

June 4, 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 Revisions to Article 213, Sexual Assault and Related Offenses

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

We write to express our deep concern over numerous sections of Tentative Draft No. 5 of Article 213 of the Model Penal Code, Sexual Assault and Related Offenses. Proposed changes severely restrict who is required to register as a sex offender, and who has access to that information. Additionally, the language would make it more difficult to obtain convictions for sexual assault and sex trafficking, greatly reduce maximum sentences of offenders, and maintains a marital exception for child sexual abuse. These policies would both undermine the seriousness of sexual assaults, particularly against children, and pose great risk to public safety. We strongly encourage the American Law Institute to reject them.

As you may be aware, RAINN is the nation's largest anti-sexual assault organization. Founded in 1994, RAINN created and operates the National Sexual Assault Hotline (800.656.HOPE and hotline.rainn.org). RAINN also carries out programs to support victims, educate the public, improve public policy, and help companies and organizations improve the way they prevent and respond to sexual violence. Rights4Girls is a national human rights organization dedicated to ending gender based violence against young women and girls in the U.S. Formed in 1950, National District Attorneys Association (NDAA) is the oldest and largest national organization representing state and local prosecutors in the country. With more than 5,000 members representing over two thirds of the state and local prosecutors' offices, NDAA is recognized as the leading source of national expertise on the prosecution function and is a valuable resource for the media, academia, government, and community leaders. NDAA's mission is to provide state and local prosecutors with the knowledge, skills, and support they need to ensure that justice is done and that public safety rights are protected. National Children's Alliance (NCA) is a professional membership organization of Children's Advocacy Centers, the largest network of care centers supporting child abuse victims in the country, with a mission to make one big

difference, one child at a time. At a CAC, a coordinated team of experts in medicine, law enforcement, victim advocacy, mental health, and other disciplines hold offenders accountable and help children and families heal in a comprehensive, seamless way so no future is out of reach. The National Center on Sexual Exploitation (NCOSE) works to end sexual abuse and exploitation through research, litigation, corporate and legislative advocacy. The NCOSE Law Center promotes and participates in key, precedent-setting cases and advocates in our state and federal legislatures to impact policy for those who have experienced sexual harm.

Sex Offender Registry

The proposed revisions to Article 213, Sexual Assault and Related Offenses, severely restrict the number and type of sexual offenses which require registration. Only **one** offense, Sexual Assault by Aggravated Physical Force or Restraint, requires registration without additional factors present. Sexual Assault by Physical Force, and of an Incapacitated Person, do not require registration unless the offender has previously been convicted of a felony sex offense. This limitation will allow dangerous sexual predators to evade registry requirements. Of every 1000 sexual assaults, it is estimated that only 28 will result in a felony conviction.¹ Given such low rates of conviction, this precondition is unreasonable and effectively ends the registration requirement for many offenders who use force, threats, or a victim's incapacity to rape them. The new recommendations also significantly curtail the conditions under which an offender would be required to register for conviction of sexual offenses involving minors. The draft would only require registration where the victim was under 12 years old, the offender is over 21, and the offender is aware of, yet recklessly disregards, the risk that the victim is younger than 21. This means that neither of the following individuals would be required to register as a sex offender:

- A 20-year old who rapes an infant.
- A 50 year old who rapes a 12 year old.

Furthermore, offenders convicted of Sex Trafficking, Possession, Distribution and Production of Child Pornography, and Online Enticement are wholly excluded from any registration requirements. Finally, the draft recommends restricting access to the sex offender registry to law enforcement only, with no exception for organizations conducting background checks for employment or volunteer positions which involve interaction with or care of children.

Sexual Offenses Involving Minors

Additionally, the proposed changes to Section 213.8, Sexual Offenses Involving Minors, undermine the seriousness of these offenses and leave victims at risk. First, the draft recommends a

¹ <https://www.rainn.org/statistics/criminal-justice-system>

maximum sentence of only three years for rape of a minor where the offender is under 21, *regardless of the victim's age*. This means a 20-year old who rapes an *infant* would face a maximum sentence of only three years. This maximum increases to only five years if the offender is 21 or over and the victim is 12 or older. This would result in a maximum sentence of five years when a 50-year old offender rapes a 12 year old. Finally, the draft recommends an *affirmative defense of marriage* to charges of sexual assault of a minor and related offenses. This perpetuates the notion that child marriages are acceptable in today's society. While some states do still allow minors to marry, the American Legal Institute should take this opportunity, at a minimum, to establish an age floor for marriage, regardless of parental consent.

Elements of Offenses

Proposed changes to the offenses of Sexual Assault by Aggravated Physical Force or Restraint and Sex Trafficking will make it more difficult for prosecutors to convict culpable offenders, without protecting innocent actors. First, under the new draft of Section 213.1(1) to convict a defendant of Sexual Assault by Aggravated Physical Force or Restraint, the new draft would require prosecutors to prove that the defendant *knew* the victim submitted *because of* defendant's use or threat to use aggravated physical force or restraint. This puts the onus on the *victim*, in the moment of a sexual assault, to make it clear to offender the reason why they are submitting to the sexual act. This is a troubling shift that perpetuates the destructive, false idea that victims are responsible for their assaults.

Additionally, the new definition of sex trafficking removes advertising from the list of conduct constituting sex trafficking, and excludes sex buyers from the definition entirely. Given the extensive use of the internet to facilitate sex trafficking, excluding advertising from the definition will essentially legalize the primary way traffickers solicit "clients" to abuse women and girls. This also removes a significant avenue of prosecution that will often, if not always, have digital evidence to corroborate victim testimony. Excluding buyers of sex with children minimizes the seriousness of their conduct and absolves them of responsibility, when in fact buyers create the demand that encourages trafficking. Finally, the new language would also require that prosecutors prove a defendant knew, and recklessly disregarded, the risk that the victim is younger than 18.

The Model Penal Code should be the standard that states across the country can rely upon for sound policy when revising their own statutory schemes surrounding sexual violence. Unfortunately, the proposed changes to Section 213 would result in a model which undermines the seriousness of sexual assault and poses a greater risk to public safety. We strongly urge you to reject these changes at the Annual Meeting on June 7 and 8.

Thank you,

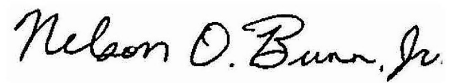
Scott Berkowitz

President, RAINN



Yasmin Vafa

Executive Director, Rights4Girls



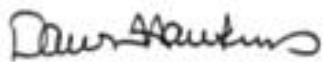
Nelson Bunn,

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Teresa Huizar

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