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Testimony of the Division of Criminal Justice

**H.B. No. 7086 AN ACT CONCERNING REGISTRATION OF SEXUAL
OFFENDERS**

Joint Committee on Judiciary – February 23, 2007
Presented by Chief State's Attorney Kevin T. Kane

The Division of Criminal Justice agrees with the intent of H.B. No. 7086, which is to protect some of the most vulnerable members of our society, young children under the age of 13, from sexual predators. As the agency responsible for prosecuting sexual offenders, we see far too often the devastating effects that their crimes have on innocent children, and we are acutely aware of the need to effectively prosecute such offenders and protect children.

That being said, the Division of Criminal Justice opposes the enactment of H.B. No. 7086 in its present form. Some provisions of this bill will harm many of the young victims it intends to protect. Such an incongruous and unintended result would undermine society's responsibility to protect its children.

Although we have concerns with a number of provisions in this bill, we would especially draw your attention to the requirement that a 25-year mandatory minimum sentence without possibility of suspension be imposed on all sex offenders, regardless of the severity of their conduct, if the victim is under age 13.

Some of our most pressing concerns with the mandatory minimum sentence proposal as provided in H.B. No. 7086 are:

1. A 25-year mandatory minimum sentence virtually guarantees that no defendant will plead guilty, and all convictions will have to be obtained by a trial. It only takes one juror to hang a jury. That means we try the entire case all over again. Even at this stage, there is no ability to plea bargain, and the child we want to shield from further trauma has to testify again. From a defendant's perspective, with a foregone sentence of 25 years, there is

nothing to lose by taking the case to trial and absolutely no incentive not to take the matter to trial.

2. With every case going to trial, innocent child victims will have to face testifying and being cross-examined. Oftentimes this is not in the best interests of the child and is in fact detrimental or even harmful to the child. Many of these children have serious problems and concerns beyond sexual abuse, i.e., they come from troubled families and they and/or their families have mental health issues. Sexual assault can leave a child with deep and lasting emotional scars. Compelling a fragile witness to face the perpetrator and be cross-examined by defense counsel re-victimizes the child, forcing them to relive the incident and subjecting them to questions about their truthfulness. Sometimes the child has to testify against a father or other relative. In fact, our experience shows that the typical offender is a relative, or a boyfriend or girlfriend of the victim's parent, and not the predatory preying in the playground. To say the least, this can be extremely difficult, and the child in such a situation often is under great pressure from other family members not to testify. Even in cases where there are supportive adults who have no relationship to the offender and would like nothing better than to see severe punishment, these adults more often than not do not want the child to testify because of their concern for what it will do to the child. Regardless of the family or other circumstances, the child witness can be re-traumatized by the whole experience. This is a very important reason why prosecutors must have the ability to resolve cases by securing a guilty plea by agreeing to recommend a sentence less than the maximum, but which carries a sufficient combination of incarceration, intensive parole, or probation supervision to monitor and control the offender and reduce the likelihood that he or she will offend again.
3. A 25-year mandatory minimum totally obfuscates the prosecutor's discretion to evaluate each case on its own unique facts. The defendant who pats a child on the behind is subject to the same sentence as a defendant who forces sexual intercourse on a child. A defendant who is a relative or family friend is subject to the same penalty as the stranger who kidnaps and rapes a child. On its face this may not seem unfair, but these are situations that split families and further traumatize a child who could be made to feel somehow responsible for the offender's lengthy term of incarceration. A teenaged boy more than two years older than his willing teen-aged girlfriend gets the same sentence as the internet predator. This provision in itself raises a potential conflict with the federal Adam Walsh Act, which requires the states to engage in risk assessment based on the severity of the various sex crimes and to rank each individual offender based on the unique risk that he or she poses.
4. By its very existence, a law requiring a 25-year mandatory minimum sentence can lead to under-reporting of child sexual assaults. Because the perpetrator is usually someone known to the child victim – a relative, family friend, clergyman, coach, etc. -- there will be occasions where the child's family will not want to see the offender locked away for what may be

perceived as a life sentence. Families will attempt to work out matters outside of the court system, which means these crimes will go unreported. While this may end the abuse of one child, it lets the perpetrator escape criminal liability and responsibility for his or her actions, and leaves this criminal to seek out fresh victims.

5. It also must be stressed that these cases are often the most difficult to prove at trial. The state's ability to present "constancy of accusation" evidence and expert testimony is narrow. We often find ourselves with cases where the reporting of the crime was delayed and no forensic evidence exists. To encourage trials in these cases would make what is already a very difficult job much more difficult.
6. There will be no incentive for incarcerated sex offenders to take responsibility for their crimes and enter treatment programs with an eye toward parole and rehabilitation. Some may say that is irrelevant, that as long as the offender is locked up he or she cannot harm children, so their propensity is dormant. But we as a society have some responsibility to offer the opportunity for rehabilitation or at the very least strict supervision to those who can be treated, or to those who have completed their jail terms.
7. The bill as proposed could put a 20-year-old offender in jail until age 45 so that at the time of release there would be no supervision of such an individual, no threat of additional incarceration that probation would pose, and no ability whatsoever to monitor or restrict the individual's behavior.
8. It is conceivable that, when faced with what may be perceived as a life sentence if arrested and convicted, an offender may hurt or even kill a child to prevent him or her from reporting the abuse and testifying.
9. Finally, the sentencing structure set forth in the bill lacks proportionality and may be subject to challenge under both the state and federal constitutions, because it subjects both violent and nonviolent conduct to the same severe penalty.

Again, the Division of Criminal Justice understands the intent behind H.B. No. 7086 and we support that intent. But even the very best of intentions cannot overcome what would essentially be bad law. To address the concerns that we have outlined with H.B. No. 7086 as now written, the Division would urge the Committee to consider H.B. No. 7237, An Act Concerning Special Parole. This bill was submitted as one of our Legislative Recommendations this year and would provide for a combination of special parole, probation and imprisonment of up to thirty-five years in certain sexual assault cases. The Division also proposed An Act Concerning Sexual Predators, which was not raised by the General Assembly. This legislation addressed online sexual predators and would establish mandatory minimum sentences for certain offenses. The proposed penalties would mirror the penalties provided for in federal law. We would be happy to provide the language of this proposal for the Committee's consideration. In addition, the Committee has raised S.B. No. 1245, An Act Concerning a Tender Years Exception to the Hearsay Rule, which would allow limited exceptions to the hearsay rule of evidence for certain child witnesses.

In examining H.B. No. 7086, it is also helpful to look to the experience of other states that have considered and rejected similar “Jessica’s Law” mandatory minimum sentencing provisions. In many cases, these states recognized the possible deleterious effects of such sentencing proposals and have enacted somewhat different provisions that make it possible for prosecutors to get negotiated dispositions that better serve the interests of the victim, our society, and, ultimately the interests of justice.

For example:

- West Virginia imposes the 25-year mandatory minimum first-degree sexual assault if the defendant is over age 18 and the child is under 12 but does not prohibit suspension of all or part of that sentence. *W.V. Code § 61-8B-3*. It also provides for a lesser offense of sexual abuse in the first degree. *W.V. Code § 61-8B-7*.
- Florida imposes a sentence of 25 years to life, but allows the court to split the sentence and impose probation after release from prison. *Florida Statutes §§ 0775-082, 800.04*.
- Vermont imposes a “presumptive” 10-year mandatory minimum sentence on aggravated sexual assault, with a requirement that a judge put on the record reasons for going below 10 years.

We as prosecutors, and those throughout our court system, have a long history of involvement in these cases. The Division of Criminal Justice is proud indeed of its long history of victim inclusion in the legal process. Our commitment to the victim – and protecting the rights of innocent children – cannot be understated. We deal with the victim and their advocates honestly. When a case is to be resolved without a trial, the victim and his or her advocates are consulted and told the amount of prison time that will result, and, if no prison time is proposed, the reason for that decision. We explain the problems that can arise in sustaining our burden of proof at trial versus the certainty of a conviction through a guilty plea and the prison time, probation and special parole, or other conditions that will with certainty accompany the guilty plea. A long mandatory minimum sentence certainly does sound good on first impression, but the luster quickly fades under the reality that it will not in fact protect children as its proponents hope, but instead will prevent the majority of cases from being resolved in a manner that would best protect children.

In closing, the Division of Criminal Justice appreciates the opportunity to present our concerns regarding this important issue. The Division stands ready to work with the Committee to address the clear shortcomings of this bill strongly and to assist you in developing legislation that will effectively carry out the intent of H.B. No. 7086. Thank you.