



NATIONAL ASSOCIATION OF WOMEN JUDGES

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March 22, 2022

The American Law Institute
4025 Chestnut Street
Philadelphia, PA 19104

RE: National Association of Women Judges (NAWJ) Statement re: the American Law Institute
Model Penal Code: Sexual Assault and Related Offenses, Section 213.0(2)(e) "Consent"

Dear ALI Council Members:

I am writing on behalf of the National Association of Women Judges (NAWJ) regarding the American Law Institute's proposed revision of the sex offense provisions of the Model Penal Code (hereafter, the "Revised Code"). On March 4, 2022, ALI Deputy Director Stephanie Middleton and Vice Chair Judge Lee Rosenthal met for a second time with NAWJ's President and Judges from NAWJ's Domestic Violence and Human Trafficking Committees to discuss the Revised Code. For purposes of discussion at that meeting, ALI provided NAWJ with the revisions to the Section 213 definition of consent which were approved by the ALI Council on March 2, 2022 (this red-lined version is attached), but which will still require the vote of the full membership at the annual meeting Model Penal Code: Sexual Assault and Related Offenses session on May 17, 2022.

Numerous letters and statements from law enforcement and victim-protection agencies and organizations¹ ranging from the Department of Justice to the National Task Force on Sexual and Domestic Violence expressing deep concern about many provisions of) ALI's *Revised Model Penal Code: Sexual Assault and Related Offenses, Section 213*, are now pending before the ALI Council. NAWJ shares those concerns and, for the convenience of the Council, we have compiled all of these documents into a 50 page compendium attached to this statement.

¹ • Department of Justice, Office of the Deputy Attorney General*; • Department of Justice, Office of Legal Policy*; • American Bar Association (Resolution and Supporting Report*); • Aquitas: Champions for Justice ; • Legal Momentum: The Women's Legal Defense Fund; • National Alliance to End Sexual Violence; • National Association of Attorneys General*; • National Center for Missing and Exploited Children*; • National Center on Sexual Exploitation**; • National Children's Alliance**; • National Crime Victims Law Institute ; • National District Attorneys Association**; • National Task Force to End Sexual and Domestic Violence*; • RAINN (The Rape, Abuse, and Incest National Network)**; • Rights 4 Girls**; • Women's Law Project; *Letter/Statement Attached ** All are signatories to the letter from RAINN.

We anticipate that the draft Revised Code that ALI will soon circulate will address several topics about which NAWJ may have concerns, however, NAWJ's discussions with ALI to date have focused on the Revised Code's definition of consent, and that is the focus of this letter. NAWJ finds highly objectionable the language in Section 213.0(2)(e)(ii) that provides "Neither verbal nor physical resistance is required to establish that consent is lacking. Consent may be express or it may be inferred from behavior—**both action and inaction**—in the context of all the circumstances." (Emphasis added).²

NAWJ shares the position of the Department of Justice (DOJ) Office of Legal Policy, in both its January 19, 2022 and March 1, 2022 letters to ALI (see the attached Compendium pages 12 through 17) that although the Revised Code provides some improvements to the language of the Model Penal Code's original sex offense provisions, 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..."

This letter addresses the following points regarding the language of Revised Code Section 213.0(2)(e)(ii) and (iv):

1) As stated in the attached *Joint Memorandum to ALI Council re MPC Sexual Assault and Related Offenses Project - Requesting Withdrawal from Publication*, sent to the Council in January 2022, "... the draft betrays one of the crowning achievements of the ALI's original MPC: the clarification and simplification of American criminal law. The labyrinthine provisions of the final draft are so overly complicated, academic, and hard to use that they will confuse legislators considering their adoption, bewilder police and prosecutors attempting to apply them, and confound courts attempting to interpret them. The stature of the Model Penal Code as a whole will suffer."

2) In the view of NAWJ, the proposed consent definition revisions shift the burden of proof to the victim, especially if the victim must establish that they are covered by the "vulnerable" individual exceptions that appear elsewhere in the Revised Code in order to negate the application of the consent definition to prosecutorial and judicial consideration of the alleged sexual assault. And,

3) The Revised Code definition of consent will impose an impossible burden on the Courts to provide clear, specific, and fair jury instructions in sexual offense cases. In fact, this language appears to completely negate the concept of "frozen in fear" despite the fact this is a well-established phenomenon experienced by many victims of sexual offenses. Further, clarifying language that a jury will be required by law to adhere to as codified in jury instructions must appear in the body of the Revised Code, **not** simply in commentary or footnotes.

NAWJ continues to advocate for an “affirmative consent” standard in the enforcement of sexual assault and related offenses; however, in light of ALI’s reluctance to adopt this standard, NAWJ would support the adoption of the consent definition proposed in 2015 in Council Draft No. 2 to Discussion Draft No. 2, Sec. 213.(3) that “*Consent means a person’s positive agreement, communicated by either words or actions, to engage in a specific act of sexual penetration or sexual contact*” as a balance between an “affirmative consent” standard and the highly objectionable language of the currently proposed revision of Section 213, inasmuch as it takes into consideration both words and actions while still protecting against allowing a “frozen in fear” reaction to be viewed as consent.

NAWJ also has concerns with the provision in Section 213.0(2)(e)(iv) of the draft consent definition ALI provided to NAWJ on March 4, 2022 respecting revocation/withdrawal of consent. The language that “A clear verbal refusal—such as “No,” “Stop,” or “Don’t”— establishes the lack of consent or the revocation or withdrawal of previous consent” may be construed as overriding the language of “Neither verbal nor physical resistance is required to establish that consent is lacking.”

In closing, as drafted, these provisions of the *Revised Model Penal Code: Sexual Assault and Related Offenses, Section 213.0(2)(e) “Consent”* will seriously harm victims, especially the most vulnerable, and are out of step with the law of sexual assault as it has evolved in states across the country. Therefore, NAWJ calls on the ALI Council to either adopt the 2015 definition of consent referenced above for a full membership vote in May or to pause further steps to finalize the Revised Code and its publication until there can be further discussion and thorough consideration of these concerns.

Sincerely,



Judge Elizabeth White (ret.)
President, National Association of Women Judges

Attachments:

Red-lined version of proposed revisions to Section 213.0(2)(e) “Consent” as of March 4, 2022

Compendium of Documents from *Organizations Expressing Deep Concerns About Provisions of the American Law Institute’s Revised Model Penal Code: Sexual Assault and Related Offenses* (50 Pages as of March 16, 2022)

Joint Memorandum to ALI Council re MPC Sexual Assault and Related Offenses Project - Requesting Withdrawal from Publication, January 17, 2022