

¹¹ Letourneau, E. (2009) researched juvenile JSO registration in South Carolina and found that: (a) JSO registration had no impact upon rates of JSO recidivism; (b) registration increased risk of subsequent arrest for “nuisance” offenses; (c) there were increases in arrests for new juvenile sexual offenses but not increase in adjudications or convictions on those charges; (d) registration served to deter prosecution of both first offense and repeated JSO cases, and (e) led to a three-fold increase in plea bargains in which the sexual element was dropped from sexual offense charges.

framework of law, policy and practice geared to prevent sexually abusive behavior among juveniles and to effectively respond to it when it does occur.

The following recommendations were developed for consideration by the Commission at the time of the October 2014 presentation which this document summarizes:

1. Assessment and treatment of juvenile sexual offenders is increasingly a highly specialized field with its own well-developed research and practice literature. There is currently no specific certification process for professionals providing these services in clinical or forensic contexts. As a result, actual professional practice in this area varies widely from facility to facility, and from practitioner to practitioner.

Recommendation: Development of a basic certification process for persons providing clinical or forensic services with JSOs. Additional certification may be warranted for services to special population JSOs such as those with Intellectual Disabilities, Autism Spectrum Disorders, children under age 10, or those with severe mental illness. A model currently exists through which the Department of Mental Health collaborates with University of Massachusetts Medical School and the Trial Court to certify persons who conduct court-ordered forensic evaluations in the adult (Designated Forensic Professional—DFP) systems and the juvenile court (Certified Juvenile Court Clinician—CJCC) system. A similar certification process may involve other collaborating entities but the training model exists. This training model is widely viewed as having improved and standardized forensic mental health practice with court-involved adults and juveniles. Certification might include community and facilities-based providers of specialized JSO assessment and intervention.

2. The current statutory scheme requires the Juvenile Court to determine within 14 days of the final adjudication of a juvenile sexual offender case whether or not to waive the obligation to register with the Sex Offender Registry Board (SORB)

Recommendation: The current framework presumes that an adolescent adjudicated on an eligible sexual offense will be subject to SORB registration unless a Juvenile Court determines otherwise. The Commission should consider an alternative approach given the significantly lower rates of sexual recidivism among adolescents, the high “false positive” error rates in reliably identifying youth rated “medium – high –very high” for sexual reoffending, and the far-reaching collateral consequences of SORB registration for youth.

This approach would involve a rebuttable presumption that these adjudicated youth would *not* have an obligation to register unless a Juvenile Court determines otherwise. This determination by the Juvenile Court would occur at the end of any period of supervision (court-based probation) or commitment (DYS commitment). This would allow the Juvenile Court to review

the case following adjudication and disposition to gauge whether the youth has responded to: (a) any interventions imposed as conditions of court-based probation; or, (b) as part of sexual offender-specific programming while committed to DYS (facilities-based care or on conditional release). The Court would also have information regarding any new sexual or non-sexual charges, the opportunity to order an updated evaluation through the Juvenile Court Clinic, and review information about the youth's general functioning. The Juvenile Court's ability to make an informed determination about a SORB registration obligation would certainly be enhanced by making a decision informed by the youth's post-disposition behavior and responses to intervention. The Commonwealth would also have an opportunity to make the case for registration with the SORB in the event it determined that it could make the case.

3. Massachusetts has very limited infrastructure of evidence-based programming with demonstrated effectiveness with high-risk violent delinquent youth, including some JSOs. The Department of Youth Services has been innovative and the Department of Children and Families is currently engaged in reviewing and revising the assessment process that is mandated by statute before a sexually abusive youth can be placed with other children in substitute care. However, most JSO are youth adjudicated on lower-level sexual offenses and in the community (often on probation or conditional release by DYS).

Recommendation: This Commission consider reporting to the Legislature and the Governor that there is a compelling need to develop and fund a community infrastructure of evidence-based programs (such as MST, FTT, Oregon model Therapeutic Foster Care). These programs are more cost-effective than traditional juvenile justice responses for high risk violent juvenile offenders as well as JSOs, and youth served in these models have demonstrably lower recidivism rates.

4. Massachusetts currently has a review process for JSO that is embedded in the SORB statutory scheme and may not yield the best outcomes for public safety or individual youth.

Recommendation: This Commission consider a separate procedural framework for children and adolescents whose cases are heard and disposed of in the Juvenile Court that reflects: (a) a rebuttable presumption that children or adolescents adjudicated on a sexual offense will not be placed on the registry or subject to community notification unless they are deemed dangerous to the community; (b) a separate classification process based upon research-based risk, protective and mediating factors that are specific to youth adjudicated on sexual offenses; (c) juvenile-specific determinations for whether or how to implement community or other notifications for cases heard and disposed of in the Juvenile Court; (d) protecting information on JSO from public scrutiny in the absence of a determination under (c) to disseminate a JSO's information; and, (d) identifying a specific term of time after which a JSO who has had no

further adjudications for a sexual or non-sexual offense could be relieved of an obligation to register and the history of registration sealed unless ordered otherwise by a Juvenile Court. For example, MASOC has recommended that youth registered with SORB for a sexual offense committed as a juvenile and heard in Juvenile Court be subject to a case review and an updated risk assessment at age 25.

5. Nationally, one in eight sexual offenses reported to law enforcement are committed by youth under age 12. Many of them have themselves been victims of maltreatment and are often described as “sexually abuse reactive” to that maltreatment. Many of them are too young and developmentally immature to be a good match for services available through the juvenile justice system, and charging them with a sexual offense often complicates their participation in school, organized social and recreational activities, and other “normalizing” experiences.

Recommendation: The Commission consider recommending to the Legislature and the Governor that statutes be amended to create a rebuttable presumption that youth under age 12 will not be charged with a sexual offense as a delinquency matter, and will instead be handled as a Child Requiring Assistance (CRA) unless a Juvenile Court determines otherwise upon the Commonwealth’s showing on specific factors. These factors may include: (a) physical harm to the victim; (b) use of a weapon to enforce victim compliance; and (c) clear and convincing evidence of a broader pattern of misconduct that would yield charges of physically aggressive/violent felonies against a person if charged.

6. Currently, the Department of Children and Families is mandated to conduct a risk assessment (the so-called ASAP) evaluation through an approved clinical provider. This ASAP is required prior to further placement with other children in substitute care in cases where a child in the custody of DCF has been sexually abusive or set fires. The ASAP protocol is currently in the process of revision to incorporate the research and practice which has emerged since it was incorporated into legislation in 1998. On occasion, defense counsel have barred evaluation of their juvenile client—either because the youth has been charged for a sexual offense or there are concerns the youth will be. This has at times led to DCF being put in the position of not being able to make a determination about safe placement because it cannot get the ASAP required by law. In the past, this has been addressed by an informal policy from the Juvenile Court that it would not allow statements made by the juvenile to be introduced by the prosecution as “confessions” in the Commonwealth’s case in chief.

Recommendation: Amend the statute to clarify that statements made by the adolescent to the evaluator retained by DCF to conduct this mandatory “safe placement and planning” evaluation may not be used by the Commonwealth in a delinquency, Youthful Offender or criminal prosecution of the juvenile for the alleged misconduct triggering the mandatory evaluation.

Amend the statute or DCF regulations to require the implementation of the most current version(s) of the assessment protocol to be relied upon.

7. There is currently wide variation in practice among District Attorneys in responding to cases alleging statutory rape.

Recommendation: Amend the statute to create a rebuttable presumption that “statutory rape” will not be charged if: (a) the individuals are within two years of age of each other; and, (b) there is no indication that any of the participants in the sexual activity were coerced or forced.

8. Adolescents are increasingly identified as being involved with social media activities that can constitute illegal activity (such as “sexting,” sending images of persons under age 18 that could legally constitute child pornography, harassment by sending nude or sexual images of oneself or others). Many of the relevant laws, especially those involving possession or transmission of child pornography, were crafted with adults in mind who are involved in child sexual exploitation or production/collection of child pornography. The meaning and impact of one 15 year old taking an eroticized “selfie” and sending it to another 15 year old is very different than an adult taking an eroticized picture of a 15 year old and then distributing it to other adults interested in child pornography. There are other examples of developmental differences and impact that illustrate the difficulty with which these legal frameworks interact with youth in the era of social media and other electronic technology.

Recommendation: The Commission or a subgroup of this Commission be tasked with specifically looking at the involvement of adolescents in actions involving electronic technology that could be charged as sexual offenses, including possessing of child pornography. Alternatively, the Commission might recommend to the Legislature or Governor’s Office that a working group attending to this matter be constituted if there is not already one serving this purpose. This is a complex area and the working group should include professionals reflecting law and public policy, child and adolescent development, social media and other electronic technologies, and others with relevant subject matter expertise.

Thank you for the opportunity to provide this summary of the presentation in October 2014 to the Commission for its review and consideration.