

## American Law Institute Adopts Revisions to Model Penal Code That Include Major Changes to Sex Offender Registries

On June 8, 2021 the membership of the American Law Institute gave its final approval to a revision of the Model Penal Code's chapter on Sexual Assault and Related Offenses. This project was initially authorized by the ALI Council in 2012. The appointed Reporters, Professors Stephen Schulhofer and Erin Murphy of the New York University School of Law, began work immediately, preparing drafts for discussion with the appointed project Advisors and the Members' Consultative Group. As is normal with ALI projects, these groups included practicing attorneys, judges, and scholars who are experts in the subject. Portions of the project were presented to the full membership at the annual meetings in 2014, 2015, 2016, and 2017. The ALI Council agreed on January 22 to recommend the membership's final approval of the completed project. Tentative Draft Number 5 was then considered and approved by the Membership at the 2021 annual meeting held on June 8. The Reporters will now prepare the final published version reflecting the discussion at the Annual Meeting as well as editorial improvements.

The complete Tentative Draft, 600 pages long, addresses the substance of the full range of sexual assault crimes. It contains the Blackletter provisions setting forth the code's statutory language for each section, official Comments interpreting and explaining each section, and Reporter's Notes providing background and citations to sources relied upon by the Reporters in the draft. The original version of the Model Penal Code was published by the ALI in 1962. It was and remains highly influential. According to Wikipedia more than half the states enacted criminal codes that borrowed heavily from the MPC, and even courts in non-adopting states have been influenced by its provisions. It was a forward looking document. One important and influential contribution of the 1962 MPC was the removal of noncommercial sexual acts between consenting adults, such as sodomy, adultery and fornication, from the criminal law. In 2001, however, the Institute concluded that revision of some portions of the 50-year-old MPC had become necessary. This project, revising the portions of the MPC addressing sexual assault, is one of three separate revision projects on different portions of the code. The original MPC contained no provisions on a sexual offense registry; the inclusion of that topic in the MPC is among the most significant revisions to it now approved by the Institute.

The MPC's registry provisions are contained in 11 sections. Including an official comment providing an Executive Summary, they are set forth in the final 120 pages of Tentative Draft No. 5. While the MPC adopts something called a registry, its substance departs significantly from existing registry laws, federal and state, as the Comments acknowledge. Key differences are:

1. Many sexual offenses that are registrable in the federal and most state laws are not registerable under the MPC provisions, which provide that no offense is subject to registration other than those it specifies as registerable. Only these five offenses (as defined by other sections of the MPC) trigger a registration obligation:

- a. Sexual Assault by Aggravated Physical Force or Restraint
  - b. Sexual Assault by Physical Force, but only when committed after the offender had previously been convicted of a felony sex offense.
  - c. Sexual Assault of an Incapacitated Person, but only when committed after the offender had previously been convicted of a felony sex offense.
  - d. Sexual Assault of a Minor, but only when the minor is younger than 12 and the actor is 21 years old or older.
  - e. Incestuous Sexual Assault of a Minor, but 1 only when the minor is younger than 16.
2. There is no public notification that individuals are on the registry, whether through a public website or any other means. Access to the registry is limited to law enforcement personnel. The knowing or reckless disclosure of registry information to others is a felony.
  3. The maximum registration period for the small group who remain on the registry is 15 years, but those who do not re-offend, and comply with parole, probation, or supervised release conditions, are removed after ten years. Failure to register cannot be the basis of parole or probation revocation; it is punishable only as a misdemeanor offense.
  4. General rules that required location monitoring of persons convicted of a sexual offense are barred, as are most restrictions on residency, access to schools or the internet. Judges could impose such restrictions in particular cases, but only on persons currently required to register, and only upon an evidentiary showing that there are special circumstances in that particular case that justify it, and only for a limited period of time. In no case may a judge require public notification. Mandatory restrictions on employment applicable primarily to persons convicted of a sexual offense that are created by other state laws are not repealed by the MPC, but anyone subject to them may petition a court for relief from the employment bar

The American Law Institute, established in 1923, is the leading independent organization in the United States producing scholarly work to clarify, modernize, and otherwise improve the law. The current Council of the ALI includes 7 members of the United States Courts of Appeal as well as Justices on the highest courts of California, Arizona, Texas, and New Jersey. The recommendations of the ALI Council become the official position of the Institute when (as with these revisions to the MPC contained in T.D. 5) they are adopted by the members, which consists of leading attorneys, law professors, and judges who have been nominated and elected to membership.