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December 9, 2021

Professor Stephen J. Schulhofer, Reporter
Professor Erin E. Murphy, Associate Reporter
Professor Richard L. Revesz, Director
Ms. Stephanie A. Middleton, Deputy Director
The American Law Institute
4025 Chestnut Street
Philadelphia, PA 19104-3099

RE: ALI Model Penal Code on Sexual Assault and Related
Offenses

Dear Professors Schulhofer, Murphy, and Revesz and Ms.
Middleton:

On behalf of the 37 states we represent as attorneys general, we write to express our deepest concern regarding the American Law Institute's ("ALI") proposed changes to Article 213 of the Model Penal Code: Sexual Assault and Related Offenses ("MPC"). The proposed changes will significantly affect the safety of survivors and victims, and the integrity of the prosecutions we undertake to obtain justice on their behalf. As state attorneys general, we are responsible for investigating and prosecuting crimes against our most vulnerable. The proposed changes to Article 213 restrict our ability to do so and limit the information available to the public that can be used to protect these same vulnerable populations. We strongly implore the ALI to reconsider its proposed changes—changes that favor the offenders of these crimes at the expense of the safety of their victims.

**I. The Proposed Changes to the Model Penal Code
Regarding Sex Trafficking Depart from Federal Statutes and
the Majority of State Laws and Disregard Impacts on Victims.**

We are especially concerned by ALI's misguided approach to Section 213.9 of the MPC regarding Sex Trafficking. The current draft rejects decades of progress made in anti-trafficking enforcement. It departs from applicable federal statutes and the majority of state laws that have been carefully constructed by subject matter experts, are supported by data, and rely on the experience of sex trafficking survivors. The proposed revisions to the MPC not only limit the criminal liability of traffickers, but also eliminate any liability for those who buy and use trafficking victims for their own sexual gratification, as well as third parties who knowingly profit from this exploitation. The proposed changes silence survivor voices and will lead to the further marginalization of some of the most vulnerable populations in our community.

As the preeminent international agreement on the Trafficking of Human Beings, the Palermo Protocol establishes a benchmark for other international instruments and is legally binding.¹ Based on this model, the United States carefully crafted and enacted the Victims of Trafficking and Violence Protection Act of 2000 (hereinafter, "TVPRA")², a federal statute that has been reaffirmed, amended, and expanded as our understanding of sex trafficking as a criminal enterprise has evolved over time.

At its core, sex trafficking is a financially motivated crime, making it distinct from other types of sex crimes, including sexual assaults. The Palermo Protocol and TVPRA focus on protecting victims and strategically combating the causes of their exploitation: (1) traffickers, (2) users and buyers of sex trafficked victims, and (3) third parties who profit from the commercial sexual exploitation of victims and enable their traffickers.

Rather than similarly targeting the root causes and most culpable offenders, ALI's proposal reverts to antiquated concepts of "conventional trafficking" and "trafficking as traditionally understood," which are nebulous and undefined terms

¹ The Protocol provides the first internationally agreed-upon definition of trafficking in persons and currently has 178 parties, including the United States; see United Nations, 12. a Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, Available at: <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg no=XVIII-12-a&chapter=18>.

² Now referred to in its current form as the Trafficking Victims Protection Reauthorization Act (TVPRA); See Polaris Project, The 2019 Trafficking Victims Protection Reauthorization Act: A Topical Summary and Analysis of Four Bills (2019), <https://polarisproject.org/wp-content/uploads/2020/01/Polaris-TVVRA-2019-Analysis.pdf>.

used throughout the draft.³ The result is an unacceptable policy, including the following proposed revisions, which are of paramount concern:

- Section 213.9(1)(b) eliminates the increased protections for minor victims in the TVPRA and allows traffickers to subvert liability regarding knowledge of the victim's age. The TVPRA rightfully puts the onus on the trafficker rather than victim, and a prosecutor does not have to prove the trafficker knew the victim's age if the trafficker had a "reasonable opportunity" to observe the victim. In justifying the reasoning behind this proposed change, the Reporters' Notes resort to victim-blaming in its archaic rationale, stating, "It is even more difficult to defend when criminal liability attaches, regardless of *mens rea*, to sexual acts with a 17-year-old whose appearance often gives no readily apparent basis for knowing or even suspecting that the individual is younger than 18."⁴
- Section 213.9(1) provides no criminal liability for *advertisers*. Online advertising has transformed the commercial sex trade and led to the explosion of domestic sex trafficking.⁵ The internet not only leads to high profitability with relatively low risk for traffickers and commercial sexual exploiters of children,⁶ but online advertising sites like Backpage.com have made more than \$100 million annually in gross revenue by serving as the global marketplace for sex trafficking.⁷ This proposed departure from the TVPRA protects the economic prosperity of special interests at the expense of vulnerable victims.
- Section 213.9(1) provides no criminal liability for those who *knowingly benefit* from their participation in sex trafficking. Amongst the business enterprises that stand to benefit most from the revised MPC⁸ are online platforms, social media companies, the financial sector, the hospitality industry, and travel

³ The American Law Institute (ALI), *Model Penal Code: Sexual Assault and Related Offenses, Tentative Draft No. 5* (May 4, 2021), p. 442, 443, 445.

⁴ ALI, *supra* at 451-452.

⁵ Urban Institute, *Estimating the Size and Structure of the Underground Commercial Sex Economy in Eight Major US Cities*, at 234 (Mar. 2014).

⁶ Urban Institute, *supra* n.15, at 218 (reporting on multiple studies concluding Internet-facilitated commercial sex transactions are "not as easily detected by law enforcement"); U.S. Dep't. of Justice, *National Strategy for Child Exploitation Prevention and Interdiction: A Report to Congress*, at 33. (Aug. 2010); Michael Latonero, *Human Trafficking Online: The Role of Social Networking Sites and Online Classifieds*, at 13 (Sept. 2011).

⁷ U.S. Senate. Committee on Homeland Security and Governmental Affairs. *Backpage.com's Knowing Facilitation of Online Sex Trafficking*, available at: <https://www.courthousenews.com/wp-content/uploads/2017/02/Backpage-Report.pdf>.

⁸ See ILO, *Profits and Poverty: The Economics of Forced Labour* (Geneva: ILO, 20 May 2014), p. 13.

companies.⁹ Immunizing wealthy individuals and corporations who knowingly benefit from sex trafficking enables exploiters and leads to further victimization.

- Section 213.9(1) provides no criminal liability for those who knowingly *obtain, patronize, or solicit* victims of sex trafficking.¹⁰ Despite acknowledging the effectiveness of addressing demand by criminalizing those users and buyers of sex trafficked victims,¹¹ the revised MPC ignores the trauma exploited victims experience and minimizes the exploitation to “a person who simply purchased sexual services from an individual who was underage or coerced by others.”¹²
- Finally, the Reporters’ Notes repeatedly justify narrowing criminal liability for traffickers, and outright eliminating criminal liability for those who benefit financially or those who use or buy sex trafficked victims for their own sexual gratification, due to “the seriousness of sex-trafficking and severe penalties that apply,”¹³ and ultimately reduces this “serious offense” to a third degree felony.

For the foregoing reasons, we express great concern regarding ALI’s proposed changes to Article 213 regarding sex trafficking. The revisions reject hard-earned progress to protect survivors and hold those involved in sex trafficking accountable. We express similar concerns regarding ALI’s recommendations regarding Sex Offender Registration.

II. The Proposed Changes to the Model Penal Code Relaxing the Sex Offender Registry Would Pose a Significant Risk to the Public – Especially Children.

We are concerned that proposed changes to the MPC undermine the purpose of the Sex Offender Registration and notification programs, which is to promote public safety through monitoring and tracking sex offenders released into the community by providing public authorities with important information, such as the current location and past offenses of sex offenders. The proposed changes to the MPC eliminate all public access to sex offender registration information, severely reduce the types and number of offenses that require registration, and

⁹ See Polaris Project, *On-Ramps, Intersections, and Exit Routes: A Roadmap for Systems and Industries to Prevent and Disrupt Human Trafficking* (July 1, 2018), <https://polarisproject.org/resources/on-ramps-intersections-and-exit-routes-a-roadmap-for-systems-and-industries-to-prevent-and-disrupt-human-trafficking/>.

¹⁰ Under the Uniform Act, “receives [or] obtains” is used to address users and buyers of sex trafficked victims.

¹¹ ALI, *supra* at 446.

¹² ALI, *supra* at 440.

¹³ ALI, *supra* at 451.

undermine the effectiveness of the Sex Offender Registration and notification programs.

The proposed revisions greatly reduce the number of sexual offenses that require registration. Of the eighteen categories of sexual offenses identified by the Model Penal Code,¹⁴ only five offenses would even require registration:

- (1) Sexual assault by aggravated physical force or restraint,
- (2) Sexual assault by physical force, *but only when committed after the offender previously had been convicted of a felony sex offense,*
- (3) Sexual assault of an incapacitated person, *but only when committed after the offender had previously been convicted of a felony sex offense,*
- (4) Sexual assault of a minor, *but only when the minor is younger than 12 and the actor is 21 years old or older,* and
- (5) Incestuous sexual assault of a minor, *but only when the minor is younger than 16 years old.*

Astonishingly, a person who commits a sexual assault using physical force and was previously convicted of multiple non-felony sexual assaults would not be required to register. And even if the person were required to register, that information would not be available to the public.

Serious and dangerous offenses, such as kidnapping; crimes relating to the possession, production, and distribution of child sexual abuse material; online enticement; sexual assault of minors 12 years of age and older; and sexual offenses involving lack of consent without physical force, would not be registrable offenses under the current proposed draft of the MPC. In particular, the removal of crimes relating to the possession, production, and distribution of child sexual abuse material and online enticement from the list of registrable offenses would endanger the physical and mental well-being of children at a time when the presence of online child predators is at an all-time high. In fact, in 2020, the National Center for Missing and Exploited Children (NCMEC) recorded a 106% increase in reports of suspected child sexual exploitation, rising from 983,734 reports in March of 2019 to 2,027,520 in March of 2020.¹⁵ With statistics showing such a sharp increase in incidents of exploitation online and society continually moving towards a more

¹⁴ ALI, *supra* at 13.

¹⁵ See Thomas Brewster, *Child Exploitation Complaints Rise 106% to Hit 2 Million in Just One Month: Is COVID-19 to Blame?*, FORBES, April 24, 2020, <https://www.forbes.com/sites/thomasbrewster/2020/04/24/child-exploitation-complaints-rise-106-to-hit-2-million-in-just-one-month-is-covid-19-to-blame/?sh=722431fc4c9c>.

digitalized existence, now is the time to provide more protective measures for our children online, not fewer.

Further, the proposed removal of online enticement and crimes related to child sexual abuse material from the registration requirement belittles the seriousness of these offenses and their impact on victims. These crimes are not victimless; they cause severe and long-lasting harm – especially to child victims. Not only do these proposed changes completely disregard the victims of these atrocious crimes, they also leave open the opportunity for those previously convicted of these crimes to hide in plain sight while continuing to seek access to children to perpetrate hands-on offenses.

Of particular concern is the proposed removal of public access to sex offender registration information. Under the proposed draft, the government would be prohibited from providing information about a person who is required to register to any community organization, entity, or person. There is no exception carved out for organizations conducting background checks for employment or volunteer positions that involve interaction with children. It is well-documented that sex offenders naturally search for opportunities to be in contact with children.

Other grave concerns within the proposed revisions to the MPC include the following:

- Downgrading failure to register as a sex offender to a misdemeanor offense, thereby stripping the law of its teeth and further jeopardizing the probability of registration.
- Limiting the number of out-of-state offenses which would trigger in-state sex offender registration obligations, thereby encouraging convicted sex offenders to “shop” for more favorable jurisdictions in which to reside in order to avoid registration altogether.
- Failing to require persons under the age of 18 to register *even if the offender was convicted as an adult*, with the only exception being the crime of Sexual Assault by Aggravated Force or Restraint if the offender was at least 16 years old at the time of the offense.
- Requiring that the convicted sex offender only confirm registration information and take a photo annually in just *one* of the jurisdictions in which the offender is required to register, thereby putting secondary jurisdictions at risk.
- Failing to require important identifying characteristics in registration such as date of birth, fingerprints, passports, and internet identifiers.

- Relaxing the length of the registration requirement to a maximum of 15 years, with the option for the offender to petition for early release from the requirement after 10 years.
- Limiting the use of GPS monitoring to *only* those convicted sex offenders who are required to register under the new proposal.

Your reconsideration of Article 213 is significant in setting the standard for strong policy ensuring the safety and security of sex trafficking survivors, survivors of sexual assaults, and our children. As attorneys general, we urge the ALI to consider the danger the proposed changes would pose to the public, especially children, and abandon its plans to amend this article of the Model Penal Code as discussed above. The revisions contemplated fail to treat sex predators appropriately and would provide them more freedom to commit these heinous crimes, putting the citizens we represent at greater risk of becoming victims.

Sincerely,



Clare E. Connors
Hawaii Attorney General



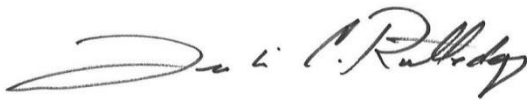
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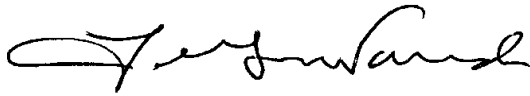
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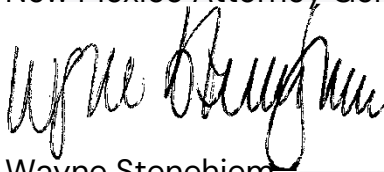
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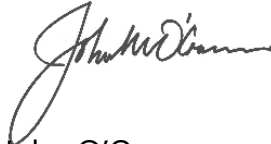
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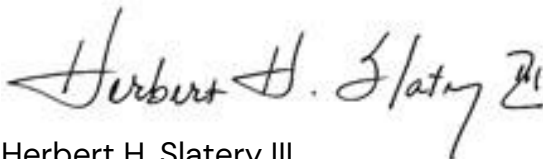
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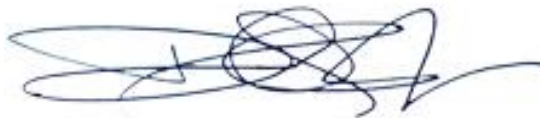
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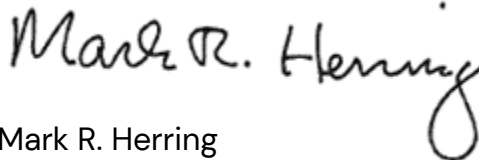
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