

Understanding the new ALI guidelines for managing sexual assault

written by Sandy | May 21, 2022



By Sandy and Prof. Ira Ellman . . . After all the brouhaha, all of the protesting and dissemination of false and misleading information, it is over. May 17, 2022, the American Law Institute voted to accept the recommended changes to its Model Penal Code in regard to sexual crimes.

The session was not without dissenters, for, according to Professor Ira Ellman, several motions to modify the changes as presented were made and voted down.

He writes:

Last December, the Department of Justice, NCMEC, and 36 state Attorneys General sent letters to the ALI opposing various parts of the proposed revisions to the Sexual Assault article of the Model Penal Code. Among the portions of the Code they opposed were those that addressed the registry. Their opposition led the ALI Council to ask the

members to make some revisions, but the revised draft continued to bar public disclosure of the registry and to limit the duration of the registration obligation to no more than ten years, with provisions for earlier termination. In advance of the annual membership meeting last week, DOJ, NCMEC, and the state AG's all sent letters making clear they regarded the revisions as inadequate, and all three urged the members to reject the revised draft. NCMEC asked to speak at the meeting to explain their opposition, and they were given three minutes to make their pitch. Their General Council appeared. She was ineffective. I think they're not used to being challenged or having to argue for their position.

At the meeting, Nancy O'Malley, the District Attorney of Alameda County, California and former chair of the California Sex Offender Management Board, offered motions intended to respond to their concerns. Her motions would have, among other things, restored the public website and public notifications and given NCMEC access to the registry. Her motions were rejected.

I offered three motions that were approved. One made clear that the bars on public access [to the registry] and the limits on the duration of the registration obligation apply to all registerable offenses, not just those addressed in the sexual assault portions of the MPC. So, for example they would apply to possession of CP, which is not an offense addressed in the sexual assault article of the Model Penal Code. The second motion protects registrants from the reach of federal SORNA rules requiring registration for long periods etc., by barring the state from accepting registrations that state law does not require. That creates an "impossibility defense" (recognized under SORNA), for anyone compliant with state registration laws, against any federal SORNA prosecution for failure to comply with SORNA's harsher requirements.

The third motion eliminated a requirement that every registrant provide all internet identifiers, which the Second Circuit Court of Appeals had just found violative of the First Amendment.

The complete draft, with my amendments (as well as some others focused on other portions of the MPC) was then given final approval—again. The project is officially done and the Council should give it final approval at its winter meeting.

Advocates for policy and laws based on empirical evidence owe Prof. Ellman as well as the full body of ALI a debt of gratitude.

Now it is time to assure that these efforts have not been in vain. These recommendations, not legally binding in and of themselves, will only become law when adopted by state legislatures. Depending on your state, your situation, and your legislature, do whatever work will be needed to bring these recommendations forward into codified law.

The recommendations themselves are a step forward. The end goal is the total removal of the registry. That will be a touchdown. Getting this important work into law will be a first down in our march toward victory.



Dr. Ellman is a Distinguished Affiliated Scholar with the Center for the Study of Law and Society at the University of California, Berkeley and a Charles J. Merriam Distinguished Professor of Law and Affiliate Professor of Psychology, Emeritus, at Arizona State University. He is the author of a recent paper "When Animus Matters and Sex Offense Underreporting Does Not: The Sex Offender Registry Regime."