

Date: October 12, 2015

From: Undersigned ALI Members and Advisers

To: ALI Director, Deputy Director, Project Reporters, Council and Members

Subject: Revisions to Sexual Assault Provisions of the Model Penal Code

Dear Colleagues:

We write to express concern about recent developments and announcements at the October 8, 2015 meeting of the Advisers and Members Consultative Group (“MCG”). Our understanding is that the Reporters seek nine “decisions” by the Council related to the Sexual Assault Project. We believe that these requested decisions are both unwise and, at a minimum, premature.

Most particularly, the reporters seek a Council decision that would lock the so-called “affirmative consent” standard into future drafts of the project. More than any other single issue in this project, the attempt to impose an “affirmative consent” standard has generated widespread opposition as seen in two co-signed memoranda (attached), many individual comments¹, many speakers at the Annual Meeting and many speakers at the October 8 Meeting of Advisers and MCG. Indeed, the discussion of “affirmative consent” consumed all of the allowed time at the October 8 Meeting and was continuing strong when the meeting was forced to end to allow the room to be set up for another event. Other issues involved in the proposed nine “decisions” were not discussed at all during the October 8 meeting.

According to the Reporters’ Memorandum to the Council, at 3, “the Reporters will present for Council decision nine foundational issues on which the structure and drafting of the Blackletter depend.” We respectfully submit that none of these nine issues has been adequately presented and discussed with the Advisers and MCG. We further note that many of the nine issues explicitly seek Council endorsement of the Reporters’ positions on consent that have generated tremendous opposition within the membership. Indeed, the Reporters are at pains to state that they scaled back both their previous definition of “affirmative consent” and the crimes to which that definition applies because of the widespread opposition:

“The Reporters investigated and judged to be well-founded the concerns about over-breath expressed at the Annual Meeting.” *Id.* at 1.

That narrowing of “affirmative consent” by the Reporters, though positive, is not a cure for the underlying, fundamental flaw in the “affirmative consent” approach and should not be endorsed

¹ See, e.g., Comment of Charles Fried to Director Revesz, presumably provided previously to the Council but not available on the ALI website and attached here for convenience.

by the Council as part of the announced effort to obtain “decisions” to shape the future of the Project.

The Reporters’ Memorandum to the Council recites and purports to refute nine “Unfounded or *de minimis* concerns” and nine “More Substantial Concerns.” As refutation of these 18 “Unfounded or *de minimis* concerns” and “More Substantial Concerns,” the Reporters present 14 pages that consist almost exclusively of the Reporters’ personal opinions, without citations of any sort. There are three footnotes (numbers 5, 6 and 10) that cite to Preliminary Draft No. 5 as support for the opinions in the Reporters’ 14 pages. On the pages of Preliminary Draft No. 5 cited in these three footnotes, the strongest statement in support of the Reporters’ opinions is the claim that among state laws for felony sexual penetration, “Nine require positive agreement or lean toward that conception.” *Id.* at 58. We are aware of only one analysis of this assertion. In that analysis, Professor Laird Kirkpatrick finds that perhaps two of the nine states may approach the Reporters’ model but even these two are less severe than the Reporters’ model. *See* attached comment of Professor Laird Kirkpatrick at 5-7 and attached letter to Erin Murphy.

In the Prospectus for the project, “affirmative consent” appears only briefly and only as an example of an extreme solution “Near the opposite pole” in a summary of widely variant approaches that may be reviewed during the project (attached, at 6-7).

At the October 8 meeting, the Reporters’ principal defense of “affirmative consent” was by way of analogy to property and contract law with words to the effect that “The law wouldn’t allow me to take your property without an indication of prior affirmative agreement” (transcript not yet available). With all due respect, the justification is both inapposite and insulting to women and to men. Outside of prostitution,² sexual relationships are not contractual transactions where one party is buying and the other is selling a product or service “property” interest.

Until recently, almost no one in ALI knew the direction being taken in the MPC Sexual Assault project. That has changed. Opposition is now substantial and growing.

The Reporters’ Memorandum to the Council at 3 states:

“Contrary to the more frequent practice, the Reporters will not move the discussion directly to an examination of specific Blackletter language; rather it was determined, in consultation with the Executive Director, that it would be more productive for the Reporters to obtain Council guidance on the most important policy choices to be made. After obtaining that guidance, the Reporters will proceed to draft detailed Blackletter implementing the Council’s choices, and the resulting language can then be brought forward for close textual examination at the Council meeting in January.” (*id.*)

² A different problem in the draft to be dealt with at a different time.

The undersigned respectfully submit that deviation from “the more frequent practice” is singularly inappropriate in this instance because awareness of the flaws in the direction of the current draft is only beginning to emerge, because the draft has enormous areas of vagueness making it impossible to fully understand its actual effect (*see, e.g.*, Comment of Smith and Rudovsky on ALI website), because the draft is so widely deviant from existing best practices among the states, and because no portion of this project has been sufficiently developed to permit any of the nine “decisions” sought from the Council.

The Council should not endorse the nine “decisions” sought by the Reporters.

Respectfully submitted,

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