

Date: January 19, 2016

From: Undersigned ALI Members and Advisers

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

Subject: Council Draft No. 3; Revisions to Sexual Assault Provisions of Model Penal Code

Dear Colleagues:

We have received Council Draft No. 3. We begin by conveying our thanks to the Council for its careful work in reviewing the prior draft at the Council's October meeting. We also thank the Reporters for their acknowledgement of prior concerns and their statement of certain guiding principles in the new Reporters' Memorandum, most particularly the statement that given "the risk of over breadth in penal statutes, the revised Draft rejects these 'affirmative consent' formulations." *Id.* at *xi*.

We write briefly now because time does not permit a thorough analysis of the new draft in advance of the January meeting of the Council and because it is important to understand that continuing concerns about the consent standard require careful consideration by the Advisers and Members Consultative Group before the draft can be considered ready for Council review. Like its predecessors, Council Draft No. 3 is a complex document with multiple interacting layers which must be understood in their combined totality rather than individual isolation. As example, please consider the following illustration:

A 35 year old, Mid-level Manager ("MM") has been taking Ritalin since junior high school because it aids focus and concentration. Every few months, MM goes to the prescribing physician for a review of the effectiveness of the dosage and for a prescription renewal. At each visit, the Physician's Assistant ("PA") takes MM's pulse, blood pressure and other vital signs. Both MM and PA are fully competent adults. Over time, MM and PA develop a deep affection and commence a fully wanted, consensual sexual relationship. Under the definition of "consent" in newly proposed Section 213.0(3), PA is a *per se* felon.

While Council Draft No. 3 and the Reporters' Memorandum have a stated intention of enabling a finding of consent in ways not permitted in the prior draft, the multi-layered structure of Section 213.0(3) first grants but then revokes or prohibits consent in a surprising number of settings. In the above illustration, the prohibition against consent comes because Section 213.0(3) states that "agreement does not constitute consent when it is the product of .....exploitation specifically prohibited by.... Section 213.4...." Under Section 213.4, PA has *per se* committed "exploitation" against MM because PA "was engaged in providing the other person... with professional treatment, assessment or counseling for a mental or emotional illness, symptom, or condition.... regardless of whether the actor is formally licensed...." The effect of

213.0(3) is thus to create whole new categories of "statutory rape" under which consenting, competent adults are prohibited from consenting and are statutorily deemed incompetent to consent.

The preceding illustration is not an isolated instance of difficulties with the newly proposed Section 213.0(3) but time does not permit a full analysis before the upcoming Council meeting in January. Accordingly, we respectfully urge the Council to defer any action with respect to the new draft until there has been a thorough review by the Advisers and Members Consultative Group in their upcoming meeting. At the same time, we wish to help to begin the process of identifying issues that should be part of the analysis of the draft and we offer the following for consideration.

The operative term in the previous draft was "positive, freely given agreement." The operative term in the new draft is "agreement," dropping the adjectival phrase "positive, freely given." There is concern that dropping the adjectival phrase did no more than delete surplusage without adequately curing the problems with the operative term. First, it is hard to think of an "agreement" that is not "positive," meaning that deleting the word "positive" does not change the operative standard. Second, the requirement for agreement to be "freely given" remains in place due to the prohibitions against "force, fear, restraint, threat, coercion, or exploitation" which are also expressed in Section 213.0(3). Accordingly, there is doubt about whether the deletion of the adjectival phrase has any substantive impact in the stated intention to move away from "affirmative consent."

It may be that the difficulty arises from use of the word "agreement." If the social ill we seek to prevent is sex with an unwilling person, we need to recognize that "agreement" is not synonymous with "willing." An "agreement" is something different and is generally recognized as a subset describing a particular form of "willingness." Unlike the usual understanding of "willingness," the term "agreement" is generally understood more restrictively and carries with it the baggage of its meaning throughout the law of contracts where "agreement" typically includes such further requirements as consideration and intent to be bound, all of which are inappropriate for intimate relations outside of prostitution.

This difference between "willingness" and "agreement" was recognized in the prior draft where "against the will" (felony) was understood to be different from the lesser offense of "without consent" (misdemeanor). *See* former Sections 213.2(1)(a) and 213.2(2). In contrast, Council Draft No. 3 now applies the lesser criminal threshold of "without consent" jointly to what had been two different offenses and treats the combined offense as a felony, not a misdemeanor. *See* Reporters' Memorandum at *xii*.

At the same time, the Reporters' Memorandum at *xi* states that the meaning of consent in the proposed model statute is "best left to evolving cultural standards." This is a matter of concern because of the importance of laws that clearly state what constitutes a crime. ALI should be cautious of proposing criminal statute language that is intentionally left so ambiguous as to be subject to "evolving" meanings.

Although Council Draft No. 3 states that it intends to reject a “subjective” standard (“Consent is something a person does, not something a person feels. The Code likewise defines consent as conduct, not a subjective state of mind.”), Comment to Section 213.0 at 1, the draft appears to endorse a subjective standard of what constitutes the “agreement” which is “best left to evolving cultural standards.” Reporters’ Memorandum at *xi*. Since “agreement” is merely one means of manifesting “willingness,” and since “agreement” is no less subjective than “willingness,” it is again appropriate to ask whether “willingness” is a better operative term than “agreement.”

No apparent rationale is offered for the use of “agreement” as a proxy for “willingness.” In the case of statutory rape, the social ill is that young children are too immature to be permitted to consent to sex and we use chronological age as a proxy rather than determine if a particular child is or is not mature. In the case of consenting adults, there is no apparent need for a proxy to be used as a substitute for “willingness” and there is no apparent need for a proxy that is unambiguously more narrow than “willingness.”

In choosing an operative term, careful consideration should be given to the standards and practices in the states. The Reporters’ Memorandum at *xii* states that Council Draft No. 3 “would situate itself roughly in the middle of the states that define consent” but acknowledges that 21 states do not utilize a consent definition, preferring instead other standards. To be “roughly in the middle” of roughly half of the states suggests that more analysis will serve ALI well and neither the Council nor the Advisers nor the Members Consultative Group have yet had opportunity to do that.

The only known scholarly review of the prior drafts expressed concern that its overall structure would “risk devolving into punishment for simple, tort negligence (or less).” Abstract; Better Sex Through Criminal Law: Proxy Crimes, Covert Negligence, and Other Difficulties of 'Affirmative Consent' in the ALI's Draft Sexual Assault Provisions; Kevin Cole, University of San Diego School of Law, *San Diego Law Review, Forthcoming, San Diego Legal Studies Paper No. 15-197*, [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2670419](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2670419). Professor Cole’s principal objection is that:

“The American Law Institute’s draft amendments to the Model Penal Code’s sexual assault provisions address the problem of unwanted sex through the use of proxy crimes. The draft forbids sex undertaken in the absence of certain objective indicia of willingness, or in the presence of certain objective indicia of unwillingness, even though the serious harm of sex with an unwilling partner does not always result from those situations. .... Imposing liability on a tort negligence standard would conflict with the Model Penal Code’s general insistence on subjective liability as a predicate to criminal liability. It would also strike many as a regrettably low standard for labelling an actor as a sex offender, and it would risk deterrent losses over time by diluting the stigma associated with the label.” *Id.*; quoting Abstract.

Professor Cole's objection to the use of proxy crimes appears to remain relevant in Council Draft No. 3 where "agreement" is used as a proxy for "willingness" and we respectfully suggest that further analysis is warranted.

Finally, we note a degree of disconnect between the proposed black letter on the one hand and the Reporters' Memorandum, Commentary, and Notes on the other. While too numerous to catalog, it appears that the Reporters' Memorandum, Commentary and Notes express reluctance about the revised black letter (*e.g.*, the statement that the prior draft was "perceived to go too far and too fast," Reporters' Memorandum at *xi*). We respectfully submit that our concerns were not about the speed of the prior draft's movement but about its direction. We hope that the final product will embrace and defend the black letter rather than suggest that the black letter is just a starting point for more expansive criminalization.

We thank you for the opportunity to begin the discussion of Council Draft No. 3. For the reasons noted, we believe that it is premature for the Council to take any action with respect to this draft and we look forward to a more fully developed discussion and analysis at the upcoming meeting of the Advisers and the Members Consultative Group.

Respectfully submitted,

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