



U.S. Department of Justice

Office of Legal Policy

Assistant Attorney General

Washington, D.C. 20530

The American Law Institute
4025 Chestnut Street
Philadelphia, PA 19104

January 19, 2021

Dear ALI Council Members:

I write on behalf of the United States Department of Justice regarding the American Law Institute's revision of the sex offense provisions of the Model Penal Code (hereafter, the "Revised Code" or "RC"). Deputy Attorney General Lisa O. Monaco is writing separately to express her concerns about the Revised Code in general. Below are detailed explanations as to why the Department of Justice urges you not to adopt the Revised Code.

The new provisions have elicited statements of concern by organizations devoted to protecting the public from sexually violent crimes and crimes involving sexual abuse or exploitation of children. Those opposing the sex offense revisions include the National Association of Attorneys General, the Rape, Abuse & Incest National Network, the National Center for Missing & Exploited Children, and the National District Attorneys Association, among others. The Department of Justice joins the law enforcement and victim-protection communities in recommending against adoption of the Revised Code. If adopted, the Department would urge U.S. jurisdictions not to change their laws to accord with it.

Although the Revised Code soundly eliminates certain archaic features of the Model Penal Code's original sex offense provisions, such as the requirement of corroboration of a victim's testimony and that a man cannot be guilty of raping his wife, overall it does not improve on current law. Rather, if adopted by the states and other U.S. jurisdictions, the Revised Code's provisions would turn back the clock on the law of sex offenses, and would reverse related victim-protection measures resulting from decades of bipartisan legislation, including the Pam Lychner Sexual Offender Tracking and Identification Act of 1996, the Adam Walsh Child Protection and Safety Act of 2006, and International Megan's Law of 2016.

Areas of key concern for the Justice Department include the following:

- **The Revised Code's provisions would narrow and weaken prohibitions against serious sexually violent crimes.** For example, if adopted by a jurisdiction, the Revised Code's provisions would go far towards decriminalizing many serious acts of sexual violence by limiting liability to cases in which it can be proven that the victim would not have engaged in the sexual act with the perpetrator but for the perpetrator's threats or violence. RC §§ 213.1(1)(b)(ii), 213.2(1)(b)(ii); MPC § 2.03(1)(a) (1962). The fact

that a victim might have been willing to engage in sex with the perpetrator in any event – e.g., in a dating situation – does not excuse or mitigate the perpetrator’s use of violence in achieving that end.

- **The Revised Code defines “consent” too broadly.** Running against the historical progress in removing victim-resistance requirements from the definition of sex offenses, the Revised Code stipulates that consent may be inferred from a victim’s “inaction” and that the victim’s failure to put up “verbal [or] physical resistance” may be considered as evidence of consent. RC § 213.0(2)(e)(i)-(iii). The Revised Code’s definition would effectively place the onus on the victim to manifest physical or verbal 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.
- **The Revised Code’s offense of Sex Trafficking would exempt facilitators and supporters of sex trafficking activities from liability.** In contrast to the federal sex trafficking offense, 18 U.S.C. 1591, the Revised Code’s Sex Trafficking offense does not hold liable persons who obtain, advertise, patronize, or solicit with respect to coerced victims or minors engaging in commercial sex acts. RC § 213.9. Exempting persons who facilitate (advertisers) and enable and support (purchasers) commercial sex acts involving coerced or child victims ignores the realities of sex trafficking. Advertisers and purchasers are as integral to the trafficking networks as other participants and holding them accountable is critical in combating sex trafficking and protecting victims. Also, in contrast to 18 U.S.C. 1591 and many state laws, the Revised Code’s Sex Trafficking offense does not refer to “fraud” as a means of sex trafficking of adults, although fraud is an important and common means by which sex traffickers exploit their victims.
- **The Revised Code’s provisions would reduce the authorized sanctions for crimes of sexual violence and for sexual abuse of children.** For example, the maximum penalty for Sexual Assault of a Minor under the Revised Code would be three years of imprisonment if the offender was less than 21 years old, and five years of imprisonment if the victim was more than 11 years old. RC § 213.8(1). Thus, under this provision, a 20-year-old who sexually abused a young child or infant could be imprisoned for no more than three years, and a 40-year-old who sexually abused a 12-year-old could be imprisoned for no more than five years. In comparison, the corresponding offenses under federal law are punishable by up to 15 years of imprisonment or life imprisonment, depending on victim age. See 18 U.S.C. 2241(c), 2243(a).
- **The Revised Code provisions, if adopted by jurisdictions, would curtail much of the existing post-release tracking (registration) of sex offenders to the detriment of the critical law enforcement and community safety functions the registration systems now serve.** Only Sexual Assault by Aggravated Physical Force or Restraint would categorically be a registration offense. The crime of Sexual Assault by Physical Force or

Restraint, and the crime of Sexual Assault of an Incapacitated Person, would be registrable offenses only if the offender had a prior felony sex offense conviction. RC §§ 213.1(2), 213.2(2), 213.3(1). The crime of Sexual Assault of a Minor would be a registrable offense only if the offender was 21 or older and the victim was less than 12 years old. RC § 213.8(1). There would be no registration for other crimes including Sexual Assault of a Vulnerable or Legally Restricted Person (e.g., the mentally disabled, persons in custody), Sexual Assault by Extortion or Prohibited Deception, Sexual Assault in the Absence of Consent, Offensive Sexual Contact by Physical Force or Restraint or by Surreptitious Incapacitation, Offensive Sexual Contact, Incestuous Sexual Assault of a Minor (unless the minor is younger than 16), Exploitative Sexual Assault of a Minor (e.g., by a teacher or coach), Fondling a Minor, Aggravated Offensive Sexual Contact with a Minor, Offensive Sexual Contact with a Minor, or Sex Trafficking (whether by coercion or of minors). There would be no registration for abducting children, or for crimes involving the production, distribution, or possession of child sexual abuse material (“child pornography”). RC § 213.11A(1)(b). Registration could not continue for more than 15 years, regardless of the seriousness of the offense or the offender’s history of recidivism, and it could be terminated at any time. RC §§ 213.11F(1)-(2), 213.11J.

- **The Revised Code’s provisions, if adopted by jurisdictions, would severely curtail information sharing and public disclosure of information from sex offender registries.** For example, under the Revised Code’s provisions, law enforcement officers would be barred from using registry information to inform the victim of a rape or crime of child sexual abuse that the perpetrator had moved back to the victim’s neighborhood following the perpetrator’s release. Child-serving organizations would be denied access to information about the identities of convicted sex offenders that they now rely on in screening applicants, employees, and volunteers. The Revised Code’s provisions would hollow out the National Sex Offender Registry – a national database required by federal law that provides nationwide access by law enforcement to information about registered sex offenders, see 34 U.S.C. 20921 – because registration authorities would be prohibited from submitting information on sex offenders to the National Registry. The nationwide system for tracking sex offenders as they relocate among different states and jurisdictions would end, because registration jurisdictions would be prevented from informing each other about the relocating sex offenders, and because minor differences in the definition of sex offenses in different jurisdictions could exempt such sex offenders from the requirement to register. Sex offenders could easily evade registration requirements, and would be encouraged to do so, simply by moving to another jurisdiction. RC §§ 213.11A(c), 213.11H, 213.11I(3)
- **The Revised Code, if adopted by jurisdictions, would seriously impede the United States’ participation in the evolving global system to protect children and other victims from crimes of sex tourism and sex trafficking.** 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 relatively few sex offenders

would be required to register and because information in the sex offender registries could not be used for these purposes. RC §§ 213.11H, 213.11I(3).

In light of the serious concerns above and the criticisms submitted by a wide array of other stakeholders, the United States Department of Justice urges that the Revised Code not be adopted.

Sincerely,

Hampton Y. Dellinger

Hampton Y. Dellinger
Assistant Attorney General
Office of Legal Policy



Office of the Deputy Attorney General
Washington, D.C. 20530

January 19, 2022

The American Law Institute
4025 Chestnut Street
Philadelphia, PA 19104

Dear ALI Council Members:

I understand that the ALI Council will consider the American Law Institute's revision of the sex offense provisions of the Model Penal Code at its meeting on January 20-21, 2022. The law enforcement and victim-protection communities have identified specific and concrete protections these revisions as drafted would weaken. The Department of Justice will likewise convey a fuller analysis outlining significant concerns with these revised provisions of the Model Penal Code, should states choose to adopt them. I wanted to write separately to underscore these concerns and urge you to consider the potential adverse impact these revisions could have on the Department's ability to protect victims and hold accountable those who commit sexually violent crimes and crimes involving sexual abuse or exploitation of children.

As you are well aware, these horrific crimes have a very real human impact. I learned this working as a staff member on the Judiciary Committee at the time of the Violence Against Women Act (VAWA)'s passage in 1994, and in law enforcement and as a federal prosecutor in the years since. Sex offense cases are inherently challenging, making strong sex offense laws vital to ensuring equality. Adopting the revised provisions would afford lesser protections to victims of sexually violent crimes and crimes involving sexual abuse or exploitation of children. For this reason and those detailed in the Department's analysis provided under separate cover, the Council should not adopt these revisions.

Sincerely,

A handwritten signature in black ink, reading "Lisa O. Monaco".

Lisa O. Monaco
Deputy Attorney General