



February 28, 2022

Council Members
American Law Institute

Re: Revised Sections 213.9 and 213.11 of the ALI Model Penal Code, Council Draft No. 12

Dear American Law Institute Council Members:

I am writing as follow-up to my January 12 letter on behalf of the National Center for Missing & Exploited Children (NCMEC) relating to continuing child endangerments presented by draft Sections 213.9 and 213.11 of the ALI Model Penal Code. We were deeply appreciative of the Council's actions in January to reserve consideration of these sections based on serious concerns raised by NCMEC, the Department of Justice, including the Deputy Attorney General Lisa Monaco, and the National Association of Attorneys General. It is clear the Council is deeply invested in ensuring the remaining sections of the Model Penal Code are forward-looking while reflective of societal norms, provide a clear and consistent legislative model to states seeking to update portions of their criminal code, and maintain the high caliber of ALI's decade-long work on this project. Unfortunately, the revised draft meets none of these goals. Far from a meaningful group dialogue with subject matter experts representing all sides of the issues, NCMEC was given the opportunity to participate in a single conversation prior to seeing the revised draft. After the draft was shared, NCMEC was directed to bring any further concerns back to the Council. We do not think the Council contemplated that the hastily compiled revised draft would so fail to address the areas of substantive concern related to child safety and would, in some instances, further obscure the existing text.

NCMEC urges the Council to again reserve consideration of Sections 213.9 and 213.11 and to call for more structured and substantive dialogue based on genuine collaboration in order to resolve the remaining concerns in the draft. We realize this is not an easy path, but the Model Penal Code is too important a project to rush to completion. In January, the Council upheld ALI's legacy by seeking clarity on issues raised by the nation's leading law enforcement entities and the nation's congressionally-designated clearinghouse on missing and exploited children issues. You and your fellow Council members demonstrated a desire to get these sections right, and we encourage you to ensure this goal is accomplished.

It is important to note certain positive revisions that were made in the revised draft, and NCMEC has expressed its appreciation to the Reporter for these changes. These positive revisions include: (1) additional crucial identifiers to be provided upon registration (Section 213.11D(1)); (2) designation of sexual assault of a minor as a registrable offense if the offender is 18 or older (lowered from 21 or older) and the victim is younger than 12 (Section 213.8(1)); (3) removal of requirement for two convictions for sexual assault by physical force before registration is required (Section 213.2(2)); and (4) permitted access to registry information in certain limited circumstances (Section 213.H(1)). These changes were necessary and will help diminish risk to children, but significant concerns remain.

The Model Penal Code is intended to serve as a model for state legislative updates and as an informative secondary source to aid in interpretation of criminal law provisions for decades to come. Unfortunately, due to the rushed attempt to address glaring child endangerments in the draft, portions of the revised Sections 213.9 and 213.11 have become inscrutable, aspirational, and an academic exercise in attempting to address the reality of sexual assault crimes against children.

At this week's meeting, you and your colleagues on the Council will be asked to accept and approve, both individually and on behalf of your professional affiliations, the Code's negative consequences on child safety in the United States as indicated below:

1. Removal of "advertises", "obtains", "patronizes", and "solicits" as predicate acts to establish the crime of sex trafficking

By removing "advertises" as a predicate act from the definition of sex trafficking, the revised draft enables those who advertise the sale of a child for rape and sexual abuse to be free from liability for the crime of sex trafficking. In NCMEC's experience the vast majority of cases involving the trafficking of a child for sex reported to NCMEC in recent years involved the child being advertised for sale through the posting of an online advertisement. Advertising is a core component of the crime of trafficking. The 2015 amendment to the federal trafficking statute that added advertising as a predicate act to prove trafficking is reflective of the widespread use of online advertising to commit trafficking. The revised draft's removal of advertising deviates from federal law, ignores the reality of how the crime of trafficking is perpetuated today, and enables traffickers who post ads to be free from liability for selling a human being for sexual abuse and rape.

Additionally, the revised draft makes no attempt to address or remove the free pass to adults who purchase a trafficked child for rape and sexual abuse. The revised draft continues to enable a buyer of commercial sex with a child to be free from liability for sex trafficking by removing "obtains", "patronizes" and "solicits" as predicate acts. The purposeful decision to remove these acts protects the offender who consummates the trafficking crime by purchasing a child for rape and sexual abuse and serves no criminal justice reform purpose. This omission only benefits offenders committing this crime who are typically at a socio-economic advantage over victims who are often facing the devastating impacts of poverty, homelessness, racism, and misogyny.

The Reporter's inclusion of sections relating to Promoting Sex with a Trafficking Victim, Patronizing a Trafficking Victim, and Complicity in Sex Trafficking do nothing to resolve the fact that the revised draft does not criminalize as sex trafficking the advertisement of a person for commercial sex or the purchase of a child for sex. It is unclear why these sections were added to the revised draft at this stage.

2. Removal of kidnapping, online enticement, sex trafficking, and crimes relating to distributing, producing, and possessing child sexual abuse material (CSAM) as registrable offenses

The revised draft still removes the most serious sexual offenses that can be committed against a child as registerable offenses: kidnapping, attempted kidnapping, online enticement, sex trafficking and the distribution, production, and possession of CSAM. The removal of these crimes undermines the very purpose of having a sex offender registry for child-related crimes. NCMEC's analysis of over 18,335 attempted abductions by non-family members makes clear that individuals who attempt to abduct a child are not doing so for companionship, but to sexually abuse a child. Of the 6,674 suspects arrested in NCMEC's study of attempted abductions, 12% were registered sex offenders at the time.

Kidnapping a child is currently included in many state registrations precisely because in most cases the crime of kidnapping in the United States is a means to obtain a child to rape and sexually abuse.

Online enticement, sex trafficking, and producing, distributing, and possessing CSAM are 21st century sexual assault crimes against children. Unlike in 1962, when there was no Internet, today children are sexually victimized precisely through the crimes the revised draft would remove. The Code's removal of online sexual crimes against children would revert to an outdated paradigm that recognizes only "hands-on" abuse and disregards the explosive growth in online child sexual exploitation as evidenced by the over 29 million reports relating to online child sexual exploitation handled by NCMEC in 2021. Offenders engage in online enticement to solicit sexually explicit images and in-person sexual contact with a child, including live-streaming video of sexual abuse. Offenders who distribute CSAM online commonly have, or will attempt to gain, access to children to commit hands-on sexual abuse. The production of CSAM is far from being a passive or victimless crime; it frequently involves extreme violence, sadistic acts, and horrific sexual abuse and torture of children, including infants. The distribution and possession of CSAM is used for the personal gratification of the offender, to entice other children into sexual abuse, and to normalize the sexual abuse of children among other offenders.

The revised draft adds a new definition for "sexual offense" (See Section 213.11(1)(c)), which includes these key crimes omitted from registry requirements (e.g., kidnapping, online enticement, sex trafficking, and CSAM crimes). NCMEC was informed that this definition meant these crimes are registrable only if other provisions of a state's penal code provide for registration. Far from providing clarity or consistency, this new language does the exact opposite, while making the ultimate outcome – less culpability for sexual offenders and increased victimization for children – immediately apparent.

3. Removal of access to the registry except in limited exceptions

As acknowledged above, the revised draft introduced certain limited exceptions where access to registry information may be permitted. Unfortunately, these exceptions are aspirational and untethered to the reality of how registries are administered or how individuals and entities actually utilize registry information. As drafted, this portion of the revised draft is theoretical, inconsistent, and provides no demonstrable relief to child victims, their families or non-profit entities seeking to keep children safe.

First, the access section now permits parents and adult victims to be provided with registry information by registry administrators about an offender in their case, but only if both they and the offender reside, work, or study in the same county. To restrict such information-sharing to a county-level is deeply flawed and evidences a complete lack of understanding for why victims need to have access to registry information concerning an offender who has sexually assaulted them or their child. County jurisdictions can be so small as to be meaningless to provide notice of an individual's location, and neighboring counties will often provide closer proximity between a victim and offender than can occur within a single large county. The revised draft's plan to have registry administrators affirmatively provide this information to parents, also evidences a complete lack of understanding of how registries operate and how deeply infeasible this proposed exception would be in reality.

Second, the new access exceptions directly undermine NCMEC's federal statutory responsibilities to provide technical assistance and information to nongovernmental organizations relating to non-compliant sex offenders and to law enforcement to assist in identifying and locating such individuals. NCMEC has fulfilled this crucial function for over 15 years and is the only non-profit organization in this congressionally-authorized role. When we explained this role and the need for NCMEC, at a minimum among non-profit organizations to have an exception to access registry information, we were informed, with no explanation, that there was no intention to seek any access for NCMEC.

Third, the Annex, which provides Model Procedures for criminal history background checks, is purely aspirational and not an existing, or necessarily viable, mechanism to provide essential registry information to those most in need of such information – namely, parents of victims, adult victims, and nonprofit entities that use registry information to safeguard children.

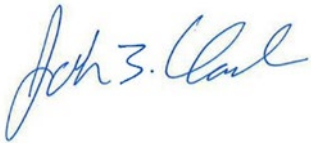
4. Registration not required for incestuous sexual assault of a minor unless the child victim is under 16 years old

The revised draft would not require an offender to register for incestuous sexual assault of a minor if the child is 16 or 17 years old. The only rationale for this age limitation is to provide relief to perpetrators and lessen the number of offenders who would have to register for this crime. It is unclear why ALI believes that the rape of a 16-year-old child by their father or uncle is less of a crime and less of a registrable act than the rape of a 15-year-old child.

The Reporter was clear with NCMEC that there was no intent to address this disparity or to explain why those who commit incestuous sexual assault against a 16- or 17-year-old child should be free from registration requirements. ALI's position on 16- and 17-year-old victims is inherently contradictory given how the revised draft addresses 16- and 17-year-old offenders of sexual crimes. While the revised draft takes thorough efforts to protect minors under the age of 18 from all registration requirements, when a 16- or 17-year-old child is victimized by incestuous sexual assault, it does not protect them.

The Model Penal Code is a legacy project for those who draft and approve its language. It must be done right, not just done. Without the needed revisions to the issues raised above, NCMEC and its partner nonprofits will advocate to states that they reject adoption of the language in Sections 213.9 and 213.11.

Sincerely,



John F. Clark
President and CEO

Cc: American Law Institute Council Members
Professor Stephen J. Schulhofer, Reporter
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