



**Model Penal Code: Sexual Assault and Related Offenses
Council Draft No. 11
Comments of the National Association of Criminal Defense Lawyers**

January 19, 2021

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL envisions a society where all individuals receive fair, rational, and humane treatment at every level of the criminal justice system. NACDL's mission is to serve as a leader, alongside diverse coalitions, in identifying and reforming flaws and inequities in the criminal justice system, and redressing systemic racism, and ensuring that its members and others in the criminal defense bar are fully equipped to serve all accused persons at the highest level. NACDL is dedicated to advancing the proper, efficient, and just administration of justice. NACDL files numerous amicus briefs each year in the U.S. Supreme Court and other federal and state courts, seeking to provide amicus assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system. NACDL also provides legislative assistance to its members and affiliates.

NACDL has a particular interest in the Sexual Assault and Related Offenses Project. Through its liaisons, NACDL has monitored and participated in the Project. NACDL lawyers represent thousands of people each year charged with sex offenses. NACDL understands from the trenches the impact of sexual assault on victims, their families, and defendants and their families. Each year, NACDL lawyers represent hundreds if not thousands of persons who were convicted of a sex offense and are serving or have served their sentence and then must navigate the vicissitudes of sex offender registration knowing that a single error or misunderstanding could cause a lengthy term of imprisonment.

NACDL opposes the implementation of sex offender registration schemes. NACDL urges ALI to codify the abolition of all types of sex offender registries as part of the current efforts to modernize and reform the Model Penal Code's treatment of sexual assault offenses. NACDL similarly opposes the implementation of residence restrictions and other collateral consequences that make communities less safe at the expense of the registrant who needs support for continued reform, rehabilitation, and reentry to society.

For the Model Penal Code to remain a reliable guide used by legislatures and courts, its recommendations should be based on evidence. The commentary and the Reporter's Notes accompanying Section 213.11 of Council Draft 11 contain the best arguments against such registration schemes – whether they include community notification or not.

The commentary supporting Section 213.11 demonstrates that current existing sex offender registries and the model proposed in the draft are not supported by sufficient evidence to warrant any registration scheme. As noted in the draft:

The objective of these laws is to reduce recidivism and enable the public to take measures for self-protection, or at least ease public fear of crimes that are particularly unsettling and injurious. Yet despite the intuitive plausibility of these benefits, extensive research demonstrates convincingly that the expected gains have not materialized. At the same time, the laws have a broad range of well-documented, undesirable consequences. Most obvious are the onerous burdens on registrants themselves, but the less evident effects are important and too often overlooked. In part because the burdens imposed on registrants can be powerfully criminogenic, these laws appear to result in more rather than less crime, including sexual crime, and ultimately impair rather than enhance public safety, undermining the very purposes that lawmakers and the public pursue in supporting these policies.

Council Draft 11, at 95-96 (emphasis added). The registry as structured in the current draft is limited to law enforcement purposes. That fact makes it far superior to most current state registration schemes and to the federal mandates required by the Adam Walsh and Jacob Wetterling acts.

However, the evidence does not support the notion that maintaining a sex offender registry, even one limited to law enforcement, achieves its intended goals. The current draft recognizes that evidence supporting a positive benefit from non-public registration is at best, tentative. See Council Draft 11, at 122-23.

The draft suggests a sex offender registry limited to law enforcement purposes will “provide locally relevant information that police cannot obtain from ordinary criminal-history databases when they have not identified a particular suspect.” See Council Draft 11, at 96. The draft also claims that a registry limited to law enforcement will “facilitate high-priority investigations of serious sexual offenses” and provide “important practical advantages for the police.” *Id.* However, the draft does not present evidence supporting these claims. The footnotes supporting these statements do not demonstrate that “high priority investigations” are advanced by a sex offender registry. As recognized by the draft itself, a broad swath of research demonstrates recidivism rates amongst convicted sex offenders are lower than people convicted of almost every other crime. See Council Draft 11, at 119.

The Reporter’s Notes at 138 recognize that a sex offender registry is unnecessary to determine the criminal history of a person of interest in an investigation. The suggestion that an NCIC check is cumbersome compared to a sex offense registry check is unsupported by any evidence. The commentary and Reporter’s Notes do not recognize that most states also maintain a state database of criminal history and driving records. In the experience of criminal defense

lawyers, NCIC checks, state criminal history checks, and driving records are available to law enforcement with little delay and increasingly from mobile sources such as a laptop installed in an officer's police car. The NCIC database details the arrest, conviction, and custodial records of all persons arrested, convicted, or detained at jail for any crime. NCIC and state criminal history checks provide far more relevant information than sex offender registries. From an NCIC or state criminal history check, law enforcement officials can determine not only if the person was convicted of a serious sex offense, but whether that person has acted out violently in the past, has a criminal history demonstrating drug or alcohol use, and whether a person has a history of resisting arrest. Moreover, NCIC and state criminal history databases reflect custodial information which in some cases may rule out a person of interest from an investigation. Rather than being cumbersome, NCIC checks, and state criminal history databases provide information swiftly and more completely address the investigative needs of the police.

Indeed, the existence of a sex offender registry (even if limited to law enforcement) tends to impair rather than assist an investigation requiring identification of a perpetrator. By relying on a sex offender registry, police officers will undoubtedly "round up the usual suspects" without regard to notions of probable cause or reasonable suspicion and to the detriment of other important investigative efforts. NACDL knows from the research data that the "usual suspects" are the least likely to have committed the serious sexual offense that precipitated the high-priority investigation. Sex offenders demonstrate low rates of recidivism. See discussion at Council Draft 11, at 119-21. Moreover, a person who was convicted of a sex offense and complies with registration requirements would seem to be the type of person least likely to re-offend. The Reporter's Note suggests that investigating an entire cohort of people with no basis other than a prior sex offense is a valid investigative tool. This is incorrect and encourages investigative conduct that can cause a widespread violation of the constitutional rights of individuals who may appear on the registry but are innocent of the crime being investigated. It also diverts the attention of investigators from more reliable investigative techniques to identify the perpetrator.

High profile stranger abduction and sexual assault cases make up a small fraction of the sexual assaults normally investigated and an even smaller percentage of overall crime. Most sexual assault investigations do not include an identification requirement as the victim and the perpetrator are known to each other. See Council Draft 11, at 123-24.

In short, the investigative effectiveness of a "law-enforcement only" registration scheme is outweighed by the false sense of security, the encouragement of investigative shortcuts, and the harm to both society and registrants.

NACDL recognizes that in the past 25 years sex offender registration schemes have been employed in every state and with great encouragement from the federal Congress. This does not change the fact that there is little to no evidence these schemes enhance their intended purposes.

Yet they play to the emotional responses of legislators and the community in general. What should ALI do?

This is not the first time that ALI has addressed such an issue. In October 2009, the ALI Membership voted to withdraw the capital punishment section from the Model Penal Code “in light of the current intractable institutional and structural obstacles to ensuring a minimally adequate system for administering capital punishment.” Sex offender registration schemes (and other collateral consequences) have not achieved their intended purposes. Law enforcement has more than sufficient tools to investigate sex crimes and crimes against children without the need for a blacklist of individuals who have served their punishment and are trying to reintegrate into society. Like the capital punishment issue in 2009, ALI should support the complete abolition of sex offender registries and the attendant collateral consequences that often accompany such schemes. The new sexual assault provisions of the Model Penal Code should specifically counsel against implementing any type of sex offender registry.

For questions, please contact NACDL Liaison to the Project:

Michael J. Iacopino
Chair NACDL Sex Offense Policy Committee
Brennan Lenehan Iacopino & Hickey
85 Brook Street
Manchester NH 03104
(603) 668-8300