



U.S. Department of Justice

Washington, D.C. 20530

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The American Law Institute
4025 Chestnut Street
Philadelphia, PA 19104

Dear ALI Members:

We understand that the American Law Institute is considering a draft revision of the sex offense provisions (article 213) of the Model Penal Code. Members of the Institute have submitted motions to withdraw or amend the draft revision. By letters dated January 19, 2022, and March 1, 2022, the Department of Justice has conveyed its disagreement with the proposed revision of Article 213. *See* Letter of Deputy Attorney General Lisa O. Monaco to the ALI Council (Jan. 19, 2022); Letter of Assistant Attorney General Hampton Y. Dellinger to the ALI Council (Jan. 19, 2022); Letter of Assistant Attorney General Hampton Y. Dellinger to the ALI Council (Mar. 1, 2022).

Because the Council's actions have not resolved the Department's concerns, our offices write to convey our view that you should approve the *Motion to Withdraw the Revised Article 213 of the Model Penal Code from Publication in its Entirety (Sections 213.0-213.11)*. We urge that the motion to withdraw be approved because the draft revision of article 213 would narrow and weaken the law of sex offenses, and roll back decades of progress in strengthening enforcement and protecting the public. The Department of Justice previously has advised that if the ALI endorses this draft, the Department will urge U.S. jurisdictions not to change their laws to accord with it.

We have fundamental concerns about the draft's general approach of narrowing the scope of sex offenses and reducing the penalties for their commission. Regarding scope, the draft would, for example, narrow liability for crimes of sexual violence, define "consent" too broadly, and restrict the crime of sex trafficking. Regarding penalties, the draft would reduce the authorized sanctions for crimes involving sexual violence or coercion, and sexual offenses against children and other vulnerable victims, in comparison with federal law and the existing laws of many jurisdictions.

We also have fundamental concerns about the draft's negative effect, if adopted by jurisdictions, on the post-release tracking and information sharing systems for sex offenders. Post-release tracking of sex offenders would be undermined, and the sharing of information would be severely curtailed, even to victims, child-serving organizations, and law enforcement. International travel notification and passport marking for sex offenders under International Megan's Law (PL 114-119 §§ 4-10) could not continue to function because the draft prohibits the use of sex offender information for purposes essential to the operation of the international

tracking and notification systems. A worthy model for the states and other jurisdictions must be consistent with the regulations the Attorney General has issued for the post-release tracking and information sharing systems. See 28 CFR Part 72; 86 FR 69856. For these reasons, we urge the American Law Institute to pass the motion to withdraw the draft revision of article 213 from publication in its entirety.

Should the motion to withdraw not be approved, we urge passage of the following:

Motion to Amend § 213.11A, “Revising the Sentencing and Collateral Consequences of Conviction Section to Ensure Registrability of Serious, Violent Sexual Offenses Against Children as Defined in the Draft Code”. This amendment would make it clear that offenses qualifying the perpetrator for post-release tracking (registration) may include those defined outside of article 213, such as child pornography production, and abduction, online enticement, and solicitation of prostitution offenses against minors.

Motion to Amend § 213.9, “Revising the Sex Trafficking Section to Ensure Appropriate Sentencing and Registrability of Traffickers and Buyers of Vulnerable Adults and Children for Sex”. The amendments in this motion would make Promoting Sex with a Trafficking Victim and Patronizing a Trafficking Victim registrable offenses, and increase the maximum penalty for the latter from five years to 10. The draft revision of article 213, as currently formulated, unjustifiably restricts the class of registrable offenses, and unjustifiably weakens the offense of Sex Trafficking, including assigning an inappropriately low maximum penalty to the offense of Patronizing a Trafficking Victim.

Motion to Amend § 213.11H, “Revising the Sentencing and Collateral Consequences of Conviction Section to Ensure Access by Victims and Other Entities for Limited Individual and Societal Safety Planning”. The amendments in this motion would remove the draft revised code’s restrictions on use of sex offender registry information to notify victims, and allow disclosure of such information to NCMEC, to organizations serving children or other vulnerable populations, and to state agencies as required for compliance with the national standards for sex offender registration and notification. This would ameliorate the revised code’s undermining of the post-release tracking and information sharing systems for sex offenders, including its unjustified restrictions on notification to victims and child-serving organizations.

Motion to Amend § 213.0 – “Motion Not to Define the Word ‘Consent’”. This motion would remove the definition of the word “consent” from the draft revised code and leave the matter to be resolved by jurisdictions through their own decisional law and legislative debate. The draft’s current definition of consent is overly broad and unsound.

Motion to Amend § 213.9, “Revising the Human Trafficking Section to Comport with Internationally Accepted Standards”. The amendments in this motion would strengthen the Sex Trafficking offense in several ways, including extending the definition of prohibited coercion and including fraud as a means by which sex trafficking may be committed.

NEGATIVE MOTIONS

A number of submitted motions would compound the draft's weakening of the law of sex offenses and adversely affect public safety. We oppose the passage of the following motions:

Motion to Amend Section 213.11, Registration for Law-Enforcement Purposes, submitted by Ira Ellman. This motion would make the revised code's restrictions on post-release tracking and information sharing for sex offenders applicable to sex offenders required to register on the basis of offenses defined outside of article 213 – e.g., child pornography production and kidnapping children. If adopted, the motion would compound the revised code's unjustified restrictions that would undermine the post-release tracking and information sharing systems for sex offenders.

Motion to Amend Sections 213.11A and 213.11D, submitted by Ira Ellman. This motion would prohibit state registration authorities from accepting information from sex offenders that is not required by state law. For example, this would prohibit state authorities from accepting information about sex offenders' intended international travel, if the state follows the revised code's approach of not requiring such information, see § 213.11D(1), though the information is required by federal law, see 18 U.S.C. 2250(b)(2), and it is integral to the international tracking and notification system established by International Megan's Law. The motion, if adopted, would compound the revised code's undermining of the national and international tracking and information sharing systems for sex offenders.

Motion to Amend Section 213.11D, submitted by Ira Ellman. This motion would remove remote communication identifiers (telephone numbers, email addresses, etc.) from the information sex offenders are required to provide to registration jurisdictions. This information is required by the national standards for sex offender registration and notification, and it serves important purposes, including helping to investigate and prevent online luring of children by sex offenders. See 28 CFR 72.6(b); 86 FR at 69872; 76 FR at 1637; 73 FR 38055; see also, e.g., *Doe v. Shurtleff*, 628 F.3d 1217 (10th Cir. 2010) (upholding requirement); *State v. Jackson*, 390 Wis.2d 402, 938 N.W.2d 639 (2019) (same). Adoption of the motion would compound the revised code's undermining of the post-release tracking and information sharing systems for sex offenders.

Motion to Amend 213.0(2)(E) to Restore the Membership-Approved Definition of Consent. This motion would restore language from an earlier draft which stipulated that the absence of verbal or physical resistance by the victim may be considered as evidence of consent. This would compound the draft's problematic definition of consent, which is already overly broad.

In sum, we strongly urge the American Law Institute to adopt the motion to withdraw the revised article 213 of the Model Penal Code from publication in its entirety. Alternatively, we urge the Institute to pass other motions ameliorating features of the revised code that would adversely affect public safety and the interests of justice, and to reject other motions aggravating features of the revised code that would adversely affect public safety and the interests of justice, as specified above.

Sincerely,

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