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**STATEMENT OF THE DEFENDER ASSOCIATION OF PHILADELPHIA
REGARDING HOUSE BILL 160**

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The Defender Association of Philadelphia recognizes that the legislation proposed in House Bill 160 represents a reasoned effort to provide a rational and simplified system of criminal laws relating to sexual offenses. We are concerned, however, about a number of provisions in the Bill. We urge the sponsor of this Bill and the House Judiciary Committee to address these problems now so as to avoid future litigation (should this Bill become law) over what may have been unanticipated (and undesirable) aspects of the Bill.

Our concerns are divided into two groups:

(A) Those involving provisions relating to the evidence that may be presented in trials involving sexual offenses, including:

(1) The possibility that courts will interpret the new legislation to permit the introduction of "expert" testimony regarding the "typical" behavior of child sexual assault victims, when in fact there is no

distinctive behavior pattern unique to child sexual assault victims distinguishable from behavior patterns of children subject to other traumatic experiences, there is no general agreement among experts in the field that there is typical behavior, and the introduction of such non-probative evidence through the authority of an "expert" can only mislead and unduly influence the jury and intrude upon the jury's constitutional duty to assess the facts and determine whether a sexual assault in fact occurred; and

(2) The expansive definition of "sexual conduct" for purposes of the rape shield law.

(B) Those concerns involving the substantive crimes and defenses defined in House Bill 160, including the following:

(1) Overbreadth of "aggravating circumstance" No. 4;

(2) The broad definition of persons deemed by law to be incapable of consent to any form of sexual contact, and the resulting criminalization of any and all sexual activity with such persons;

(3) The criminalization of all sexual contact between teenagers, where one teenager is not yet fourteen;

(4) The creation of strict criminal liability through the preclusion of a defense of reasonable mistake of age, where age is deemed a barrier to consent;

(5) The creation of criminal liability for indecent touching, even where that touching is unintentional and without any desire for sexual gratification; and

(6) The potential overbreadth of the proposed statute relating to the photographing of children.

I. PROPOSED LEGISLATION RELATING TO THE INTRODUCTION OF EVIDENCE

1. Section 3101. Definition of "Sexual Conduct".

The definition of "sexual conduct" was placed in Bill 160 because it was a term in the proposed rape shield statute which was originally included in the predecessor to Bill 160. That rape shield statute, however, has been deleted from House Bill 160, and the definition of "sexual conduct" should therefore be deleted as unnecessary.

If the definition remain, the Defender Association suggests deletion of the sentence: "The term [sexual conduct] includes any sexual offense committed, or alleged to have been committed, against the victim".

Without a doubt it would be deplorable for defense counsel to suggest that, because a complainant has been a victim of a sexual assault in the past, he/she is somehow now less worthy of protection, and, therefore, subject to sexual assault with impunity. However, it is no less deplorable to prevent defense counsel from informing a jury, for example, that the complainant (upon whose credibility prosecution depends) had brought false allegations of sexual assault in the past. Such information, if

true, would unquestionably be relevant to a jury's determination of the complainant's credibility in the present prosecution. Defense counsel should not be prohibited from discrediting a witness who has been shown to be untruthful under similar circumstances. The search for the truth must not be abandoned in the zeal to protect complainants, some of whom may not be victims at all.

2. Section 5990. Expert witness testimony

This proposed provision should be deleted.

This proposed provision "grants" trial judges discretion to admit "expert" evidence of the "typical behavior" of child victims of sexual assault. While this proposed legislation may be superficially appealing because of the desire to address concerns about the sexual abuse of children, it is inappropriate for a number of reasons. The legislation may encourage the introduction of misleading and unreliable evidence that will usurp the jurors' constitutionally imposed duty to independently evaluate the evidence and decide the facts for themselves.

First, there simply is no such "typical" behavior. There is no "general acceptance in the scientific community" that typical behavior exists that can be used to prove the occurrence of a sexual assault, as opposed to the occurrence of any one of a number of other disruptive events in the child's life. Hence, this type of evidence fails to meet the well-established and virtually universally applied "general acceptance" test governing the proper subject of expert testimony at trial.

The symptoms outlined in the so-called "child abuse syndrome" or "profile" may result from many forms of stress, and not merely sexual assault. Moreover, the application of this profile to a criminal case, as if to assist in proving the existence of a sexual assault, is inappropriate and even disingenuous because it contradicts the findings of numerous studies of sexually abused children which conclude either that too little is known about the behavioral and psychological sequelae of child sexual assault¹ or that children exhibit the entire gamut of behaviors, from positive to negative, in response to a sexual assault.² See generally Note, The Unreliability of Expert Testimony on the Typical Characteristics of Sexual Abuse, 74 Georgetown L.J. 429 (1985).

Furthermore, the profile has proven as flexible as the particular criminal case requires, shifting its symptomology to match the child (and/or the needs of the prosecution's case). As one commentator has noted:

In fact, those experts who have tried to establish some universal symptomology of sexual abuse victims sometimes seem to believe their own theory. An employee of a sexual assault center testified [in one case] that the typical victim of intra family sexual abuse shows regressive behavior and acts like a younger child. Had she read some of the most widely cited literature on the subject, the employee might have found that, on the contrary, the typical victim of sexual abuse

¹ See, e.g., Jaffe, et al., Sexual Abuse of Children, A.J. Dis. Child, Vol. 129, June 1975, 689-691-692.

² Suzanna Sgroi, M.D., Child Sexual Assault: Some Guidelines for Intervention and Assessment, in SEXUAL ASSAULT OF CHILDREN AND ADOLESCENTS, 134-35 (1978); D. Finkelhor, SEXUALLY VICTIMIZED CHILDREN, 65-72 (1979).

displays "pseudomature seductive behavior." The same expert testified that it is typical for the child to act withdrawn, but had she read an often cited paper on characteristics of sexual abuse victims, she might have found that such children typically display "'acting out' behavior." In [another reported decision], the expert testified that abused children typically display a negative view of sex, but is this consistent with a symptomology of "sexual abuse syndrome" that includes frequent masturbation and/or pseudoseductive behavior?

Note, The Unreliability of Expert Testimony on the Typical Characteristics of Sexual Abuse Victims, 74 Georgetown L.J. 429, 441 (1985).

Another trenchant critique of expert testimony in child sexual assault cases has come from Gary Melton, a psychologist and member of the Department of Psychology and College of Law at the University of Nebraska:

I believe that such testimony is inherently misleading and should be excluded . . . [G]iven the proportion of children in the population -- much less other clinical groups -- showing some of the behaviors often placed in syndromes (e.g., sleep disturbances, specific fears), a child who shows behavior purportedly indicative of sexual abuse is far more likely not to have been abused than the converse. This incidentally is true even if the hit rate were much higher than in current syndromes . . . [Also], the existing symptoms are based on clinical intuition and not hard data.

Melton, Children's Testimony in Cases of Alleged Sexual Abuse (available from G. Melton, Law/Psychology Program, University of Nebraska-Lincoln, 209 Burnett Hall, Lincoln, Nebraska 68555). Put more simply, the "profile" symptoms are found among children across

the population, and in greater incidence among those who have not been abused.

Indeed, the Pennsylvania Supreme Court has so found only recently. In its thorough and well-reasoned opinion in Commonwealth v. Dunkle, ___ Pa. ___, 602 A.2d 830 (1992), the Pennsylvania Supreme Court discussed this issue extensively and precluded the use of "typical behavior" expert testimony. The Court cited a host of expert commentators (psychological and legal) who have pointed out that the so-called "child sexual abuse syndrome" has no validity as either a diagnostic tool or as relevant evidence because there is no evidence that sexually abused children consistently exhibit a distinct pattern of behavior or any behavior different from the behavior of children who have experienced another kind of trauma (such as the trauma incidental to a divorce or psychological abuse, etc.) Thus, the expert testimony in Dunkle did not meet the traditional standard uniformly applied in the courts for the admission of expert testimony. That standard is a reasonable one - that there must be general acceptance in the field in which it belongs. See, e.g., Commonwealth v. Nazarovitch, 496 Pa. 97, 436 A.2d 170 (1981).

To worsen matters, this evidence would have an unfair and undesirable impact upon the jurors. Not only would they be presented with unscientific information, but the unreliable information would be coming from an "expert" who would be telling the jurors, in effect, that there was additional evidence in the case that the crime charged had indeed occurred. The evidence

could not help but have great impact. The constitution mandates, however, that jurors be the factfinders, not experts. Here, the unscientific testimony of the expert would infringe upon that factfinding function.

Given that there is reason to doubt the scientific basis and legitimacy of this information concerning so-called expert testimony about "typical" behavior, there is no compelling reason to enact legislation that might encourage trial judges to admit evidence that is not probative. In attempting to accommodate the needs of sexually abused children, the law should not obviate a fair trial that produces a reliable verdict. As scientific knowledge develops in this field, the courts will reconsider the issue of whether to admit expert testimony on the behavior of children who have been subject to sexual assaults. In the meanwhile, proposed section 5990 does not serve the legitimate goals of a truth-seeking process.

II. THE PROPOSED SUBSTANTIVE CRIME STATUTES

A major change that House Bill 160 would accomplish is the replacement of the present crimes of rape (18 Pa.C.S. §3121) and involuntary deviate sexual intercourse (18 Pa. C.S. §3123) with a consolidated offense denominated "sexual assault." The Bill proposes two grades of that offense: aggravated sexual assault (proposed section 3121), which would be a felony in the first degree punishable by up to twenty years in prison; and sexual assault (proposed section 3122), which would be a felony in the

second degree punishable by up to 10 years in prison. Under section 3121, sexual assault becomes an aggravated sexual assault in one of two ways: either because an "aggravating circumstance" is present (§ 3121(a)), or because the victim is deemed, as a matter of law, incapable of consenting to a sexual act (§ 3121(b)).

The Bill also proposes a new offense of indecent contact (Section 3129), which also has a normal and aggravated form with corresponding penalties.

1. Aggravating Circumstance No. 4

Aggravating Circumstances No. 4, which transforms a sexual assault to an aggravated sexual assault, provides that:

The act is committed during the commission or attempted commission of any other felony by the defendant.

There should be some nexus between the sexual assault and the commission of (or attempt to commit) another felony before an aggravated penalty is imposed. Thus, if a defendant kidnaps the victim in order to sexually assault him/her, the sexual assault is more serious and should be punished more harshly. However, if a defendant sexually assaults the victim and then takes the victim's wallet or car (felonies of the third degree), it in no way makes the sexual assault more serious. (Of course, the theft is independently punishable). Where the impact of the contemporaneous felony does not in any way contribute to the threat of force, compulsion or fear that the victim is subject to during the course of the assault, there is no justification for treating this as an aggravated offense.

This problem can be remedied by modifying aggravating circumstance No. 4 as follows:

"The act is committed during and in furtherance of the commission of any other felony or attempted felony by the defendant."

2. Consent

Under proposed Section 3129(a), a defendant commits the offense of indecent contact if s/he engages in indecent contact "without the victim's consent".

"Consent" is defined in Section 3101 as:

Intelligent, informed and voluntary affirmation not to be construed as coerced or reluctant submission."

The inclusion of the concept of "reluctant submission" criminalizes sexual activity where one partner who is not "in the mood" goes along, in "reluctant submission", with the other partner who is. The scenario is so common that it is a veritable cliché. Should one spouse whose partner "reluctantly submits" solely in response to even repeated reminders of his/her "conjugal duties" be treated as a sexual offender? Should one who "reluctantly submits" "against his/her better judgment" to another's sexual advances be treated as a sexual offender? Unquestionably, the importuning partner would not perceive himself/herself as a criminal. Nor would most of society. Under the proposed legislation the importuning partner would be guilty of a sexual offense. People have been "reluctantly submitting" to sexual activity since the dawn of the time for a variety of complex personal reasons. It is only when a person's will is overborne by true, objective forcible

compulsion that societal condemnation in the form of criminal sanction is warranted. Consent should therefore be defined as follows:

"Consent". Intelligent, informed, and voluntary affirmation [not to be construed as coerced or reluctant submission].

3. Incapacity to consent

Under proposed Section 3121(b), a defendant commits a first degree felony if engaging in a sexual act with a victim "incapable of consent". Similarly, under proposed Section 3129(b), a defendant commits a first degree misdemeanor if engaging in indecent contact when "the defendant is over 18 years of age and the victim is incapable of consent". However, under Section 3109 the only persons incapable of consenting to a sexual act are persons "13 years of age or younger". Thus, unforced and voluntary sexual acts between a thirteen year old and a fourteen year old results in the fourteen year old have committed an aggravated sexual assault, felony of the first degree; and unforced and voluntary sexual acts between two thirteen year olds results in both having committed aggravated sexual assaults. Surely, such acts of factually (if not legally) consensual sex should not be punishable as a felony of the first degree. A criminal law with such coverage is a draconian use of penal sanctions to inhibit sexual experimentation among contemporaries. Worse still is the assignment of a criminal penalty to only one of two contemporaries participating in a consensual activity.

Section 3121(b) should more properly be included as §3122 and categorized as sexual assault, rather than aggravated sexual assault, and penalized as a felony of the second degree. Moreover, there needs to be some further age requirement or age differential requirement. The current statutory rape statute requires that the offender be "18 years of age or older". The proposed aggravated indecent assault statute included in Bill 160 likewise requires that the offender be "over 18 years of age". Such a requirement that the defendant be "18 years of age or over" altogether eliminates the problems of criminalizing sexual experimentation between thirteen year olds and their slightly older social contemporaries, and properly limits application of criminal sanctions to the situations deserving societal opprobrium. Another alternative with similar effect would be a requirement that the defendant be a certain number of years older than the victim, five for instance. Two thirteen year olds exist in a common social milieu. A ten year old and a fifteen year old do not and there is an inherent aspect of the older taking advantage of the younger present in the latter scenario which is not present when the youths are only a couple of years apart in age.

4. Forcible compulsion

The definition of "forcible compulsion", which is an element of aggravated sexual assault (§3121) and sexual assault (§3122), reads as follows:

To compel by use of physical, intellectual, moral, emotional or psychological force, either express or implied.

Should the spouse who "compels" his/her partner to engage in sex by invocation of the spouse's "moral" obligation to perform "marital duties" be treated as a rapist? Should one who "compels" another to engage in sex by using the "emotional or psychological force" of guilt over expensive wining and dining or gifts be treated as a rapist? Neither individual would perceive himself/herself as a rapist, nor would society in general.

Furthermore, the addition of the concept of "implied" force adds an unwarranted subjectiveness to an already overly inclusive and vague definition. Does a defendant have to intend to imply intellectual force or does the victim merely have to perceive it as having been implied? What is implied intellectual force? How would anyone know when (s)he was doing it or perceived as doing it?

The proposed "forcible compulsion" definition provided by Section 3101 is just too slippery. The term "forcible compulsion" should not be defined, and its meaning should be developed by judicial decision sensitive to facts in particular cases.

5. Section 3102: Ignorance Of Age Not Defense

All persons thirteen years of age or younger are legally incapable of consenting to any sexual activity or touching of intimate bodily parts. Concomitantly mistake of age is not a defense (§3102(a)).

The elimination of any defense of mistake of age is problematic. Strict liability crimes, i.e., crimes without any criminal intent, are the exception rather than the norm. There should be compelling reasons for creating such offenses, and

particularly crimes of the seriousness of those involved here. Normally, strict liability offenses involve behavior that is absolutely prohibited regardless of the circumstances. Voluntary sex is not such absolutely prohibited behavior.

It is legitimate for the legislature to protect a class of victims deemed too immature to protect themselves from predatory sexual behavior. Eliminating reasonable mistake of age as a defense where there has been a deliberate misrepresentation of age by the "victim", however, goes far beyond that legitimate goal. It creates a new class of victim - defendants with no criminal intent and no awareness that they are doing anything wrong when they have voluntary sexual activity with the bona fide and reasonable belief that their partner is of the age of consent.

In the situation where there has been an active and reasonably believable misrepresentation of age, and the defendant has done what he/she can to assure his/her compliance with the law, it is highly unfair to penalize the defendant for his/her partner's misrepresentations. A reasonable mistake of fact as to age should be a defense.

6. Section 3129. Indecent contact.

There is a significant due process and fundamental fairness concern regarding the expansiveness of the proposed offense of indecent contact. This offense has no mens rea requirement. The term "indecent contact", which is an element of the offense of the same name, is defined in Section 3101 thusly:

Touching by the victim or defendant of the victim's or defendant's intimate parts, either directly or indirectly.

Thus, as presently drafted, the statute allows a criminal conviction to rest not only upon an unintentional touching, but also upon a touching that is not for any sexual gratification. The person pushing onto the crowded bus or subway or engaged in coed contact sport is at risk of committing a criminal offense if an unintended "indecent contact" occurs. Likewise, the health care professional attending to the hygiene of the infirm patient who is incapable of consent, or the parent changing a diaper is, by definition, guilty of an indecent contact.

It does not appear to be the goal of this legislation to criminalize such unintentional conduct or such legitimate conduct. Indeed, in this context, there is no societal benefit to be gained from criminalizing such conduct. The problem is easily remedied by inserting the into Section 3129 a requirement that the defendant "intentionally" engaged in the prohibited contact "for the purpose of sexual gratification".

7. Section 6312. Sexual abuse of children.

The same due process and fundamental fairness problems presented by the elimination of a defense of mistake of age in section 3102 are present in section 6312(e), which eliminates reasonable mistake of age as a defense to photographing or filming sexual acts of children under 18 years of age (§6312(b)) and the dissemination of photographs and films involving a child under that age (§6312(c)). Thus, it is no defense to these crimes that: 1)

the defendant did not know the age of the person photographed; 2) the child misrepresented his/her age; and/or 3) the defendant had a bona fide belief that the person was over the age of eighteen.

There is no justification for strict liability sanctions upon a person who did not and could not have known that he/she was doing anything wrong, especially given the eminent plausibility of a reasonable belief that a seventeen year old could be eighteen years of age. To the extent that the law can deter the sexual exploitation of children through photography, it will do so by encouraging the producer of such photographs to take reasonable steps to determine the age of the subject. To go further and punish those who have taken such steps but have been misinformed by the subject, even when that misrepresentation is plausible, deters not only sexual exploitation of children but deters legitimate, constitutionally protected forms of photography.

Even if a higher accountability for the photographers is justifiable because of their immediate contact with the child, there is no justification for such higher accountability for the mere disseminator who has had no such immediate contact and cannot factor the child's demeanor into a decision as to the child's age.

Moreover, the elimination of a reasonable mistake of age defense has serious First Amendment implications, given the chilling effect it would have on constitutionally protected forms of expression. The definition of "prohibited sexual act" in subsection 6312(a) includes nudity not involving sexual acts or simulated sexual acts. Since such a depiction is not "obscene", it

is fully protected by the First Amendment, so long as it does not involve a minor. The test for whether a picture is obscene is whether: 1) the average person, applying contemporary community standards, would conclude that the work, taken as a whole, appeals to prurient interests; and 2) it depicts sexually explicit conduct in a patently offensive manner; and it lacks serious literary artistic, political or scientific value. See Miller v. California, 413 U.S. 15 (1973).

If a producer or distributor must risk prosecution and punishment when dealing with "non-obscene" pictures that depict nude subjects, despite having a bona fide belief that none of the subjects is a minor, there is a substantial basis for such a person to claim that his or her First Amendment right to free expression is being seriously infringed. Indeed, the federal circuit court of appeals that has addressed this issue has held that prohibition of the defense of mistake of age in this context is a violation of the First Amendment because of its chilling effect on protected forms of expression. See United States v. U.S. Dist. Court for Cent. Dist. of Cal., 858 F.2d 534 (9th Cir. 1988). For a distributor in particular, there would be no basis to distinguish between two identical nude photographs of the same model taken the day before and the day after his/her eighteenth birthday. The distributor of the former photograph, however, would be strictly liable for the commission of a felony, while the distributor of the latter would be guilty of no crime at all. Since such photographs are indistinguishable and the consequences of possessing the wrong

photograph are so great, there would be an inevitable chill on the right to distribute non-prohibited material of the type that can be found on every newsstand.

The Defender Association believes that distributors should have access to the same defense of mistake of age as do possessors of photographs under section 6312(e). If the Legislature believes that producers and photographers should be held to a higher level of accountability, it should do so by requiring that before they will be allowed to avail themselves of the defense of mistake of age, such persons must take affirmative steps to ensure a bona fide belief that the subject to be photographed is not a child.

Respectfully submitted,



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