

January 18, 2007

Hon. Edmund G. Brown Jr.
Attorney General
1300 I Street, 17th Floor
Sacramento, California 95814

Attention: Ms. Krystal Paris
Initiative Coordinator

Dear Attorney General Brown:

Pursuant to Elections Code Section 9005, we have reviewed the proposed initiative cited as “The Victim’s Rights and Protection Act: Marsy’s Law - Version 2” (A.G. File No. 07-0095). This measure amends the State Constitution and various statutes relating to (1) the legal rights of crime victims and restitution, (2) the pretrial release of offenders, (3) punishment of offenders in prisons and jails, (4) the granting and revocation of parole, (5) death penalty appeals and other court procedures, and (6) additional compensation and training of prosecutors. These provisions are discussed in more detail below.

Expansion of the Legal Rights of Crime Victims and Restitution

Background. In June 1982, California voters approved Proposition 8, known as the “Victims’ Bill of Rights.” This initiative amended the Constitution and various statutes to, among other changes, grant crime victims the right to be notified in advance, attend, and state their views at sentencing and parole hearings. Other separately enacted statutes have created other rights for crime victims, including the opportunity for judicial orders to protect a victim from harassment by a criminal defendant.

Proposition 8 established the right of crime victims to obtain restitution from any person who committed the crime that caused them to suffer a loss. Restitution involves, for example, replacement of stolen or damaged property, or reimbursement of costs that the victim incurred as a result of the crime. A court is required under current state law to order full restitution unless it finds compelling and extraordinary reasons not to do so. Under certain court procedures, a restitution order can be enforced by a victim in the same manner as a civil judgment. Proposition 8 also established a right to “safe, secure and peaceful” schools for students and staff of primary, elementary, junior high, and senior high schools.

Provisions to Ease Collection of Restitution. This measure contains a series of provisions that would make it easier for victims to successfully enforce their existing legal rights to collect restitution from criminal offenders:

- Courts would not be allowed to reduce restitution payments without a written finding of justification.
- Any funds collected by a court, or law enforcement agencies, from a person ordered to pay restitution would go to pay that restitution first, in effect prioritizing those payments over other fines and obligations an offender may legally owe.
- Restitution equal to a lifetime of lost wages would be awarded to the victim's estate in murder cases.
- Upon their conviction, offenders would be required to disclose additional personal information, such as bank account numbers and life insurance policies that could be used by a victim to obtain restitution.
- The amount of any restitution that went unpaid after three years would be subject to a 30 percent surcharge.
- Nonpayment of restitution would also result in various sanctions. For example, if an offender had not paid the restitution amount in full, he or she could not be terminated from probation, they would not be eligible to have any felony charges against them reduced to a misdemeanor, and their criminal records could not be expunged.

The Department of Justice (DOJ) would be directed to study the feasibility of other techniques, such as intercepting tax refunds, lottery winnings, and welfare or Social Security payments, to obtain restitution for crime victims. Based on the study, DOJ would recommend new legislation to make such methods available to victims. If the Legislature did not enact such changes, the Attorney General would be required to file an initiative proposal containing the recommended legislation. The DOJ would also be required to provide written materials to probation departments on how victims can successfully receive restitution, which probation officers would provide to crime victims.

Notification and Participation of Victims in Criminal Justice Proceedings. As noted above, Proposition 8 established a legal right for crime victims to be notified of, attend, and state their views in sentencing and parole hearings. This measure would expand these legal rights to require that various law enforcement agencies notify victims of developments related to the filing of charges, extradition of defendants, pretrial proceedings, certain actions of prosecutors, and hearings related to the sentencing, parole, and the transfer or release of defendants. In certain cases, the measure would require that various entities give a crime victim specific information on victims' rights and related

matters such as the restitution process. For example, law enforcement and criminal prosecution agencies would be required to provide victims with a "Marsy's Rights" card detailing the victim's rights and resources or a "Victims Survival and Resource Guide" containing similar information.

The measure would also change state laws to make it easier for victims, their families, and their representatives to be present at, and present their views, at various stages in the criminal justice process. For example, the measure would increase the opportunity for crime victims to participate in bail hearings, decisions about extradition, decisions whether or not to file charges, various sentencing hearings, and parole hearings.

Other Expansions of Victims' Legal Rights. This measure expands the legal rights of crime victims in other ways:

- Crime victims and their families would now have a state constitutional right to confidentiality and privacy of their personal information, to protection from harm from individuals accused of committing crimes against them, and to the return of property no longer needed as evidence in criminal proceedings. Some of the constitutional legal rights for victims added by this measure now exist in statute.
- The initiative would make it illegal for public officials to "exploit" a victim of crime or their family, or to mention them in political campaign publications, without their written approval.
- Courts would be required to provide safe entry to courthouses for crime victims, their family members, and others providing them support. This would include giving them priority in courthouse security lines. Where practicable, courts would also be required to provide those individuals with separate entrances, security checkpoints, and seating in the courthouse to minimize contact with criminal defendants.
- The measure would state that the right to safe schools includes community colleges, colleges, and universities.

Restrictions on the Pretrial Release of Criminal Defendants

Background. Bail is a sum of money that must be paid by an individual accused of a crime before a court will release the person from jail while awaiting the conclusion of his or her criminal case. In making the determination about the sum of money required for bail, the judge may hear from the attorneys present and may consult a schedule that gives suggested bail levels. In addition, the judge considers the facts surrounding the alleged crime, the threat the accused represents to public safety, and how likely it is that the accused will flee upon release. Judges making decisions on bail must currently consider if an offender's crime was a violent felony, such as rape or assault, as specified in state law.

The judge may also release the accused on his or her “own recognizance,” thus not requiring bail, or the judge may refuse to release the individual at all.

Changes to Bail and Own Recognizance Releases. This measure would change the way the courts conduct and make decisions about the pretrial release of persons accused of crimes in several ways:

- Crime victims would be provided with the opportunity to be heard before someone charged with a violent or serious felony was released on bail.
- Special hearings would be required in certain circumstances before the judge could set bail below the amount requested by the prosecutor.
- Judges would be specifically required to consider in bail decisions whether the crime occurred while the accused was on parole or probation for another offense or was out on bail or their own recognizance awaiting trial on other charges. The court would also have to take into account whether the offense was a serious felony, as defined in state law, such as burglary.
- Notice of bail hearings would be provided to crime victims.
- Individuals charged with murder, attempted murder, or crimes involving a possible life term in prison could not be released on bail unless attempts had been made to notify the crime victim.
- Judges could not reduce bail to address overcrowded conditions in jails.
- Release on own recognizance would not be permitted under the measure if the charges against the accused were for specified violent felonies, or for felonies that took place while the individual was on parole or probation or out on bail or their own recognizance.

Operational Changes for Prisons, Jails, and Other Institutions

This measure contains various provisions that could affect the operation of state prisons, other state institutions, and county jails.

Retroactive Sentence Reductions Prohibited. This measure would amend the Constitution to prohibit retroactive reductions in the criminal sentences of individuals whose judgments were final. This measure states that this prohibition would apply both to statutory changes made by the Legislature or to those made by the voters through the initiative process. The measure would also make it an explicit state constitutional duty of local governing bodies and the Legislature to adequately fund correctional facilities and departments to prevent the early release of inmates due to inadequate space.

Inmate Rights and Privileges Limited. The Constitution would also be changed to prohibit the enactment of any new statutes granting rights or privileges to inmates beyond those required by the U.S. Constitution.

This measure would prohibit the California Department of Corrections and Rehabilitation (CDCR) from granting certain classes of inmates any type of overnight family or conjugal visits. In addition, in some circumstances, CDCR or a county sheriff must revoke all inmate privileges not guaranteed by the State and U.S. Constitutions and reallocate resources available to them to prevent any early release of inmates. This would occur if (1) the Governor, sheriff, or a federal or state court finds a prison or jail facility exceeds its lawful capacity, or (2) a federal or state court orders that inmates be released from custody due to inadequate space to house them.

Temporary Jails Permitted. In the event that a county experienced jail overcrowding that reached a "crisis level," as defined by the measure, sheriffs would be empowered to acquire and operate temporary housing to prevent the early release of inmates. Once the crisis was over, a sheriff would have to close the temporary housing or bring it into compliance with the necessary laws and regulations to make the housing permanent.

Electronic Monitoring Requirements. A number of counties operate programs in which criminal offenders participate in work programs in the community in lieu of serving time in jail. This measure requires that an inmate in such a program be electronically monitored at any time they were outside of a confined area.

Reporting Requirements. Under this measure, all institutions that detain defendants, including state prisons and mental hospitals and county jails, would be required to provide crime victims, criminal prosecutors, and judges with information on the defendants they hold and those that they will release.

Changes Affecting Revocation and Granting of Parole

Background. Before CDCR releases an individual sentenced to life in prison with the possibility of parole the inmate must go before the Board of Parole Hearings. The board is part of CDCR, with parole commissioners that are subject to Senate confirmation. Two representatives of the board meet with the inmate to determine if an inmate is suitable for release. In the event of a tie, all commissioners hear the case, with a majority vote determining whether the inmate will be released. Current statutes grant commissioners wide latitude in the way they make their decisions. State law provides that the board "shall normally set a parole release date" for an inmate with a life sentence, although, historically, the board releases very few inmates eligible for parole.

The board also has authority to return to state prison for up to a year individuals who have been released on parole but who commit parole violations. In keeping with a federal court settlement, the state provides legal counsel to parolees facing revocation charges.

Parole Board Reorganized. This measure reorganizes the parole board. Specifically, the measure would rename the board the Department of Parole, make it an agency separate of CDCR, and give it a separate budget which is required to be annually adjusted for inflation. The new department would be subdivided into two agencies: the Board of Adult Parole Hearings and the Board of Juvenile Parole. The Governor would appoint the head of the department and each agency, as well as the commissioners serving on the boards. None of these individuals would be subject to Senate approval.

Modified Procedures for Consideration of Parole. This initiative changes the procedures to be followed by the new Department of Parole when it considers the release of inmates with a life sentence from prison in the following ways:

- In making decisions on whether to release inmates, the board would be directed to presume that the term to be served by the inmate is life in prison. The current statutory language specifying that the board “shall normally set a release date” for inmates would be repealed.
- The board would be free to deny parole solely based on the crime the inmate committed.
- In the event of a tie decision about a parole case, the board could only grant parole if, at the subsequent hearing, a two-thirds majority of commissioners voted in favor of such an action.
- The time inmates must wait before they are eligible for parole consideration would be lengthened, as would the time allowed between hearings if the board denies an inmate parole. Crime victims would receive earlier notification in advance when inmates come before the board for parole consideration.
- In addition to having expanded opportunities to testify at such hearings, victims would also be able to bring additional family members and other representatives to testify at parole board hearings.
- If necessary, video conferencing would be provided to allow outside testimony at parole hearings.

Parole Revocation Procedures. This measure also makes changes to the board’s parole revocation procedures for offenders paroled from prison after the enactment of this initiative. It places into state law longer deadlines for probable cause hearings and hearings on the revocation charges than are now required for parole revocation cases under a court settlement. The measure also specifies that legal counsel will be provided to parolees facing revocation charges on a case-by-case basis if the parolee is deemed indigent, their case is complex, or they are incapable of defending themselves because of a mental or educational incapacity. Under the current court settlement, all parolees must be afforded legal counsel.

Changes to Death Penalty Appeals and Other Court Procedures

Background. There are several different levels of courts in California. Each county has a superior court, while each of the court of appeals presides over the superior courts in its division. The highest California court is the Supreme Court.

Most criminal trials take place at the superior court in the county in which the crime was committed. Offenders who are convicted in superior court have the legal right to appeal the decision to the court of appeals in their division. After a court of appeals has ruled on such a case, it can generally only be heard before the Supreme Court if the court approves the defendant's petition for review. However, under the Constitution, only the Supreme Court has appellate jurisdiction in death penalty cases. Also, death penalty cases can also be appealed to the federal courts. As of December 2007, 667 inmates were on Death Row at all stages of the death penalty and appeals process.

Changes to Appellate Review of Death Penalty Cases. This measure contains various provisions that would change the way the state Supreme Court handles death penalty appeals but leaves unchanged the appeal process relating to federal courts.

Specifically, the measure would authorize the Supreme Court to transfer appeals of death penalty verdicts to any state court of appeals, without regard to the jurisdiction in which the crime originally occurred. Following the decision of the court of appeals in such a matter, the Supreme Court would be required to review it for errors, and would be able to affirm it without necessarily hearing oral arguments. In cases where the Supreme Court reversed a death sentence, it would be required to hear oral arguments and produce a written decision. Within 120 days of the enactment of this measure, the Supreme Court would be required to identify all current cases that it would decide itself and to transfer the remainder to the state courts of appeals.

In addition, the Legislature and the Administrative Office of the Courts, a state agency that helps to administer the court system, would be required to develop a plan to allocate the funding and resources necessary to assure that all pending death penalty cases were heard and decided within five years.

Other Changes Affecting Court Procedures and Operations. This measure contains a number of provisions that would affect court procedures in criminal cases and court-house operations:

- The way courts would handle requests for discovery of evidence in post-trial challenges of criminal convictions would change. Defendants who requested discovery, such as to see evidence and information used by the prosecution in the original trial, would have to provide specific information to support their requests, including their own list of witnesses and evidence. If the court granted a request for discovery by a criminal defendant, prosecutors would

be provided an opportunity to pursue the discovery of similar information from the defendant.

- Criminal prosecutors would be required to seek the extradition back to California of persons charged with having committed violent or serious crimes carrying at least a four-year prison term, or charged with any felony for which bail had been set at \$50,000 or more, but who were subsequently arrested outside the state. The measure would make the failure of a district attorney to seek extradition in other cases where it was not mandatorily a matter of public record and require notification of the victim of the crime of the district attorney's decision.
- Courts would be prohibited from dismissing charges against defendants before the prosecution has used the full time it is allowed under statute to bring a case to a preliminary hearing or trial. Currently, courts can decide to dismiss a case if the prosecution is not prepared to proceed with a case at the time of a scheduled court hearing on the matter.
- Prosecutors would be permitted to enter courthouses without being subject to metal detectors and other electronic security measures. This opportunity to bypass security could also be made available, at the discretion of a county's presiding judge, to judges, public defenders, certain court staff, private attorneys, and news media staff who regularly cover the courts.
- A ten-year pilot program would be initiated in Los Angeles County to use video conferencing technology so that criminal defendants would not have to be physically transferred between courthouses and jails during the legal proceedings against them. The program could be extended on a permanent basis to other jurisdictions in the state if it was found to be successful.

Additional Compensation and Training of Prosecutors

Background. The state, counties, and cities employ several thousand attorneys who specialize in the prosecution of criminal offenses. In general, pay and benefits for the attorneys are determined by the legislative bodies of their respective employers—including the Legislature, county boards of supervisors, and city councils—as a part of those bodies' responsibilities to budget public funds. In many cases, prosecutors who are not supervisors or managers are represented by public employee unions. The unions negotiate terms and conditions of employment with public employers on behalf of the attorneys.

Changes to Public Prosecutors Pay, Benefits, and Training. The measure would institute new minimum requirements for pay, benefits, and training of prosecutors employed by the state, counties, and cities. For deputy district attorneys employed by counties, for example, the measure would require pay and benefits that are at least

equal to those of comparable attorneys employed in the county's public defender office or county counsel office. Terms and conditions of employment for prosecutors would be required to be compatible with the Federal Fair Labor Standards Act, which establishes minimum wage, overtime, and recordkeeping requirements for most workers. Also, the measure establishes new requirements for the continuing legal education for prosecutors. However, some of the changes proposed in the measure would only apply to Los Angeles County.

Restrictions on Gifts to Prosecutors. This measure prohibits any prosecutor from soliciting or receiving any gift, campaign donation, or anything else of value from a criminal defendant, the defendant's attorney, or the family, employees, or business partners of the defendant or their attorney while prosecution of the defendant is pending. Violation of these provisions would constitute a crime.

Fiscal Effects

Net Increase in Judicial System Costs for the State and Counties. Various provisions of this initiative could result in a significant net increase in state and local judicial system costs, including state trial court operations and local government prosecutors and defense counsel involved in criminal cases.

Specifically, the addition of various criminal court procedures and hearings, and the expanded ability of victims to take part in them, is likely to lengthen criminal proceedings. This, in turn, is likely to increase the costs of conducting these proceedings. These costs would affect both the state, which pays for the operation of trial courts, and counties, which pay for some staff, such as prosecutors and public defenders, who take part in criminal proceedings. Because the implementation of these provisions could vary across the state, it is not possible to estimate the exact fiscal impact of these changes, but they are likely to be significant on a statewide basis. These costs could be partly offset to an unknown extent by the measure's provisions restricting the release of offenders on bail or their own recognizance. This would expedite the processing of their cases in the judicial system and may lead to some savings.

Other provisions of this measure that require special security lines, additional waiting rooms and the creation of the video conferencing pilot program could also result in significant judicial system costs. The actual costs of these provisions would depend both on the interpretation of the initiative and the degree to which current facilities and courthouse procedures are found to already meet the new requirements it creates. But it is possible that their costs could exceed a hundred million dollars initially and require spending in the tens of millions of dollars thereafter on an annual basis. The measure also directly appropriates \$5 million from the state General Fund, and \$1 million annually, to conduct the video conferencing experiment. These costs could be partially offset

to the extent that the video conferencing pilot program reduces costs to counties for transporting offenders between jails and courthouses.

The provisions that modify the conduct of death penalty appeals by the courts could also increase state and local judicial system costs. These stem primarily from three aspects of the initiative. First, because the initiative would allow the Supreme Court to delegate some death penalty proceedings to the courts of appeal, these courts may require additional staff and judicial positions, although it is possible Supreme Court operational costs could be somewhat reduced. Secondly, because the Supreme Court could review the rulings by the courts of appeal, the initiative may create additional death penalty legal workload for the courts, prosecutors, and defense attorneys. Finally, the initiative calls for the creation of a plan to assure that pending death penalty cases are decided within five years. This would likely require the creation of additional judicial positions and the hiring of additional attorneys to meet this deadline. The combined fiscal effect of these death penalty appeal provisions is unknown, but is likely to amount to tens of millions of dollars annually.

Fiscal effects related to prosecutors' pay and benefits would depend on how the measure is interpreted by (1) public employers, (2) labor arbitrators, and (3) the courts. These provisions could result in additional costs totaling in the millions of dollars or tens of millions of dollars per year depending in part on interpretations of the provisions related to prosecutors' retirement benefits.

Taking all of the factors affecting the judicial system into account, we estimate that this measure may initially increase state and local government costs by more than \$100 million, with increased costs annually thereafter amounting to tens of millions of dollars on a statewide basis.

Net Increase in State Prison Costs. The measure would likely result in a net increase in state prison costs due to increased inmate populations, new crime victim notification requirements, and changes in the privileges and programs provided to inmates. Depending upon circumstances that we discuss below, the fiscal effect of these provisions could range from millions to hundreds of millions of dollars annually.

The provisions of this measure requiring additional notices to victims about the movement of inmates within the prison system are likely to result in state costs in the millions of dollars annually for the additional staff who would be needed to prepare and send out these notices.

The proposed constitutional amendment in this measure that prohibits retroactive reduction of prison sentences could result in significant additional state costs in the hundreds of millions of dollars annually in the event that it prevented the enactment of state legislation for such a purpose. In addition, the proposed statutory changes to limit the

programs and privileges provided to inmates, or suspend them altogether in the event of overcrowding and the early release of inmates from prison, could potentially reduce state correctional system costs by hundreds of millions of dollars annually. However, these offenders would no longer be eligible to earn credits from their participation in work and education programs that would otherwise reduce the time they must serve in prison. Therefore, the savings associated with limiting programs and privileges could be offset by hundreds of millions of dollars in increased prison costs. Furthermore, to the extent these programs would have reduced recidivism, decreasing future prison populations, these savings would be offset by a future, unknown increase in costs. Finally, there maybe some savings for the state prison system associated with the provisions that modify death penalty proceedings. If these changes reduce the Death Row population, either through an increase in executions or by overturning additional death sentences by resolving inmates' legal appeals, there would be lower costs associated with housing individuals on Death Row. These savings could eventually reach the millions of dollars annually.

State Costs and Savings From Parole Board Changes. The changes to parole would have several different fiscal impacts, both increasing and reducing state costs by millions of dollars annually. However, the net fiscal effect of these various changes are potentially a net savings for the state in the low tens of millions of dollars annually if the changes related to parole revocation procedures were not overturned by potential legal challenges.

The creation of the Department of Parole, separate of the CDCR, could result in increased state administrative costs in the millions of dollars annually. The budgeted amount would automatically be adjusted each year for inflation, regardless of the size of the new department's parole hearing caseload. In addition, some changes to the parole hearing process would be likely to increase the cost of parole hearings.

The provisions of this measure that reduce the number of parole hearings received by life inmates would likely result in state savings amounting to millions of dollars annually. Additional savings could result from the provisions changing parole revocation procedures, such as by limiting when counsel was provided by the state, which could save tens of millions of dollars annually. However, some of these changes are likely to be subject to legal challenges. In addition, both of these sets of provisions could also ultimately increase state costs to the extent that they result in additional offenders being held in state prison.

Local Law Enforcement. This measure is likely to result in a net increase in costs for county jails, work release programs, probation supervision, and other law enforcement agencies. The net cost of these provisions for local law enforcement agencies is unknown but could amount to millions to tens of millions of dollars annually on a statewide basis.

The provisions of this measure limiting or denying bail or own recognizance releases in certain circumstances could increase the number of defendants who would have to

await the completion of their trials in county jail. These factors would increase the cost to counties of operating jails. In addition, the provisions of this initiative empowering sheriffs to establish temporary jails could increase county costs.

These increases in county jail operating costs could be offset by two factors. First, the increase in the pretrial population of jails, due to fewer releases on bail or own recognizance, could be offset to an unknown extent due to the early release of a larger number of sentenced offenders in jail systems with limited capacity. Second, the requirement that sheriffs suspend inmate privileges in the event of overcrowding or early releases of offenders could also reduce county costs for jail inmate programs.

Other provisions of this measure are likely to increase local law enforcement costs in different ways:

- The requirement in this measure that all inmates on work release be electronically monitored could increase county costs for operating these programs. This could result in a decrease in the use of these programs, and higher county costs for holding these offenders in jails.
- Local law enforcement agencies would incur increased costs to provide crime victims with information about victims' rights and services as well as information about criminal cases.
- The provision in this initiative prohibiting the termination of an offender from probation until he or she has fully paid restitution could increase probation caseloads. Offenders could remain on probation caseloads longer than they otherwise would if they lacked the financial resources to pay what they owe in restitution.

Other State and Local Government Fiscal Impacts. The requirements in this measure to provide additional information to crime victims are likely to increase administrative costs for DOJ and the Department of Mental Health, which operates state mental hospitals. In addition, this measure would likely result in an expanded awareness by crime victims of the government services currently available to them. To the extent this leads to a greater use of these services, it could prompt state and local agencies to increase expenditures for them.

The changes to the restitution process would also potentially have other impacts on a host of local and state programs. Currently, a number of different state and local agencies receive funding from the fines and penalties collected from criminal offenders. For example, counties' general funds, the Fish and Game Preservation Fund, the Traumatic Brain Injury Fund, and the Restitution Fund for crime victims receive revenues collected from offenders. Because this initiative mandates that all monies collected from the defendant first be applied to pay restitution orders directly to the victim, it is possible that their

payments of fines and penalties revenues to various funds, including the Restitution Fund, could decline. This impact may be offset to the extent that certain provisions of this initiative, such as the requirement for additional financial disclosure of their assets, improve the overall collection of monies owed by criminal offenders.

Finally, this initiative may also generate some savings for state and local agencies to the extent that the provisions of this measure (1) increases the restitution collected by crime victims and (2) the victims collecting restitution therefore need less help from state and local government programs, such as social services and victim assistance programs.

The net fiscal impact of these factors on the state and local agencies is unknown.

Summary

This measure would have the following major fiscal effects:

- Increased state and county judicial system costs that may initially exceed \$100 million and amount to tens of millions of dollars annually thereafter on a statewide basis.
- A net increase in costs for state prison operations that, depending on circumstances, could range from millions to hundreds of millions of dollars annually.
- A potential net savings in the low tens of millions of dollars for the administration of parole reviews and revocations if the changes related to parole revocation procedures were not overturned by potential legal challenges.
- A net increase in local government costs for county jails, work release programs, probation supervision, and other local law enforcement agencies in the millions to tens of millions of dollars annually on a statewide basis.

Sincerely,

Elizabeth G. Hill
Legislative Analyst

Michael C. Genest
Director of Finance