



January 12, 2022

Council Members
American Law Institute

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

Dear American Law Institute Council Members:

I write as President and CEO of the National Center for Missing & Exploited Children (NCMEC) to express significant concerns regarding the child endangerments that will arise from final passage of Sections 213.9 and 213.11 of the ALI Model Penal Code: Sexual Assault and Related Offenses, Council Draft No. 12. In your capacity as an ALI Council member who will vote on the Revised Model Code at the Council meeting on January 20-21, I ask you to reject passage of Sections 213.9 and 213.11. These sections pose severe risks to child safety as currently drafted and should be reconsidered and revised in consultation with relevant subject matter experts, including the child advocate, offender, prosecutorial, and survivor communities, in order to most successfully fulfill ALI's goals of updating and ensuring consistency in the model criminal justice codes.

As background, NCMEC is a private, non-profit organization created over 37 years ago to serve as the nation's congressionally designated clearinghouse and resource center to help find missing children, reduce child sexual exploitation, and prevent child victimization. Each year, NCMEC receives tremendous volumes of reports relating to child abduction and sexual exploitation. To date, NCMEC has provided technical assistance to law enforcement relating to over 200,000 noncompliant registered sex offenders involved in potential crimes against children; handled over 114 million reports relating to child sexual exploitation, including over 113,000 reports of child sex trafficking and 229,000 reports relating to the enticement of children for sexual abuse; and worked on over 4,000 reports of children abducted by non-family members.

A. Section 213.9 of the Revised Model Code Diverges from the Federal Trafficking Statute, Endangers Children Victimized by Sex Trafficking, and Creates Impunity for Buyers of Children for Rape and Sexual Abuse

Section 213.9 of the Revised Model Code significantly departs from established federal law governing sex trafficking and puts children at heightened risk for victimization. Most troubling, the revisions to Section 213.9 focus on eliminating liability both for offenders who buy children for sex as well as third parties who knowingly profit from sex trafficking, without regard for the reality of how sex trafficking victimizes children in today's world or the recurring harm this crime inflicts on children.

The most concerning revisions in Section 213.9 that will heighten child sexual victimization are as follows:

- Section 213.9 removes advertising as a predicate act that can be used to establish trafficking. In NCMEC's experience, virtually every case involving child sex trafficking reported to NCMEC in

recent years has involved a child trafficked for sex through the posting of online advertisements. By eliminating liability for advertising the sale of a child for sex, the Revised Model Code ignores the reality of modern-day trafficking and removes culpability for most traffickers who utilize online advertising to perpetuate their criminal activity.

- Section 213.9 also removes criminal liability for obtaining, patronizing, or soliciting a child for sex. This revision immunizes buyers from liability for trafficking, essentially providing a free pass to adults who purchase a trafficked child for rape and sexual abuse.

The ALI commentary reflects that these changes were influenced in part by ALI's consensus that it was unfair to attach the stigma and sanctions of sex trafficking to an offender who purchases a child to rape and sexually abuse them. ALI also notes as part of its rationale for these revisions that "the buyer's encounter with a victim is usually brief" and therefore should not give rise to a trafficking charge. What is left unsaid is that a buyer's encounter with a victim is often brief because the buyer is paying in minute increments to force a sex act on the victim – and the sexual crime is often immediate, violent, and inflicts long-term impacts on the child victim.

B. Section 213.11 of the Revised Model Code Dismantles Current Protections Provided by Sex Offender Registries and Creates Severe Endangerments for Children

Section 213.11 of the Revised Model Code acknowledges that "special burdens can be defended on the basis that sex crimes, being distinctively harmful and unsettling, warrant exceptional effort to prevent them. And of course this is especially true for sexual offenses against children." Yet the Revised Model Code removes many protections currently provided by state offender registry laws, including the following which severely impact child safety:

- Removes from the registry requirements several of the most severe crimes that can be committed against a child, including online enticement, sex trafficking, kidnapping and attempted kidnapping, and crimes relating to child sexual abuse material (also known as child pornography).
- Requires an offender who uses physical force to sexually assault a child to register, but only if the offender has been previously convicted of a felony sex offense. An offender who is convicted of using physical force to sexually assault a child would not have to register and would continue to have unfettered access to children, unless they were convicted of the crime a second time.
- Requires offenders who sexually assault a minor to register, but only if the child is younger than 12 years old and the perpetrator is 21 years old or older. Under the Revised Code, a 19-year-old man who rapes an 11-year-old child, would not have to register.
- Requires offenders who commit the incestuous sexual assault of a minor to register, but only if the child is younger than 16 years old. A 57-year-old father who rapes his 16-year-old daughter would not have to register.
- All public access to sex offender registry information would be terminated. Only law enforcement would be permitted to access registry information, and they would be prohibited from sharing this information, even with non-profit, child/youth sports, day care, and child-serving organizations and businesses.

NCMEC has previously raised its concerns with the Reporters and leadership of ALI but has received no response (see NCMEC's May 27, 2021 letter to ALI, <https://www.missingkids.org/blog/2021/losing-ground>). The National Association of Attorneys General (NAAG) shares many of NCMEC's concerns relating to the Revised Model Code and issued a bipartisan policy letter on December 9, 2021, signed by 37 state Attorneys General (<https://www.missingkids.org/content/dam/missingkids/pdfs/ALI-NAAG-Letter-Final.pdf>).

ALI's goals in revising the Model Penal Code are laudable, and many of the proposed revisions are long overdue to bring the Code up to date with today's societal structure and legal needs. However, the revisions in Sections 213.9 and 213.11 are dismissive of child victims and ignore the sustained harm that sexual crimes inflict on child victims, the evolution of child sexual exploitation online, and the pervasiveness of sexual violence against children. It is difficult to accept that the revisions in these particular sections are representative of the Council members' views and the views of their professional organizations. They certainly do not reflect improvements in child safety, but rather unravel decades of child protection efforts.

NCMEC has a long history of engaging productively with policy makers, legislative representatives, government agencies, and non-profit partners in a balanced approach to advocate for our mission and ensure laws and policies are developed that provide safeguards for children while also fulfilling other societal goals. As a member of the ALI Council we urge you to refrain from passing Sections 213.9 and 213.11 of the Revised Model Code and instead engage with NCMEC and other subject matter experts on revisions to these proposed sections that currently present significant harm to children.

Sincerely,

A handwritten signature in blue ink that reads "John F. Clark". The signature is written in a cursive, flowing style.

John F. Clark
President and CEO

Cc: American Law Institute Council Members
Professor Stephen J. Schulhofer, Reporter
Professor Richard L. Revesz, Director
Ms. Stephanie A. Middleton, Deputy Director