



**REPORT ON LEGISLATION BY THE
SEX OFFENSE WORKING GROUP,
CORRECTIONS AND COMMUNITY REENTRY COMMITTEE
AND CRIMINAL JUSTICE OPERATIONS COMMITTEE**

**A.8257
S.2862**

**M. of A. Weprin
Sen. Sepulveda**

AN ACT creating the New York state commission on sex offender supervision and management; provides that such commission shall consist of thirteen members; requires the commission to make a report of its findings.

THIS BILL IS APPROVED

BACKGROUND

This legislation would create the New York State Commission on Sex Offender Supervision and Management (“Commission”), a body that would consist of thirteen members and conduct research and make a report of its findings. The Commission would investigate:

- whether large numbers of individuals required to register on the New York State Sex Offender Registry (“Registrants”) reside in certain geographic areas, and determine the circumstances that caused this geographic distribution;
- the practices of the New York State Department of Corrections and Community Supervision (“DOCCS”) Division of Parole and others in investigating and approving residences for individuals convicted of sex-related offenses;
- the availability of appropriate housing;
- the adequacy of supervision and monitoring;
- the effectiveness and availability of existing treatment programs; and
- the need for additional programs in correctional facilities and communities.

About the Association

The mission of the New York City Bar Association, which was founded in 1870 and has 25,000 members, is to equip and mobilize a diverse legal profession to practice with excellence, promote reform of the law, and uphold the rule of law and access to justice in support of a fair society and the public interest in our community, our nation, and throughout the world.

Five of the thirteen Commission members would come from the Executive Branch; eight would be appointed by the Legislature and be “representative of community-based providers of employment, education, housing and other services used by individuals returning to society from prison, criminal justice advocates, victim advocacy groups, and academic professionals in the field of criminal justice.”

Most would agree with the statement in the legislative memorandum that persons convicted of sex offenses must receive “appropriate supervision and treatment designed to reduce the risk of re-offense in order to ensure the safety, health and welfare of the communities in which convicted sex offenders reside.” However, the most salient point is located later in the memo, i.e., that relevant agencies “are often unable to locate suitable housing for convicted sex offenders. This lack of housing has resulted in an unacceptable level of concentration of sex offenders” in certain locations.

Although the Commission’s mandate would not explicitly encompass reviewing the way that sex offender “risk levels” are determined under the Sex Offender Registration Act (“SORA”)¹, the classification of numerous persons as high risk is one of the “circumstances” that cause over-concentration, and thus a review of the “risk assessment instrument” used by the Board of Examiners of Sex Offenders would be within the Commission’s scope.²

REASONS FOR SUPPORT

The crisis in available housing is an unintended consequence of the Sexual Assault Reform Act (“SARA”), adopted in 2005 (L. 2005, c. 544), which prohibits individuals convicted of sex offenses against persons less than 18 years old, and Level 3 “high-risk” individuals regardless of the victim’s age, from living within 1000 feet of the “real property boundary line” of a school

¹ Under SORA, codified as Article 6-C, Section 168-1 of the Correction Law, courts classify persons convicted of sexual offenses as low-risk, medium-risk or high-risk based on a Risk Assessment Instrument prepared by the Board of Examiners of Sex Offenders. Persons of any risk level are subject to the Sexual Assault Reform Act if the victim was under 18 years of age; persons designated “high-risk” are subject to SARA without regard to the victim’s age. The law specifies that the Board shall consider, among other factors, whether the person has a mental abnormality or personality disorder that makes him or her likely to engage in predatory sexually violent offenses; whether the conduct was found to be characterized by repetitive and compulsive behavior, associated with drugs or alcohol; whether he or she has served the maximum term; whether he or she committed the offense against a child; his or her age at the time of the commission of the first sex offense; the relationship between the person and the victim; whether the offense involved the use of a weapon, violence or serious injury; the number, date and nature of prior offenses; whether the individual is under supervision, receiving counseling, therapy or treatment; physical conditions that minimize risk of re-offense; the person’s response to treatment; and the person’s recent behavior, including behavior while confined. In practice, though, the instrument is heavily weighted toward factors involving details of the offense, such as whether there was penetration, and whether physical force was employed, factors that are of little value in determining the risk of recidivism if the offense occurred many years in the past. *See People v. McFarland*, 29 M. 3d 1206(A) (Supreme Ct. N.Y. 2010), for a detailed critique of the instrument; *see People v. Gillotti*, 23 N.Y. 3d 841 (2014), for a discussion of the circumstances under which courts may “depart,” upward or downward, from the Board’s recommendation.

² “Updating the Guidelines of the Sex Offender Risk Assessment Instrument,” New York City Bar Association, Jan. 23, 2020, <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/updating-the-guidelines-of-the-sex-offender-risk-assessment-instrument> (Report supporting NYS bill that would require re-examination of the instrument in view of recent research on the question of risk). (All websites last visited on Nov. 2, 2021.)

while they are under parole supervision, a period that typically lasts many years. In New York City, SARA's mandate leaves most people in these categories homeless upon their release from prison. The prohibited zones include nearly all of Manhattan, most of Brooklyn, and at least half of Queens and the Bronx. Because areas that have greater population density and affordability tend to be in closer proximity to schools, for practical purposes the prohibited zones are even more all-encompassing than a map would show. Moreover, because most returning individuals' families live in prohibited zones, the law prevents people from returning to their families and communities, even though the importance of family support in successful rehabilitation is well-supported.³

SARA's immediate impact was stark: most affected people from New York City were required to reside in homeless shelters, a less-than-ideal situation. But the situation was about to get far worse: in 2014, DOCCS determined that the New York City Department of Homeless Services ("DHS") Manhattan "intake center" for single men was too close to school grounds and stopped releasing men with directions to report there. Because DHS refused to accept more than ten SARA-restricted parolees per month into its limited number of "SARA-compliant" shelters on Wards Island and in the Bronx – citing lack of space – hundreds of men suddenly had nowhere to go.⁴

DOCCS then created a stopgap solution by designating some of its prisons as "Residential Treatment Facilities" ("RTF"s): when individuals reached the maximum expiration date of their court-imposed sentences, they were assigned to "reside" in one of these prisons. Although for all practical purposes individuals assigned to RTFs live as prisoners and are subject to the same rules and regulations as prisoners, the fiction is that they are on "post-release supervision" and the prison is just being used "as a residence." Over the past six years hundreds of people have passed through RTFs, and generally more than one hundred individuals are confined to RTFs at any given time. The waiting list for a SARA-compliant shelter bed in New York City for individuals confined to RTFs is approximately one year. For people seeking to return to certain suburban and upstate counties which refuse to provide any shelters accommodating those with sex offense convictions

³ Frankel, "Pushed Out and Locked In: The Catch-22 for New York's Disabled, Homeless Sex Offender Registrants," 129 Yale L.J. Forum 279, Nov. 25 2019, <https://www.yalelawjournal.org/forum/pushed-out-and-locked-in>; see also *People ex rel Green v. Superintendent*, 137 A.D. 3d 56, 60 (3rd Dept. 2016), and DOCCS's own white paper, "Coming Home, A Family's Guide to Reunification," Dec. 2019, <https://doccs.ny.gov/system/files/documents/2019/12/coming-home-2019.pdf> ("Research shows that persons who transition back into an informed and supportive family are less likely to re-offend and return to prison").

⁴ "Nowhere to Go: New York's Housing Policy for Individuals on the Sex Offender Registry and Recommendations for Change," Sept. 2018, (this White Paper was issued by the Alliance of Families for Justice; the Bronx Defenders; Brooklyn Defender Services; Coalition for the Homeless; Center for Community Alternatives; College and Community Fellowship; Community Service Society; Correctional Association of New York; the Fortune Society; Hour Children; the Legal Action Center; The Legal Aid Society; Mobilization for Justice, Inc.; Neighborhood Defender Service of Harlem; the Prisoner Re-Entry Institute, John Jay College of Criminal Justice; Providence House, and Youth Represent), <https://fortunesociety.org/wp-content/uploads/2019/05/NowhereToGo.pdf>; see also *People v. McFarland*, 35 M. 3d 1243(A) (Supreme Ct. N.Y. 2012), *rev'd on other grounds*, 120 A.D. 3d 1121 (1st Dep't 2014). Forced homelessness resulting from housing restrictions can have tragic consequences. See Blau, Reuven and Rosa Goldensohn, "Homeless Man Jailed For Failing to Put Address on Sex Offender Registry Dies at Rikers," The City, July 20, 2020, <https://www.thecity.nyc/2020/7/20/21331595/rikers-island-sex-offender-registry-homeless>.

and have restricted the availability of other potential residences like motels, the wait is even longer, in some cases more than two years.⁵

Meanwhile, hundreds more individuals who have been granted parole subject to their finding a SARA-compliant address, or who would have been granted conditional release based on good behavior in prison subject to their finding a SARA-compliant address, have been kept in prison solely because no such address is available. These individuals have completed the “Sex Offender Counseling and Treatment Program” while serving their sentences, but remain in custody solely for lack of housing, without even the fiction that they are in a “residential treatment facility.”

The difficulty of locating suitable housing for these individuals has frustrated not only the individuals themselves, but also parole officers tasked with finding and approving housing. This problem is not confined to New York State. After Iowa enacted residency restrictions, a sheriff stated, “[w]e are less safe as a community now than we were before,” (Human Rights Watch, 2007) and the Iowa county attorneys charged with enforcing the restrictions issued a statement asking that they be rolled back.⁶ The Colorado Sex Offender Management Board stated in a 2009 White Paper that residence restrictions have proven counter-productive because they “often cause destabilization to sex offenders” and may “inadvertently exacerbate the factors associated with recidivism.”⁷

Multiple individuals held in custody because of SARA and DOCCS’s implementation of SARA have filed lawsuits challenging this regime, but have been unsuccessful. In decisions issued on Nov. 23, 2020 in *People ex rel. McCurdy*, *People ex rel. Johnson*, and *People ex rel. Ortiz*, the New York State Court of Appeals denied constitutional and statutory challenges to current practices. Notably, however, the Court did not defend the SARA regime as either necessary or desirable. Instead, it put the issue squarely in the hands of the Legislature, stating “[t]he appeals before us present troubling issues concerning the fairness and effectiveness of the methods chosen by the legislature for deterring sex offender recidivism. These are important public policy issues that may require legislative attention.”⁸

As the Court of Appeals pointed out, the current practice of isolating from society people convicted of sex offenses has repeatedly been questioned. The State itself has discussed, in laws and regulations adopted subsequent to the SARA Law amendment, “the importance of stable housing and support in allowing offenders to live in and re-enter the community and become law-abiding and productive citizens,” and has recognized “the necessity to provide emergency shelter to individuals in need, including those who are sex offenders.”⁹

⁵ *People ex rel. Johnson v. Superintendent*, 174 A.D. 3d 992, 996 (2019) (Garry, P.J., concurring).

⁶ J. Meirick, “Through the Tiers: Are Iowa’s New Sex Offender Laws Unconstitutional?” 96 Iowa L. Rev. 1013 (March 2011), at 1027.

⁷ Rodriguez, Cathy, and Dethlefsen, Amy. “White Paper on the Use of Residence Restrictions as a Sex Offender Management Strategy, Colorado Sex Offender Management Board,” June 2009, <https://docs.google.com/file/d/0B67htTDuFr48N3dDelYydFpYa1E/edit>.

⁸ 2020 WL 682834, 2020 NY Slip Op 06934, at 10 (Nov. 23, 2020).

⁹ 18 NYCRR 352.36(a)(3); see also Social Services Law Sec. 20(8)(b), and L. 2008, c. 568, cited in *McCurdy* majority opinion at 15, and *People v. Diack*, 24 N.Y. 3d 674, 683 (2015), stating that the 2008 statute was meant to ensure “that there is suitable and appropriate housing available for sex offenders in every community in the state.”

The City Bar has previously spoken on this issue, opposing legislation that would have made residence restrictions even more onerous than they already are.¹⁰ Opposition by the City Bar and others, proved to be effective; the proposed legislation was not adopted. It is now apparent, though, that new legislative consideration is required. The Court of Appeals may have found the existing regime to be lawful, but it is nonetheless unnecessary, unfair and unwise.

The proposal to create a commission to study these issues is not a novel one. Massachusetts, Connecticut, and Illinois created similar commissions that issued recommendations to their respective legislatures.¹¹

Appointment of a Commission, including academic experts and advocates who are closest to the situation, is an eminently sensible approach to the problem at hand. Given the near unanimity of expert opinion that the existing residence restrictions are ineffective, the Commission is likely to reach a consensus on recommendations that would be a basis for action by fair-minded legislators. It is not a given that the Commission's recommendations would be entirely favorable to individuals seeking greater latitude in terms of where to live. But, at a minimum, the recommendations would be subject to honest and informed debate.

Accordingly, the City Bar believes that it is essential that a process for reform like that suggested by the proposed legislation be initiated without delay. We urge that this legislation be approved.

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¹⁰ “Opposition to Further Residency Restrictions for Sex Offenders – 2019 NYS Executive Budget,” New York City Bar Association, March 2018; <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/opposition-to-further-residency-restrictions-for-sex-offenders-2019-nys-executive-budget>; *see also* “The Impact and Legality of Sex Offender Registry Restrictions Created by New York’s Sexual Assault Reform Act,” Oct. 2016, New York City Bar Association, <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/the-impact-and-legality-of-sex-offender-residency-restrictions-created-by-new-yorks-sexual-assault-reform-act>.

¹¹ Connecticut Sentencing Commission, “A Study of the Sex Offender Sentencing, Registration and Management System,” June 22, 2017; Final Report of the Special Commission to Reduce the Recidivism of Sex Offenders, Massachusetts, 2016, https://www.ct.gov/ctsc/lib/ctsc/Sex_Offender_Report_11.03.2017Final_edits.pdf.