To:	ALI Director, Deputy Director, Project Reporters, Council and Members
Date:	January 18, 2021
Re:	Intentional Torts to Persons; Restatement of the Law Third; Council Draft No. 7 dated November 30, 2020

Dear Colleagues:

A lengthy, analytic Co-Signed Memorandum dated May 17, 2019 explained why the "affirmative consent" approach was inappropriate for Section 18 of the Intentional Torts Project. The Council also will recall that "affirmative consent" was overwhelmingly rejected by the Membership in the Model Penal Code Project. To their credit, the Intentional Torts Project Reporters have revised the Black Letter of Section 18 to reject "affirmative consent" and to adopt a communication of "unwillingness" standard that is more consistent with the clearly expressed view of the Membership.

No lengthy analysis or Co-Signed Memorandum is needed for the Council to take note of the remaining issue: The Comments to Section 18 are inconsistent with the Black Letter. Having specifically rewritten Section 18 to remove "affirmative consent" and bring this project into line with the expressed will of the Membership regarding "affirmative consent," the Comments on Section 18 should be revised to explain rather than undercut the Black Letter. For example, Comment "g," at page 13, currently contains the following:

> [T]here are plausible arguments on both sides of this debate. Accordingly, this Restatement takes no position on whether affirmative consent is the appropriate tort standard for consent to sexual intercourse or penetration.

This statement surely is not correct since the Black Letter of Section 18 was rewritten specifically to remove the "affirmative consent" standard and to reflect the opposition of the Membership to that standard. Indeed, all of Comment "g" appears to be an invitation to disregard the Black Letter of Section 18. Comment "g" should be deleted or recast to explain why ALI actually has taken a position against the "affirmative consent" standard.

Respectfully submitted,

Ronald Henry
Washington DC