



U.S. Department of Justice

Office of Legal Policy

Assistant Attorney General

Washington, D.C. 20530

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The American Law Institute
4025 Chestnut Street
Philadelphia, PA 19104

Dear ALI Council Members:

Thank you for the opportunity to review the current draft revision of the sex offense provisions of the Model Penal Code, prepared by the Reporter (“Current Draft” or “CD”). We understand the Council will consider this draft at its March 2, 2022, meeting. By letters dated January 19, 2022, from Deputy Attorney General Lisa O. Monaco and me, the Department of Justice previously communicated its views regarding an earlier version of those provisions. We appreciate the effort in the Current Draft to address certain concerns raised in those letters. Regrettably, however, it does not resolve a number of them. The Department of Justice recommends against its adoption. If adopted, the Department would urge U.S. jurisdictions not to change their laws to accord with it.

The principal areas of continuing concern are:

DEFINITION OF SEX OFFENSES. Like the previous draft, the Current Draft narrows and weakens the definition of sex offenses in ways the Department finds troubling and opposes. See DOJ Letter (Jan. 19, 2022).

DEFINITION OF CONSENT. Like the previous draft, the Current Draft runs against the historical progress in removing victim-resistance requirements from the definition of sex offenses, by stipulating that consent may be inferred from a victim’s “inaction.” CD § 213.0(2)(e)(ii). This definition would effectively place the onus on the victim to manifest non-consent, rather than on the actor to secure the victim’s consent, creating the risk that factfinders will erroneously conclude that a victim who was frozen by fear was communicating consent.

SEX TRAFFICKING. The Current Draft only partially addresses certain of our concerns about the formulation of the Sex Trafficking offense. It does not refer to “fraud” as a means of sex trafficking, although fraud is an important and common means by which sex traffickers exploit their victims. It creates liability for persons who engage in commercial sex acts with coerced victims or child victims of trafficking, but it reduces the maximum penalty from 10 years to five years in such cases. CD § 213.9(4). In comparison, the maximum penalty under the federal sex trafficking offense is up to life imprisonment. See 18 U.S.C. 1591(b).

PENALTIES FOR SEX OFFENSES. Like the previous draft, the Current Draft fails to authorize maximum penalties that reflect the seriousness of the offenses. For example, most crimes involving sexual abuse of child victims, mentally disabled victims, persons in custody or under supervision, and persons caused to submit through extortion or deception, would carry maximum penalties of only five years, three years, one year, or six months. See CD §§ 213.3(2)-(3), 213.4, 213.5, 213.6, 213.7, 213.8(1), (3), (4), (5), (6).

POST-RELEASE TRACKING AND INFORMATION SHARING. If adopted by jurisdictions, the Current Draft, §§ 213.11 et seq., like the previous draft, would virtually eliminate the post-release tracking and information sharing systems for sex offenders. There would be no post-release tracking (registration) for persons convicted of many serious sex offenses. Registration would end after at most 15 years, regardless of the seriousness of the offense and the offender's history of recidivism, and it could be terminated at any time. The disclosure of information from sex offender registries – even to victims, child-serving organizations, and law enforcement – would be severely curtailed. Sex offenders could easily evade registration requirements simply by moving to another jurisdiction, because registration jurisdictions would be prevented from informing each other about relocating sex offenders, and because minor interjurisdictional differences in the definitions of sex offenses could terminate registration obligations. The system of international travel notification for registered sex offenders, and the passport marking requirement for registered child sexual abusers who travel abroad – established by International Megan's Law, see PL 114-119 §§ 4-10 – could not function because information in the sex offender registries could not be used for purposes essential to the operation of the international tracking and notification systems.

We hope and trust that the Council will consider these grave consequences for the protection of victims and public safety at its upcoming meeting. The Department stands ready to assist should the ALI be willing to consider alternative language to the Current Draft and to meet for discussion regarding specific revisions.

Sincerely,

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