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| **To:** | ALI Director, Deputy Director, Project Reporters, Council and Members |
| **From:** | Undersigned ALI Members and Advisers |
| **Date:** | January 17, 2018 |
| **Re:** | Council Draft No. 7; Revisions to Sexual Assault Provisions of  Model Penal Code |

Dear Colleagues:

We thank the Council for its attention to the concerns the Membership has expressed in previous Co-Signed Memoranda and at the past several Annual Meetings.  We are pleased to see several notable improvements in Council Draft No. 7 (CD7).

Regrettably, we must report that the “Whack-a-Mole” problem first noted by Professor Cole has recurred in CD7 where certain improvements are offset by the introduction or exacerbation of other problems elsewhere in the draft. 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. In particular, CD7 regresses to “affirmative consent” despite the overwhelming Member opposition to that concept and despite the membership vote to both reject the Reporters’ definition of consent and to substitute a specific definition for the term “consent.”

Regrettably also, we must report that concerns about the analysis and discussion of citations in support of CD7 continue to emerge. Memoranda have been submitted about these concerns by Professor Kirkpatrick and by Professor Stith in connection with prior drafts.  In connection with the matters now under consideration by the Council, Judge Keyes has submitted two memoranda (posted December 5, 2017 and January 4, 2018) describing concerns about the analysis and discussion of case law and statutes in Texas, Connecticut and New York.  Obviously, individual members writing as volunteers in the short time available after the release of a new draft do not purport to be comprehensive in surfacing all concerns, but the samplings done by Professor Kirkpatrick, Professor Stith and, now, Judge Keyes are worrisome.

In the following pages, we primarily address the CD7 sections that are under consideration for Council approval.  The shortness of time for consideration of a massively rewritten draft and the limited resources of your volunteer Members make it impossible to fully analyze all of the deficiencies in CD7, particularly the sections that are for discussion only.

**Section 213.1. Forcible Rape**. This section is improved (deletion of 213.3) and we again thank the Council for its attention and assistance with the project.  The draft now uses the formulation “causes another person to …. submit” and this also is an improvement.  We do not understand the Reporters’ reluctance to use the membership approved definition of “consent” in this and various other sections of CD7, but the formulation “causes another person to …. submit” is certainly an improvement over the prior draft which expressly stated that the absence of consent was not an element of the crime.

The difficulty is that CD7 does not simply say “causes another person to submit.”  Instead, it says, “causes another person to engage in or submit.”  The additional formulation, “causes another person to engage in” certainly means something different than “causes a person to submit.”  But what?  Clearly the phrase “causes another person to engage in” can only mean some undefined behavior that is less severe than “causes another person to submit” and this is the problem.  Vague terms that can only mean something less than “causes another person to submit” are exactly the root of the over criminalization problem.  Such terms invite unpredictable, expansionist interpretations and should be avoided.  ALI’s motto is “Clarifying the Law Since 1923” and the double formulation within 213.1 certainly does not do that.

The Reporters’ refusal to use the word “consent” causes still other problems.  Indeed, CD7 continues the pattern of the previous draft and states repeatedly (*e.g*., at 39) that “consent is not an element of the crime,” but this is inexplicable.  To “submit” means to act against the will, to act without consent.  The black letter sets the standard as “submit,” but the Comment and Reporters’ Note state over and over in each section that “submit” does not have its common and ordinary meaning when used for their purposes.  If “submit” does not mean “without consent” or “against the will,” it is misleading to use the word in the black letter.

Additionally, 213.1(2)(c) retains the “recklessly” *mens rea* standard that was the subject of strong Membership opposition at the last Annual Meeting.  See comment by Joseph Bankoff, movant, posted October 16, 2017. We understand that the ALI website has recently been modified to narrow its description of the scope of the overwhelming Membership vote that was taken at the Annual Meeting, but no one would suggest that the Membership indicated support for “recklessly” in any part of 213.1 or elsewhere.  213.1(1) sets “knowingly’ as its *mens rea* standard.  213.1(2)(a) sets “knowingly’ as its *mens rea* standard.  213.1(2)(b) sets “knowingly” as its *mens rea* standard. It is unwise to set “recklessly” as the *mens rea* standard for 213.1(2)(c).

**Section 213.2. Rape or Sexual Assault of a Vulnerable Person**. This section also uses the problematic “engage in” formulation, but conflates radically different situations, in some of which the phrase “engage in” may be appropriate while in other covered situations it is not appropriate for the same reasons that make it inappropriate for use in 213.1.  Section 213.2(1), for example, includes offenses against unconscious persons and “causes the other person to engage in” an act is defensible as an appropriate standard because an unconscious person does not “submit.”  It is the conflation of “unconscious” with radically different situations that creates the problem in 213.2

Under 213.2(1), “sleeping” is treated as absolutely identical to “unconscious” which obviously is not a correct understanding of those two physical states.  As explained in the October 17, 2017 Co-Signed Memorandum:

Initiating sexual penetration “however slight” (see 213.0(1)) with a comatose hospital patient is fundamentally different from a morning caress to a still dozing spouse who will quickly awaken and either desire or not desire to continue, but 213.2(1)(a) treats the dozing spouse as identical to the comatose hospital patient.  Note further that 213.2(1)(a), like 213.1, omits consent from the definition of the offense.  A spouse who has caressed her partner a thousand times during the morning transition from sleep is nevertheless a rapist if she does the same thing on the day her partner has secretly planned the filing of their divorce. *Id.* at 4-5.

The further problem with 213.2 is the continued use of the “recklessly” *mens rea* standard. For example, 213.2(1)(c) correctly states (for a crime at this level of punishment) that the defendant must have administered a disabling substance “for the purpose” of disabling the other, but the offense then gets muddled by injecting “recklessly” as the mens rea standard.  It is very hard to comprehend a standard of “recklessly for the purpose of.”  A person who administers a drug “for the purpose” of disabling another person is acting with intentionality, is acting purposefully.  That is why the crime justifies the same grading as 213.1.  Lowering the *mens rea* to “recklessly” does nothing but induce confusion and lead to expansionist efforts to criminalize more behavior by exploiting ambiguity and imprecision. A large part of ALI’s credibility lies in its insistence upon clarity and precision. CD7 provides neither.

We recognize that ALI staff recently posted a memorandum to the ALI website noting the *mens rea* standards that are already in the 1962 Model Penal Code and stating that those definitions will apply to this project.  There are several problems with these assertions.  First, there is another staff memorandum on the Project website showing that barely half of the states use the 1962 Model Penal Code definition of “recklessly.”  Second, confusing formulations like “recklessly for the purpose of” mean that no judge or jury will be able to use “recklessly” in accordance with its original 1962 intent.  Third, we do not have the luxury of ignoring common understanding of commonly used words. Even if a jury tries to attend closely to the 1962 definition, the jury members will inevitably be drawn back toward their own understanding and usage of the word in everyday life.  As explained in the October 17, 2017 Co-Signed memorandum:

It is not sufficient to say that the 1962 Model Penal Code has a fairly stringent definition of “recklessly.” The word “recklessly”  has to mean something less than “knowingly” and it does nothing in this context other than create risk of a slide toward a negligence standard in actual practice.  Whatever the word “recklessly” meant in 1962, today it means “fifteen miles per hour over the speed limit” or “distracted driving” and nearly every driver in America has crossed the “recklessly” threshold.  It is not an appropriate standard for intentional sexual assaults. *Id*. at 5.

Moreover, all of the offenses in 213.2(1) directly involve purpose and intentionality. A defendant did not “recklessly” assault an unconscious person, the defendant acted precisely because the person was unconscious.

Similar problems arise under 213.2(2) which conflates widely different physical states. This section operates under a rigid assumption that all of the physical states it lists are conclusive proof of incapacity, but this is simply not true. A person who has been “vomiting” (many causes, including a bad burrito) or “incontinent” (many causes, including old age) is simply not the same as a “person lacking the ability to communicate unwillingness.”  Again, over inclusiveness and conflation of unlike situations leads to overcriminalization and injustice.

**Section 213.3. Sexual Assault by Coercion or Exploitation**. The problems of “recklessly” and “engage in” recur in this section. As formulated in 213.3(1), “recklessly” using physical force, “recklessly” using threats of physical force, “recklessly” threatening to accuse, “recklessly” threatening to take or withhold official action,” and “recklessly” making any other threat, all make no sense. The use of force and threats is intentional, purposeful, and directed to compel a particular outcome--- submission.  Using the wrong words--- “recklessly” and “engage in”--- invite confusion and have real world consequences.

Section 213.3(1)(d) has the further problem of making the existence or non-existence of a crime solely dependent upon the degree of delusionality being experienced by the complainant. The standard for liability is simply “all the facts as that person believes them to be.”  There is no requirement for the complainant to be rational, reasonable or anything else.  The crime exists if the complainant believes that the crime exists.

Section 213.3(2) shows improvement for which we again thank the Council. This section appropriately uses the “knowingly” *mens rea* standard and appropriately excludes persons with pre-existing intimate relationships.  Under the new draft, a nursing home employee is no longer prohibited from having sex with a spouse who resides in that nursing home. However, the section continues to have problems, both old and new, such that again the Whack-a-Mole difficulty arises.

Under 213.3(2)(b), “affirmative consent” returns by requiring “explicit prior permission” in certain settings.  It may be that an individual in a yoga studio was undressing “for the purpose” of a yoga class, but that does not create a situation under which the individual needs or is entitled to a different standard of consent (note again the Reporters’ refusal to use the word approved by the Membership) than an individual in any other setting.  The Member approved definition of “consent” is fully adequate to handle all of the special pleading situations being put forth to restore “affirmative consent.”

Even more surprising are sections 213.3(2)(c) and (d).  These have become strict liability offenses. Whether playfully, or narcissistically, or randomly, a person who tells a falsehood is a sex criminal, even where the falsehood had nothing to do with the other person’s willingness to engage in sexual relations.  The continuous drive in each draft to increase the criminalization of sexual behavior is troubling.

**Section 213.9. Permission to Use Force.** The stated intention of 213.9 is to protect BDSM practitioners in situations where role playing involves the use of force and feigned opposition to the force.  “No No” means “Yes Yes” until the “safe word” communicates the real  “No.”  Narrowly limited to this purpose, 213.9 could protect an occasional BDSM practitioner, but the actual effect of 213.9 is to restore “affirmative consent” yet again.  213.9 is not limited to BDSM relationships.  It is stated to be an “affirmative defense” (burden on defendant) to allegations arising under 213.1; 213.3(1), 213.4 and 213.6.  Most of these offenses have absolutely no requirement of force, *e.g*., 213.3(1) and 213.6(2)(213.4 is not presented in CD7).  Moreover, 213.3(1) and 213.6(2) also use the “recklessly” standard which places a party at risk of misunderstanding in virtually all sexual encounters.

Excluding situations where consent is not possible (e.g., a child), the 1962 Model Penal Code uses the *mens rea* standard of “knowingly” except in a few instances where it uses the higher standard, “compels,” to denote focused purpose and intentionality as in 213.1. The 1962 Model Penal Code does not use “recklessly” in any offense. Lowering the *mens rea* standard to “recklessly” as the Reporters propose is really a move back to “affirmative consent.” The term “recklessly” denotes an awareness of risk. In romantic encounters, there is always risk and the actor always knows that there is always risk. Without someone taking the initiative and its inherent risk, there would never be any romantic encounters. If the current “knowingly” standard is reduced to “recklessly” as the Reporters propose, every actor will be driven toward risk avoidance, toward “affirmative consent,” and toward the hyper-technical, hyper-detailed “affirmative defense” of 213.9. This is precisely what the Membership rejected when it adopted a definition of “consent” and rejected the earlier attempt to impose “affirmative consent.”

All of this is unnecessary and again reinstates affirmative consent as well as advancing overcriminalization.  As explained at length by Judge Keyes (January 4, 2018 memorandum at 4- 7 and 14), a big part of the problem is the refusal to simply use a provision that is already in the Model Penal Code and entirely consistent with the definition of “consent” adopted by vote of the Membership.  Existing Model Penal Code Section 2.11 establishes that consent is a defense to otherwise prohibited physical contact and, even, physical injury:

(1) **In General.** The consent of the victim to conduct charged to constitute an offense or to the result thereof is a defense if such consent negatives an element of the offense or precludes the infliction of the harm or evil sought to be prevented by the law defining the offense.

(2) **Consent to Bodily Injury.** When conduct is charged to constitute an offense because it causes or threatens bodily injury, consent to such conduct or to the infliction of such injury is a defense if……[stating limits such as severity of injury]

This project has a definition of consent that is fully adequate to the need. The offenses should be drafted to state that the offense only occurs when the act is “without consent” and 2.11 confirms the availability of consent even in offenses where it is not explicitly called out as an element of the crime.  Rather than embrace the Member approved definition of consent and existing Model Penal Code Section 2.11, CD7 inappropriately and repeatedly excludes consent as an element of the offenses and dismisses 2.11 in a brief footnote, “Section 2.11 of the 1962 Code does not apply to Article 213.”  No explanation for this dismissal is offered and, even if it is accurate, the simple and correct action is to make 2.11 applicable to Article 213.

As noted, time and volunteer resources do not allow analysis of the various sections that are only presented to the Council for discussion, but we close with a comment on one discussion section.  Section 213.0(6) defines “physical force” as, *inter alia*:

(b) physical strength that is sufficient to overcome a person; or

(c) physical strength that is sufficient to restrain a person…..

Simply put, 213.0(6) has created a criminal status.  Merely being a strong person, merely possessing physical strength is the definition of “physical force” with no actual use of the strength being required to meet the definition.

We opened this Co-Signed Memorandum with regret and we close with additional regret.  This project has been underway for approximately six years, but it has approved only three definitions, the most important of which the Reporters decline to use.  The current draft, CD7, is a massive rewrite with more new material than perhaps anyone has had time carefully to analyze.  Certainly, none of us would claim to fully understand CD7, yet large parts of it while brand new and not reviewed by the Advisers and Members Consultative Group, are proposed for Council approval.  We respectfully suggest that there is no part of CD7 that is ripe for Council approval.

Respectfully submitted,

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