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| To: | ALI Director, Deputy Director, Project Reporters, Council and Members |
| From: | Undersigned ALI Members and Advisers |
| Date: | January 16, 2017 |
| Subject: | Council Draft No. 5; Revisions to Sexual Assault Provisions of Model Penal Code |
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Dear Colleagues:

We thank the Council for its continued effort to assist the Model Penal Code Project and we write to offer support to your effort. Although holiday schedules, the beginning of new semesters and other obligations limited the time available for review and consultation among ourselves with respect to Council Draft No. 5, we believe that certain items are readily apparent and necessitate the attention of the Council.

Attendees at the May 2016 Annual Meeting heard great concern from the Membership about the risks of overcriminalization. The Membership rejected the approach presented in Tentative Draft No. 2 for the concept of consent and adopted a substitute definition. Throughout the summer and fall, the ALI Director and Deputy Director creditably assisted laborious, iterative efforts to bring the Comments and Reporters’ Notes into harmony with the Black Letter adopted by the Membership. In October, a two day session of the Advisers and Members Consultative Group provided extensive input to the Reporters with respect to Preliminary Draft No. 7 and to the continued need to reduce the problem of overcriminalization then embodied in provisions of the draft apart from the definition of consent. At the end of that session, many expressed hope and confidence that the next draft would ameliorate the concerns.

We write today with regret to inform you that the hope and confidence were not fulfilled. We cannot in this document fully repeat the input provided to the Reporters both at and outside of the meeting of the Advisers and Members Consultative Group but a few examples will illustrate the reasons for continued concern. For reasons that appear hereafter and because many of the concerns are of longstanding, we have attached six prior Co-Signed Memoranda addressing some of the salient issues.

In the May 12, 2016 Co-Signed Memorandum, we wrote:

The core criticisms of the draft presented at the 2015 Annual Meeting and acknowledged by the Reporters centered on the draft’s expansion of the criminalization of sexual behavior and on the draft’s attempt to “dictate social norms” through the *in terrorem* effect of criminal liability. Tentative Draft no. 2 at *xv*. A fair first test of Tentative Draft No. 2 is to examine whether the overcriminalization and “dictate social norms” problems in last year’s draft have been cured. Consider the following hypothetical:

“A” and “B” are walking in a park when B bends at the waist to examine a flower and exposes the waistband of B’s underwear. Mischievously, A executes a “wedgie” upon B.

The May 12, 2016 Co-Signed Memorandum went on to explain the interconnections among the draft definitions that caused the common juvenile prank of tugging on the waist band of another person’s trousers or exposed underwear to become a sex crime. That Co-Signed Memorandum also explained the vacillations among the various drafts under which “wedgies” bounced between felony and misdemeanor status but the underlying problem of the overbroad definition never changed. For example, in Discussion Draft No. 2, a “wedgie” was a misdemeanor. In Tentative Draft No. 2, it became a felony. In Preliminary Draft No. 7, it reverted to a misdemeanor and in Council Draft No. 5, it is again a felony but with yet a further complexity. In Council Draft No. 5, a “wedgie” is a Fifth Degree Felony unless the complainant has on some prior occasion expressed aversion to “wedgies,” in which case it is a Fourth Degree Felony. Section 213.2. In both cases, of course, these are denominated as sex crimes and would require sex offender registration in most states.

The continuing challenge of trying to get at the root of a problem and bring it to closure across successive drafts is what prompted Professor Kevin Cole to write about the lack of progress in resolving problems with the definition of consent prior to the definitive intervention and vote of the Membership:

ALI critics of the sexual assault proposal could not be faulted for feeling as if they are in a game of Whack-a-Mole…. High penalties for sex in the absence of affirmative consent were replaced with misdemeanor penalties, but have now risen to the felony level again…. Critics concerned that commentary favorable to defendants did not match the statutory text saw the text amended to include some of those ideas [Council Draft No. 3], only to see that text disappear in the most recent draft. Bold proclamations of a shift from “affirmative” to “contextual” consent end up, on examination, to have changed very little.

Kevin Cole, “Like Snow to the Eskimos and Trump to the Republican Party: The ALI’s Many Words for and Shifting Pronouncements About ‘Affirmative Consent,’” at 5, http://papers.ssrn.com/sol3/papers.cfm?abstract\_id=2753718, footnotes omitted.

That same problem is recurring in connection with the offense stated in Section 213.2 and elsewhere in Council Draft No. 5.

While there have been periodic statements of reassurance that ALI should not be concerned about overcriminalization, the facts are otherwise. Indeed, concerns about overcriminalization of sexual behavior have only increased as more information has become available. For example, there has been little research into the collateral consequences of sex offense convictions but recent research has revealed that over 750,000 Americans are currently on sex offender registries with all the collateral consequences for jobs, education, housing and virtually every aspect of life that flow from such registration. *See, e.g.,* “The War on Sex Offenders is the New War on Drugs, Which Means it's About Race,” https://www.inverse.com/article/16109-the-war-on-sex-offenders-is-the-new-war-on-drugs-which-means-it-s-about-race

Even more disturbingly, it has been reported that the lowering of definitions for what constitutes a sex crime combined with zealous prosecution has resulted in the stunning situation where the single most common age for law enforcement pursuit against a sex offender is age 14. Age 14. That is not a typo: http://nypost.com/2016/07/25/bogus-sex-offender-labels-are-ruining-lives/. Similarly, *see* Prosecutor Wants to Charge 14-Year-Old Girl with Sexual Exploitation for Taking PG-13 Pictures of Herself; http://reason.com/blog/2016/10/04/prosecutor-wants-to-charge-14-year-old-g.

Whether age 14 is the most common age for “wedgies” or “humping” or “grinding” or “petting” or any of the other common activities that can result in “penetration” (Section 213.0(7)) through the other person’s clothing, the simple fact is that Council Draft No. 5 does not align with what most of the population views as a felony sex crime. Even a “piggy-back ride” or a lifting up a child for a hug can shift the clothing and cause “penetration” as defined in Section 213.0(7). This is one of the reasons for statutory drafting that requires something like “for the purpose of sexual gratification” as an element of offenses that are punished as sex crimes. Council Draft No. 5 contains no such limiting element in any of its proposed offenses.

The further problem with the proposed definition of “penetration” is that it does not require any “penetration” at all. As defined, “penetration” (Section 213.0(7)) means “contact” including, “any touching of the anus or genitalia of one person by the mouth or tongue, of another person…”

By the express terms of Council Draft No. 5, a kiss on the thigh or abdomen that strays an inch too far becomes “penetration” that is treated for all purposes in the remainder of the draft as the exact equivalent of extended genital to genital intercourse. Thus, the concern about overcriminalization.

The problem is overbreadth. An enormous range of sexual behavior is reduced to a single word, “penetration,” and all “penetration” is treated as identical. This is an excessive economizing of words that will have very serious real world consequences if ever enacted as legislation because Council Draft No. 5 grades all conduct at the most serious end of the covered spectrum rather than at the lowest end of the covered spectrum. In most criminal statutes, the offense is graded to be appropriate to the least severe act that is covered by the offense. If a more severe act occurred, the prosecutor will also charge a higher level offense. By contrast, Council Draft No. 5 grades everything as if all acts were equal to the most severe act that is covered by the offense. The public will largely agree that genital intercourse without consent as defined in the ALI proposal constitutes a felony. Few in the public will agree that a kiss in the wrong spot or a wedgie is a felonious sex offense, yet Council Draft No. 5 treats the full range of behaviors as if they were identical. As noted by several speakers during the meeting of Advisers and Members Consultative Group in October, not every sexual act is “rape.”

Serious concerns arise throughout the remainder of Council Draft No. 5 but we solicit your indulgence by mentioning only a few.

Section 213.1 is wholly dependent upon the definition of “penetration” discussed above and creates a Felony in the First Degree if the defendant “acts with the participation or assistance of one or more actors who are present at or near the place where the act of sexual penetration occurs, and the other person is aware of that presence….” By its express terms, Section 213.1 creates a Felony in the First Degree with the risk of lifetime imprisonment if one teenager dares another teenager to perform a “wedgie” on a person who later complains.

Section 213.3 addresses crimes against “vulnerable persons.” This section also is wholly dependent upon the definition of “penetration.” In certain other respects, the section is improved from prior drafts by reducing the explicitly overbroad prior language but the draft contains so many “reserved” definitions that it is neither possible to approve nor even to discuss what the section means since the meaning itself is “reserved.”

Section 213.4 addresses “coercion or exploitation.” This section also is wholly dependent upon the definition of “penetration” and is somewhat improved from prior drafts by reductions in the prior overbreadth but, *inter alia*, it does not define who is an “official” subject to the prohibition, what is an official “action,” or what is an economic or financial harm to the complainant “that would not benefit the actor.”

Collectively, we are grateful for the progress that has been made in this project, particularly the vote of the Membership at the May 2016 Annual Meeting to establish a definition of consent, and we are eager to see further progress in moving the project away from the problems of overcriminalization of sexual behavior. At this time, none of the sections of Council Draft No. 5 is ready for Council approval but we stand ready to assist in the further advancement of the project.

Respectfully submitted,

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