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**Senate Judiciary Committee
Public Hearing on House Bill 1947
Monday, June 13, 2016**

**By Bruce L. Castor, Jr.
Solicitor General
On behalf of the Office of Attorney General**

Good morning Chairman Greenleaf, Chairman Leach, and members of the committee. My name is Bruce Castor, and I am Solicitor General of Pennsylvania. I have been a lawyer for 30 years. I served eight years as a Montgomery County Commissioner, eight years as District Attorney of Montgomery County, and 14 years as an assistant district attorney there as well. I have served the state in a number of roles including helping to draft the Evidence Code, on the staff of Governor Ridge's committee overseeing the Governor's Special Session on Crime, as a member of the Rules of Juvenile Court committee of the Supreme Court, the Judicial Reform Commission of the Supreme Court for the First Judicial District, and the General Assembly's Joint Committee on Wrongful Convictions. I also served as a special deputy attorney general for many years, and since April of 2015, as a special assistant district attorney of Centre County on an as needed basis. I have practiced law privately for over 8 years, though not so much since assuming the post of Solicitor General in March of this year.

Pennsylvania Attorney General Kathleen Kane has delegated me the responsibility to testify here today on behalf of the Office of Attorney General. The Attorney General is extremely appreciative that the General Assembly is poised to take very positive steps to protect victims even in cases where many years have elapsed. The Bill under consideration will dramatically advance that cause, and the rapidity with which the General Assembly has acted in the wake of the recent Grand Jury Report out of our office shows the three branches of government working collaboratively to address a serious and pressing problem affecting many Pennsylvanians. We thank the General Assembly and this committee for working with us to help achieve justice for victims.

The Attorney General directed me to research a small part of the bill, and render to the committee a legal opinion, as Attorney for the Commonwealth, on the narrow issue of whether the civil retroactivity provisions relative to the statute of limitations contained in House Bill 1947 as currently written violate the Remedies Clause of the Pennsylvania Constitution. Apart from

that provision, our office whole heartedly supports the Senate's ultimate passage of House Bill 1947 in substantially the same form in which it was presented to the committee from the House.

I am aware that the General Assembly has, in part, been moved to consider this issue as a result of Attorney General Kane's investigation from the 37th Statewide Investigating Grand Jury, and the Grand Jury's report concerning activity within the Altoona-Johnstown Archdiocese of the Catholic Church. The Attorney General herself asked me to convey how very much she appreciates the efforts of the General Assembly in addressing the concerns raised publicly through her investigation. Our office is continuing its investigation by branching out to other parts of the state in an effort to ascertain the scope and breadth of efforts by church officials to conceal allegations of sexual assault by members of the clergy against children, or, perhaps, against adults as well.

My role today is to give the committee the opinion of the Office of Attorney General on whether the so-called Remedies Clause of the Pennsylvania Constitution would preclude the General Assembly from extending retroactively a civil statute of limitations within which private citizens could initiate civil lawsuits for damages. This would include that class of potential defendants for whom the statute of limitations will have "run" or expired as of the date any proposed legislation would take effect. It is beyond question that the General Assembly, in its discretion after wise deliberation, may extend (or even eliminate) civil statutes of limitations, and that potential defendants for whom the statute has not yet run, would then have the statute extended as to them making them subject to civil or criminal penalties. But, the question at issue is: may the General Assembly "pull back", within the period of the statute of limitations, those persons for whom the current statute of limitations has "run" or expired?

In preparing for today's testimony, I reviewed the opinions of various legal scholars expressing both points of view: those who opine that the General Assembly may retroactively extend the civil statute of limitations, and those who opine that the General Assembly may not retroactively extend the statute. I also read the major case decisions addressing this point. Upon doing so, I conclude that the retroactivity provisions of House Bill 1947 would violate the Remedies Clause of the Pennsylvania Constitution.

Unlike the United States Constitution, the Pennsylvania Constitution has a provision, known as the Remedies Clause, in Article I, Section 11. The Remedies Clause in my opinion creates a bar to any legislative effort to make a change in the statute of limitations apply retroactively, because the Clause prohibits the elimination of a fixed right. The Pennsylvania Constitution says:

All courts shall be open; and *every man for an injury done him in his lands, goods, person or reputation shall have remedy by the due course of law, and right and justice administered without sale, denial or delay.* Suits may be brought

against the Commonwealth in such manner, in such courts and in such cases as the Legislature may by law direct.

The Pennsylvania Supreme Court clarifies the Remedies Clause by stating the Clause forbids acts of the General Assembly that would impinge upon a “vested right.” Konidaris v. Portnoff Law Assocs., 953 A.2d 1231, 1232 (Pa. 2008). Vested rights include vested *claims* and vested *defenses*. Two further Pennsylvania Supreme Court decisions deal directly with the Remedies Clause. In Ieropoli v. AC&S Corp., 842 A.2d 919, 932 (Pa. 2004), the Court states “The Remedies Clause, which binds both the legislature and the courts, provides that an accrued cause of action is a vested right and as such, cannot be eliminated by subsequent legislation.” In Lewis v. Pennsylvania R. Co., 69 A. 821, 823 (Pa. 1908) going all the way back to 1908, “If the law of the case at the time when it became complete is such an inherent element in it that a plaintiff may claim it as a vested right, on what possible grounds can it be held that a defendant has no vested right with respect to an exemption or defense?” Plainly, the Remedies Clause means that the General Assembly cannot eliminate claims that *already* exist but that are not time barred, and, likewise, cannot eliminate *defenses* that have already ripened and are available to a civil defendant. Thus, a plaintiff who has a legitimate claim cannot have that claim removed by act of the General Assembly. The converse of that is also true: a defendant who, though passage of time, has reached the point where his defense is perfected, the General Assembly also may not take the perfected defense away from him by subsequent legislation.

An actual example from a decision by the Pennsylvania Supreme Court is not only instructive on this point, it operates as controlling precedent. In Lewis v. Pennsylvania Railroad Company, a train conductor died on the job in an accident. His widow, the plaintiff, sued the railroad for negligence. At the time of the conductor’s death, the statute in effect governing this situation barred the widow’s claim. While the suit was pending, however, the General Assembly repealed the law barring such suits and created a new law allowing an opportunity for the widow’s suit to move forward against the railroad while seeking money damages. The plaintiff went ahead under the new law, and would certainly have prevailed had the new law been in effect at the time of her husband’s death. Nevertheless, the Pennsylvania Supreme Court ruled against her and denied the widow’s claim.

The Court in the case involving the widow of the railroad worker (Lewis), concluded that “retroactive legislation that reduces a defendant’s defenses or “exemptions from demands” cannot be applied where the defense has “vested.” The Supreme Court 100 years later in the Konidaris case I previously mentioned (953 A.2d at 124) interpreted the Lewis decision in 2008 exactly the same way the Lewis court intended in 1908. The Lewis court declared—and it is especially relevant to the situation under review by the committee—“There is a vested right in an accrued cause of action, in a defense to a cause of action, *even in the statute of limitations when*

the bar has attached, by which an action for a debt is barred.” Lewis, 69 A. at 823 (emphasis added and quotations removed).

Since its decision in 1908, Lewis has been favorably cited by the Supreme Court on several occasions, which is to say, it remains controlling. It is critical to note that the Lewis Court and the Konidaris Court specifically addressed the Remedies Clause *in the context of* the Statute of Limitations. I submit it is difficult to imagine a more “on point” Supreme Court series of precedential decisions on the very question of what it is this committee must grapple with over the course of these hearings.

I have read opposing points of view, from legal minds of distinction, pointing to the difference between “procedural” and “substantive” rights. I do not find this delineation persuasive, however. I do not see how application of the Remedies Clause prohibiting the revival of a time-barred claim could depend on the “procedural” or “substantive” nature of the defense. Throughout the United States, not just in Pennsylvania, court after court has found that once a statute of limitations has run, the liability under the statute cannot be revived by subsequent legislative activity. In addition to our Supreme Court so finding in the Lewis and Konadaris cases, our Superior Court also held in Maycock v. Gravely, 508 A.2d at 331, 333 (Pa.Super.1986) that whether we call the statute of limitations “procedural” or “substantive,” the legislature cannot retroactively revive a time barred claim.

In applying the rule that time-based claims cannot be revived, Pennsylvania does not stand alone. While not an exhaustive list, I saw cases from Alabama (1996), Arkansas (2008), Florida (1994), Illinois (2009), Indiana (2008), Iowa (1995), Kentucky (2003), Maine (1980), Maryland (2002), Missouri (1993), Nebraska (1979), Ohio (1982), Oklahoma (2009), Rhode Island (1996), South Carolina (2005), Utah (2012), Vermont (2003), and Wisconsin (2010) all standing for the same premise which we know from the 1908 Lewis decision, has been the law of Pennsylvania now for 108 years.

House Bill 1947, if enacted into law in its current form and without amendment will, in our opinion, violate the Remedies Clause of the Pennsylvania Constitution. Potential defendants, who have had the statute of limitations pass without their being subjected to suit, will rightly claim a vested right in the applicable statute of limitations. Such operates as a total block to liability which the General Assembly, despite surely the very best of intentions, cannot retroactively cure. Without doubt, House Bill 1947 represents a laudable attempt to provide a remedy for a well identified social problem. However righteous the policy goals behind HB 1947, the General Assembly in its zeal, cannot overrule a state constitutional right. In Ieropoli, a case I mentioned a few minutes ago, (842 A.2d at 932) the Supreme Court specifically found that legislative reforms must not offend the Remedies Clause.

I have seen some legal analysis equating the term "due process," to the term "due course of law" the latter of which is contained in the Remedies Clause. Many court decisions have addressed the concept of "due process," which protects people against *government* deprivations of liberty or property by the state, absent due process of law. By contrast, the right to "due course of law," as contained in the Remedies Clause of the Pennsylvania Constitution, provides an independent guarantee of legal remedies for *private* wrongs by one person against another, by granting to litigants *access* to the state's judicial system. This distinction between "due process" and "due course" is specifically drawn by the Supreme Court in Konidaris (598 Pa 55 at 71). Thus, our view is that "due process" deals with *government* action, and "due course" focuses on *private* causes of action. Therefore, using a legal analysis of the Remedies Clause based on the body of law which has sprung up around the notion of "due process" is ill-advised, since "due process" in the context of governmental action, is separate and distinct from the notion of "due course of law" in private causes of action contemplated by the Remedies Clause which is an important issue currently before this committee.

Mr. Chairman, based on the foregoing, it is the opinion of the Office of Attorney General that the Remedies Clause contained in the Pennsylvania Constitution at Article I, Section 11 would prohibit the General Assembly from extending retroactively the Statute of Limitations for civil causes of action. Because of the Remedies Clause, the General Assembly cannot make civil defendants potentially liable where the cause of action is time-barred as of any future effective date of the proposed new legislation. As Solicitor General of Pennsylvania, while there is a great deal to support in the bill advancing the cause for victims of sexual exploitation, I recommend this committee seek removal of the civil retroactivity portion at this time. We believe that portion of the bill purporting to allow retroactive application of the civil statute of limitations, likely runs afoul of the Pennsylvania Constitution. The General Assembly, like our other co-equal branches of state government, ever strives to uphold the Constitution of this Commonwealth even when doing so may not be universally popular, and in this instance it is my advice is that it so at least for now.

I want to be clear, however, that the Office of Attorney General supports nearly all of the remainder of House Bill 1947 as a way to provide relief for victims of sexual abuse even decades after the offenses. We praise the General Assembly for working so quickly to address this issue in a thoughtful and deliberative way, but while still moving rapidly to respond to a pressing need that the Commonwealth grant crime victims further remedies at law. That one small piece, in our opinion, appears to be unconstitutional, should in no way diminish in the eyes of the public our overall approval of the goal for which the General Assembly strives: justice for victims of abuse in the Commonwealth. It may well be that future court decisions will affect our opinion on the application of the Remedies Clause, or similar clauses be interpreted by courts in other states, that will allow us to revisit our opinion. Should that occur, I will not hesitate to reevaluate our thinking, and bring any new analysis to the attention of this committee. We think House Bill

1947 is a wonderful concept, but with one small constitutional flaw. The need to move forward now where we know we are on solid ground outweighs, in our view, becoming sidetracked on the retroactivity issue. As Solicitor General for the Commonwealth, I feel it prudent to pause on this one issue, and urge the committee to move ahead on what is an excellent advancement in victims' rights to have their cases heard.

Thank you for permitting me to provide testimony on this very important issue. I, and Attorney General Kane, look forward to working with the Committee and the General Assembly to provide further protection for victims of sexual assault when permitted by the Pennsylvania Constitution. I welcome any questions you may have.