

To: ALI Director, Deputy Director, Project Reporters, Council and Members
From: Undersigned ALI Members and Advisers
Date: February 27, 2022
Re: Revisions to Sexual Assault Provisions of Model Penal Code

Dear Colleagues:

After ten years of diligent work and overwhelming final approval at the May 2021 Annual Meeting, we are surprised and concerned to see a new draft called "Revisions to CD No. 12" posted just a few days ago that substantially revises the Member approved project.

During this long project, prosecutor groups and advocacy groups fully participated. In some cases, the Membership adopted their viewpoint. In others, the Membership did not concur with them. Approximately seven months after the final Membership approval and on the eve of final Council review of the post-Boskey editorial clean-ups, renewed objections by prosecutor groups and advocacy groups have resulted in development of the new Revisions to CD No. 12 that will be presented to the Council on March 2, 2022.

While we do not view the Member-approved project as sacrosanct or exempt from any needed correction of errors, we are concerned about the large number of proposed changes, their substance and their attempt to change the Membership's policy decisions rather than correct errors.

All will recall the overwhelming Membership concern about over-criminalization, over-incarceration and, particularly, the concern about disparate impacts on low income and minority populations lacking access to strong legal representation. Sex offenses have the additional burden of stunningly severe post-incarceration collateral consequences, often including stringent life-long restrictions and registry. No other offenses, not even Murder in the First Degree, have such collateral consequences and the Membership strongly supported efforts to reduce or eliminate those collateral consequences. The changes proposed in the Revisions to CD No. 12 move sharply in the opposite direction away from these Membership concerns.

There has been some suggestion that the Revisions to CD No. 12 will assuage opponents of this project, but that is an impossibility and this is not a contract negotiation in any event. ALI must adopt what it believes are sound policies while considering but not being coerced by external opposition. Indeed, every advance in the law that has been made by ALI has been accomplished despite external opposition.

The shortness of time between the posting of the Revisions to CD No. 12 and the March 2 Council meeting prohibit detailed analysis, but we offer the following in the hope that it will be of assistance to the Council.

Consent: The Membership adopted and the Council approved the following definition of Consent:

213.0(2)(e) "Consent"

(i) "Consent" for purposes of Article 213 means a person's willingness to engage in a specific act of sexual penetration, oral sex, or sexual contact.

(ii) Consent may be express or it may be inferred from behavior—both action and inaction—in the context of all the circumstances.

(iii) Neither verbal nor physical resistance is required to establish that consent is lacking, but their absence may be considered, in the context of all the circumstances, in determining the issue of consent.

(iv) Notwithstanding subsection (2)(e)(ii) of this Section, consent is ineffective when given by a person incompetent to consent or under circumstances precluding the free exercise of consent, as provided in Sections 213.1, 213.2, 213.3, 213.4, 213.5, 213.7, 213.8, and 213.9.

(v) Consent may be revoked or withdrawn any time before or during the act of sexual penetration, oral sex, or sexual contact. A clear verbal refusal—such as "No," "Stop," or "Don't"—establishes the lack of consent or the revocation or withdrawal of previous consent. Lack of consent or revocation or withdrawal of consent may be overridden by subsequent consent given prior to the act of sexual penetration, oral sex, or sexual contact.

The Revisions to CD No. 12 propose to delete the following from 213.0(2)(e)(iii):

but their absence may be considered, in the context of all the circumstances, in determining the issue of consent.

We submit that this proposed deletion would be a mistake. First, of course, the full definition has been approved by the Membership and the Council. Second, there is no justification for the deletion of half of (iii) other than it being an attempt to remove one of the opponents' objections. There is no error in (iii); it is simply a policy choice that ALI has made after hearing and considering other viewpoints. Analytically, the deletion of a portion of (iii) is unwise since it would leave the remainder of (iii) unbalanced and misleading.

213.0(2)(e)(ii) states:

(ii) Consent may be express or it may be inferred from behavior—both action and inaction—in the context of all the circumstances.

213.0(2)(e)(iii) then clarifies and particularizes (ii) by demonstrating how both action and inaction are part of "all the circumstances" that must be considered:

(iii) Neither verbal nor physical resistance is required to establish that consent is lacking, but their absence may be considered, in the context of all the circumstances, in determining the issue of consent.

Deletion of half of (iii) will lead to confusion and internal inconsistency within the full definition of consent. As Professor Kate Stith has explained, "[I]f the ALI keeps the first part of (iii) but drops the second part, the following is sure to happen in the real world:

DEFENSE ATTORNEY (cross-examining complainant): You didn't resist in any way, right? Verbally or physically?

PROSECUTOR: Objection. The statute says resistance is not required to prove non-consent. [At the judge's bench]: To allow the defense to go down this path of "lack of resistance" will confuse the jury into thinking that resistance is required.

COURT: Sustained."

As Professor Stith demonstrates, the deletion of half of (iii) will unbalance the remainder of the definition and prevent consideration of "all the circumstances" which was the intended core of the full definition. The deletion of half of (iii) would both create confusion and undercut the overall definition of consent.

While we do not recommend it, there is the possibility of moving all of (iii) into the Comments as part of the explanation of (ii). We think this is inferior to simply keeping all of (iii) in its current place in the Black Letter but it is "less bad" than chopping out half of (iii). Keeping all of (iii) in the Black Letter is advantageous and superior since this project is expected to be adopted as statute and the Comments are unlikely to become known to practitioners implementing the statute.

Increased Penalties for Offenses: Upon a preliminary review, the Revisions to CD No. 12 contain both increased penalties (none are lowered) for multiple offenses and several wholly new offenses. The Revisions to CD No. 12 increase the penalties in 213.3(3) without explanation for the deviation from the prior grading matrix. Penalties also are increased in portions of 213.8 (1), (4) and (6). Any increase in penalties should require a high level of justification given the Membership commitment to reducing over-incarceration.

The Revisions to CD No. 12 also add entirely new crimes in 213.9(3), (4) and (5). None of these have been vetted through the normal process with the Advisers and Members Consultative Group.

The importance of vetting is seen, for example, in 213.8 (4) where it appears that a 13 year-old who fondles a 2 year old has been elevated and is now treated more harshly (4th degree and registration) than a 17 year old who fondles an 11 year-old (5th degree, no registration). There also is concern about the creation of entirely new crimes that have never been discussed or analyzed. We urge the Council to exercise restraint both in creating new crimes and in increasing penalties that have not been thoroughly considered. Simply presenting them for vote at the next Annual Meeting is not a full substitute for the normal ALI process.

Registration: The Membership has clearly demonstrated deep aversion to registration. The debate has always been about whether to sharply restrict registries or to eliminate them. We need not review all of the ills of registries that the Council well knows.

The Revisions to CD No. 12 impose registration on three offenses not previously registrable (213.8(3), 213.8(5) and 213.9). The Revisions to CD No. 12 also widen the circumstances requiring registration under six other offenses. Collectively, the changes in the Revisions to CD No. 12 represent a very sharp increase in registration liability.

The core problem with registries is that they become a classic "slippery slope." If "X" is registrable and "Y" is just a little less bad, the political tendency is to make "Y" registrable, and then do the same for "Z," sometimes all the way down to absurdly minor offenses by very young people.

We understand the political reality that registries are popular with politicians, but we urge the Council to avoid the slippery slope and to be very sure about the importance of registration for any individual offense: Will it really reduce recidivism? Will it really improve public safety? Will it prevent reintegration of a rehabilitated former prisoner? Recall that no other offenses, including First Degree Murder and large-scale drug dealing, require registration even though violent crimes and drug crimes have higher levels of recidivism than sex crimes.

This project has done good work in limiting the consequences of being on a registry, but the Membership has shown a hunger for more progress as seen in the ease with which multiple ameliorating amendments were approved at the Annual Meeting. The time has come for the Council to consider a true step forward. ALI can state that it does not recommend the use of registries (for all the reasons we know) but does offer Section 213.11 for any state which decides to have a registry.

We respect the challenges faced by the Council due to the recent outside pressure, but we know also that the Council has a long history of working to achieve the best answer rather than the answer demanded by critics.

Respectfully submitted,

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