THE NEED FOR REFORM:
Safety, Fiscal, and Legal Concerns with AB 579

I. CONTEXT

- The Adam Walsh Child Protection and Safety Act (AWA) is a federal law designed to toughen sex offender laws and make laws parallel across states. In 2007, the Nevada Legislature passed AB579 which made sweeping, drastic changes to how registration and notification is handled.
  - AWA and AB579 both reflect noble aims – everybody can agree that increasing public safety is vitally important and that it is especially important to protect our children.
  - But reality sometimes does not match our goals, and how to tackle the problem of preventing sex offenses is a problem best tackled by the States. Nevada’s laws that were in place before AB579 was enacted in 2007 better promoted safety, were more cost effective, and were easier to enforce than the laws are now.

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1 Assembly Bill (AB) 579, 2007 Nev. Stat., ch. 485, § 41, at 2770-71 amended NRS Chapter 179D and made sweeping changes to how Nevada addresses sex offender registration in order to comply with the Adam Walsh Act and avoid losing federal funding.
2 Title 1 of AWA is the Sex Offender Registration and Notification Act (SORNA) and contains the provisions regarding registration and notification. Here, I am using “AWA” but the laws are often referred to as “SORNA.”

Prepared for Nevada Legislature, Senate Judiciary Committee March 1, 2013 hearing by Maggie McLetchie of Langford McLetchie LLC (email maggie@nvlitigation.com or call (702)471-6565 with any questions).
II. **COST ISSUES: CAN NEVADA AFFORD TO IMPLEMENT AB579?**

One of the initial motivators for passing AWA compliant legislation was not losing federal Byrne Grant Funding (AWA provided for a 10% reduction).³

A. But the AWA is an unfunded mandate and the federal government should not be able to dictate Nevada policy or take away existing funding in retaliation for Nevada’s decision not to follow AWA.

1. The broader constitutionality of reducing state funds for refusing to comply with a federal mandate is questionable in light of the United States Supreme Court’s recent decision on the Affordable Health Care Act. There, the majority agreed with the law’s challengers’ contention that Congress improperly coerced the states to expand health care coverage. Nevada faced losing prior-awarded Byrne grant funding for failing to pass a state legislative scheme that the federal government desired and acted out of fear of losing those funds.

“The Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress’ instructions.”


³ See A.B.579 Legislative History, pg. 21.
B. In any case, the amount of Byrne grant funding that Nevada could lose is very small compared to the costs of implementing AB579:

<table>
<thead>
<tr>
<th>Estimated Cost to Implement AWA in Nevada in 2009</th>
<th>Byrne Grant Funding (2006)</th>
<th>10% of Byrne Grant Funding</th>
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<tbody>
<tr>
<td>$4,160,944</td>
<td>$1,808,095</td>
<td>$180,810</td>
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</tbody>
</table>

From: Justice Policy Institute, “Registering Harm: a Briefing Book on the Adam Walsh Act” (October 2008).

C. In part due to costs, very few states have complied with the AWA and even fewer states have actually implemented it. For example, Arizona, Arkansas, California, Nebraska and Texas have all affirmatively rejected the AWA. [http://www.pewstates.org/projects/stateline/headlines/states-still-resisting-national-sex-offender-law-85899420374](http://www.pewstates.org/projects/stateline/headlines/states-still-resisting-national-sex-offender-law-85899420374).

III. SAFETY ISSUES: AB579 WILL NOT IMPROVE PUBLIC SAFETY

What AB579 does – in a nutshell:

- Broadens who is subject to sex offender laws and re-categorizes previously assessed offenders.
- Applies to offenses committed as far back as 1956.
- Applies to juveniles over 14 adjudicated delinquent for sexual assault, battery with intent to commit sexual assault, or lewdness with a child (or attempt or conspiracy to commit one of those crimes). NRS 179D.450(1)(b).
- Requires community notification of all sex offenders (and other offenders who committed a crime against a child), regardless of their tier classification.
- Does not allow for people to challenge application of the law or address errors (zero due process).
- Has impact on ability of people to travel and work and more importantly, their families.
### Summary Chart:

<table>
<thead>
<tr>
<th>Qualifying Crime</th>
<th>New Tier Level</th>
<th>Registration Period&lt;sup&gt;4&lt;/sup&gt;</th>
<th>Effects</th>
</tr>
</thead>
<tbody>
<tr>
<td>Any offender convicted of a crime against a child or a sex offender other than Tier II or III. N.R.S. 179D.113 (a “catch all” category).</td>
<td>Tier I</td>
<td>15 years</td>
<td>• No opportunity for appeal of tier level determination.</td>
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<td>• Subject to community notification and registration.</td>
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<td>• Requires sex offenders to register with a local law enforcement agency annually and whenever traveling.</td>
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<tr>
<td>Any offender convicted of a crime against a child or sex offender whose offense constituted a felony. N.R.S. 179D.115</td>
<td>Tier II</td>
<td>25 years</td>
<td>• No opportunity for appeal of tier level determination.</td>
</tr>
<tr>
<td></td>
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<td></td>
<td>• Subject to community notification and registration.</td>
</tr>
<tr>
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<td></td>
<td>• Requires sex offenders to register with a local law enforcement agency every 180 days and whenever traveling.</td>
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<tr>
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<td>• No opportunity to appeal for a shorter registration period.&lt;sup&gt;5&lt;/sup&gt;</td>
</tr>
<tr>
<td>Any offender convicted of a crime against a child or a sex offender who has been convicted of murder, sexual assault, battery, abuse of a child under 13 years old, or kidnapping. N.R.S. 179D.117.</td>
<td>Tier III</td>
<td>Life</td>
<td>• No opportunity for appeal of tier level determination.</td>
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<td>• Requires sex offenders to register with a local law enforcement agency every 90 days and whenever traveling.</td>
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<td>• No opportunity to seek a shortened registration period unless adjudicated delinquent and meet other criteria, and then only after 25 years.</td>
</tr>
</tbody>
</table>

<sup>4</sup> N.R.S. 179D.490, as amended by A.B.579, Sec. 41.

<sup>5</sup> *Id.*
**Example of a Registrant**

“Robert” is a senior citizen, husband, father, grandfather, and resident of a town of about 3,000 people in Elko County. He accepted a plea agreement in 1960, pleading guilty to statutory rape. He was 18 years old and had sex with a 13 year-old female. The court ordered him to serve four years of probation. After serving four months, Robert violated his probation when he was arrested for drinking and stealing hay. He was then ordered to serve time in prison. After nine months, Robert was released from prison, and was not subject to any parole or probation requirements.

Robert is not a pedophile. He has not had a single legal problem since he was released from prison over forty years ago. He has been required to register as a Tier 1 offender but he has never been subject to community notification.

Once AB579 applies he will be subject to community notification and become a Tier 2. He fears that his family will suffer humiliation and ridicule from community members.

**AB 579 casts a broad net:**

- AB579, like the pre-existing law, is based on a 3 tier system, with Tier 3 being the tier that is supposed to capture the most dangerous offenders and triggers the most extreme registration and notification requirements.
- Rather than an individualized approach, however, AB579 defines sex offenders based only on the crime committed and redefines people whose sex offenses were committed as far back as 1956, who have not committed additional offenses, and have not been subject to registration and notification.
- AB579’s reach is not limited to dangerous sex offenders and pedophiles.
- For example:
  - It includes a broad catch-all trigger —“Any other offense that has an element involving a sexual act or sexual conduct with another.” NRS 179D.097(p).
  - It includes statutory rape. NRS 179D.097(c).
  - It also contains constitutionally infirm provisions. The Act criminalizes the “infamous crime against nature,” which only applies to same-sex activity. It also criminalizes consensual activity between people over the age of consent. NRS 179D.097(j).
AB579’s categorical, one-size-fits-all approach is flawed:

- The focus is on prior offenses, and actual dangerousness is entirely irrelevant to the statutory scheme.
- This means that people the State of Nevada has determined not to be a high risk based on using an individualized risk assessment will now be moved to Tier 3.
- The opposite is also true: people that Nevada has determined to be extremely likely to reoffend may be moved to Tier 1, depending on the actual offense committed.
- AB579 leaves no room for discretion as to whom the law applies, no safety valve to ensure people are not put into the wrong categories, and almost no way to get released from restrictions early. More and more, our legal system is moving past categorical and inflexible approaches (like mandatory minimums) in recognition of the fact that a one-size-fits-all approach does not work. Just to give one example, juveniles and adults alike who fall within Tier 3 have to register for life with very few exceptions. But, of course, life registration is a much longer punishment for a juvenile than for an adult, such as somebody in their 60s.

AB579 is not based on research:

- No studies support the AWA-AB579 approach. Sex offender recidivism rates are generally low and vary greatly by, among other things, the offenses committed. Especially given the broad net of AB579, there is no basis to assume high recidivism rates. A recent study demonstrates that an individualized approach is a far better way to identify the sex offenders that need close supervision (better at predicting recidivism) than the categorical approach reflected in AB579.

“Actuarial risk assessment scores consistently outperformed AWA tiers. More important from a policy standpoint is that the tiering systems already in use by the states outperformed AWA tiers in predicting sexual reoffending.”

AB579 creates a needle in the haystack problem:

- AB 579 does not focus on sex offenders that we ought to be focused on – those whom we know are dangerous. Instead, it drastically increases the number of people that are subject to registration and notification and dilutes the ability to focus on the most dangerous of offenders.
- “As John Pacult, a clinician who contracts with the state and county to conduct psychosexual evaluations of juvenile and adult sex offenders, said ... ‘the really dangerous people on the radar screen are going to get lost. The Parole and Probation system will become overwhelmed with the large number of new Tier 3 sex offenders,’ he said.”  David Kihara, “Rating Relapse Risks,” Las Vegas Review-Journal, June 22, 2008 (emphasis added).
- A Parole and Probation lieutenant explained: “But that [increase in Tier 3 offenders] doesn’t mean there will be more serious sex offenders prowling the streets. Under current state law, Tier 3 is the group deemed most likely to re-offend, but that will change come July,” Page said. “The perception of what the tier levels mean is going to have to change,” Page said. **‘Tier 3 no longer means highest risk to re-offend.** Tier 3 is now crimes against children and sexual-assault based crimes.”  Id. (emphasis added).
- The increase in registrants, especially Tier 3 offenders, dilutes resources for law enforcement and public agencies. With many new people to track, it will be harder to keep close track of the most dangerous offenders.
- It also causes confusion for registrants, law enforcement, and the public. Most members of the public assume that people on registries are violent, predatory pedophiles. It also distracts from the fact that most sex offenses against children are committed by someone the child and family knows and trusts by perpetuating the myth that they are committed by strangers.

Logistical enforcement issues:

- Problems interpreting and understanding AB579 make ensuring compliance and enforcing the law difficult. Whatever laws are in place, we need to be able to understand them, people who are subject to them need to know how to follow them, and we need mechanisms to ensure that law enforcement can capture the names of people who aren’t following the law.
- The duty lies with the registrant to determine whether he or she needs to register. While the State can assist with this process and evaluate the persons currently registered, not everybody is currently in the system.
IV. LEGAL ISSUES AND UNINTENDED CONSEQUENCES

Legal Issues – Unconstitutional if applied to anyone else?

- The Ninth Circuit reversed Judge Mahan’s injunction as to AB579, a challenge that was predicated largely on Ex Post Facto grounds – essentially, that the law constituted retroactive punishment. However, other challenges remain pending, both at the Nevada Supreme Court and in the Eighth Judicial District.
- After the United States Supreme Court upheld Alaska’s sex offender law, the Alaska Supreme Court threw it out.
- In Ohio, one of the other states that actually adopted AWA legislation, the state supreme court has found a law like AB579 unconstitutional.
- There are a number of legal problems with AB579 – there is no due process, the laws violate separation of powers, and they constitute retroactive punishment under the Nevada Constitution. There are also ramifications for plea deals.

“Only a person protected by legal training from the ordinary way people think could say, with a straight face, that this terrible consequence of a sex offender’s conviction is not punishment.”

*Sigler v. Ohio, 07 CV 1863, Slip. Op. at 7 (Ohio August 11, 2008)*
The wrong guy – a cautionary tale of the dangers of public harassment

The Las Vegas Sun has reported on the effects of misinformation on the sex offender registry on an innocent, elderly gentleman of 71 years. Harvey Berlin, who contacted the ACLU for help because he was being harassed by people who thought he was a sex offender and the Las Vegas Metropolitan Police and Department of Public Safety failed to correct the information despite repeated requests from Mr. Berlin.

The intended target of the harassment was actually a 35 year old sex offender named Christopher. Christopher no longer lived at the address listed on the registry, but the address was listed on the websites of law enforcement and private sites who had obtained the information.

Source: Abigail Goldman, “Flawed sex offender tracking leads to a wrong door,” Las Vegas Sun, November 18, 2007

Unintended impact on families and victims - Vigilantism:

- Especially because the victims of sex offenses and the perpetrators can be members of the same family and are reunited in some instances, community notification can also mean victim “outing.”
- Sex offenders and family members of sex offender have been subjected to violence and harassment.6

Unintended Consequences – Impossible to Rebuild:

- Persons released from prison are less likely to recidivate if they can get jobs and move on with their lives. AB579 has collateral impacts on housing and employment.

Unintended Consequences - Errors:

- Registries can include errors. This is especially problematic in light of web-based community notification. Websites are archived both by Google and by www.archive.org: errors are forever.

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V. RECOMMENDATIONS - WHERE DO WE GO FROM HERE?

- Do not operate out of a desire to comply with AWA/SORNA – make laws fit Nevada.

- Focus on the real dangers.
  - Do not perpetuate myths and hysteria that mask the real dangers to children.
  - Do not assume everyone who is given the label “sex offender” is dangerous.
  - Instead, base Nevada laws on approaches such as individualized risk assessment that empirical research shows promote public safety by predicting risk properly.
  - Nevada’s prior risk assessment approach promotes safety better than AB579.

- Promote rehabilitation. We already have harsh sentences in place to punish people who are convicted of sex offenses. We should allow persons released from prison to return to our communities to work and live their lives so long as they do not pose a risk. This also helps reduce recidivism.

- Abandon a one-size-fits-all approach:
  - Ensure that procedures are in place to allow people who have been miscategorized or improperly classified as sex offenders to challenge their placement, and to allow people to petition to get off registries because they have not reoffended and are not dangerous.
    - Time periods before being able to apply for relief are too long under both prior law and AB579; at least ten years. If a person can demonstrate to a court non-dangerousness, they should be provided relief because it allows law enforcement to better focus on truly dangerous offenders.
  - Do not apply laws retroactively.
  - Do not subject children to notification.