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February 20, 2018

Senator John A. Alario, Jr.  
President of the Senate  
P.O. Box 94183  
Baton Rouge, Louisiana 70804

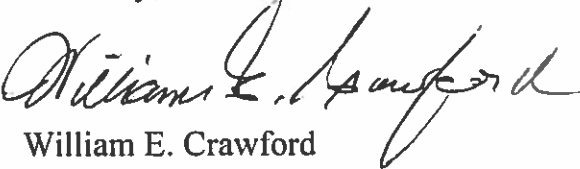
Representative Taylor Barras  
Speaker of the House of Representatives  
P.O. Box 94062  
Baton Rouge, Louisiana 70804

**RE: SENATE CONCURRENT RESOLUTION NO. 97 OF THE 2013 REGULAR SESSION**

Dear Mr. President and Mr. Speaker:

The Louisiana State Law Institute respectfully submits herewith its report to the legislature relative to responsive verdicts for aggravated incest.

Sincerely,

  
William E. Crawford  
Director

WEC/puc

Enclosure

cc: Senator Michael A. Walsworth

email cc: David R. Poynter Legislative Research Library  
[drplibrary@legis.la.us](mailto:drplibrary@legis.la.us)  
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**LOUISIANA STATE LAW INSTITUTE  
CRIMINAL CODE AND CODE OF CRIMINAL  
PROCEDURE COMMITTEE**

**REPORT TO THE LEGISLATURE  
IN RESPONSE TO SCR NO. 97 OF THE 2013 REGULAR SESSION**

**Relative to responsive verdicts for aggravated incest**

Prepared for the  
Louisiana Legislature on

**February 20, 2018**

Baton Rouge, Louisiana

**LOUISIANA STATE LAW INSTITUTE  
CRIMINAL CODE AND CODE OF CRIMINAL  
PROCEDURE COMMITTEE**

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Judge Guy Holdridge, Acting Reporter  
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SENATE CONCURRENT RESOLUTION NO. 97

BY SENATOR WALSWORTH

A CONCURRENT RESOLUTION

To urge and request that the Louisiana State Law Institute study and make recommendations relative to the issue of whether the Code of Criminal Procedure should contain responsive verdicts for the crime of aggravated incest.

WHEREAS, Code of Criminal Procedure Article 814 does not contain responsive verdicts particular to the crime of aggravated incest; and

WHEREAS, Code of Criminal Procedure Article 815 provides only that the responsive verdicts of "guilty," "guilty of a lesser and included grade of the offense", and "not guilty" are permitted with regard to the crime of aggravated incest, since responsive verdicts for that crime are not specifically provided in Article 814; and

WHEREAS, the lack of responsive verdicts for the crime of aggravated incest can result in a defendant being found "not guilty" when the specific facts of a particular case as established at trial do not permit either a finding of guilty or a finding of guilt on a lesser included offense, or can result in a defendant being found guilty of a lesser included offense with a maximum penalty that is insufficient to serve the interests of justice; and

WHEREAS, the crime of aggravated incest (La. R.S. 14:78.1) by its very nature involves heinous acts committed against minors who are particularly vulnerable and oftentimes reluctant to testify about the abuse to which they have been subjected, and who are further subjected to undue stress and embarrassment when they do testify; and

WHEREAS, the problems associated with the lack of responsive verdicts for the crime of aggravated incest can sometimes necessitate a new trial and the calling of victims as witnesses, thus subjecting them again to the stress and embarrassment of a second and subsequent legal proceedings; and

WHEREAS, the crime of aggravated incest also contains penalty provisions specific to the age of the victim such that the lack of responsive verdicts in the Code of Criminal Procedure can, depending on what facts are and are not established at trial, confront the judiciary with a range of possible sentences of imprisonment from five years to ninety-nine years, with no guidance to be found in the Code of Criminal Procedure.

THEREFORE, BE IT RESOLVED that the Legislature of Louisiana does hereby urge and request that the Louisiana State Law Institute study and make recommendations with regard to whether there is a need for responsive verdicts particular to the crime of aggravated incest, and if so, make recommendations relative to the specifics of any such responsive verdicts.

BE IT FURTHER RESOLVED that the Legislature of Louisiana does hereby urge and request that the Louisiana State Law Institute report the results of its study findings and its recommendations to the legislature not later than January 10, 2014.

BE IT FURTHER RESOLVED that a copy of this Resolution be transmitted to the Criminal Code Committee of the Louisiana State Law Institute.

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PRESIDENT OF THE SENATE

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SPEAKER OF THE HOUSE OF REPRESENTATIVES

February 20, 2018

To: Senator John A. Alario, Jr.  
President of the Senate  
P.O. Box 94183  
Baton Rouge, Louisiana 70804

Representative Taylor F. Barras  
Speaker of the House of Representatives  
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**REPORT TO THE LEGISLATURE  
IN RESPONSE TO SCR NO. 97 OF THE 2013 REGULAR SESSION**

Senate Concurrent Resolution No. 97 of the 2013 Regular Session urged and requested the Louisiana State Law Institute to study and make recommendations relative to the issue of whether the Code of Criminal Procedure should contain responsive verdicts for the crime of aggravated incest. The resolution also provided that “the lack of responsive verdicts for the crime of aggravated incest can result in a defendant being found ‘not guilty’ when the specific facts of a particular case as established at trial do not permit either a finding of guilty or a finding of guilt on a lesser included offense, or can result in a defendant being found guilty of a lesser included offense with a maximum penalty that is insufficient to serve the interests of justice.” In fulfillment of this request, the Law Institute assigned the project to its Criminal Code and Code of Criminal Procedure Committee.

The Committee’s Co-Chairman, Judge Robert Morrison, III, and late Reporter, Professor Cheney Joseph, conducted extensive background research with respect to this issue. However, before their proposed amendments to Code of Criminal Procedure Article 814 could be presented to the Committee for its consideration, the legislature enacted Acts 2014, Nos. 177 and 602 to repeal the crimes of incest and aggravated incest provided by R.S. 14:78 and 78.1 and to instead incorporate the elements and penalties of those crimes into the provisions of R.S. 14:89 and 89.1 on crimes against nature and aggravated crimes against nature. It was suggested that this legislative action effectively eliminated the subject matter of Senate Concurrent Resolution No. 97, particularly since the legislature did not simultaneously elect to provide responsive verdicts for offenses of aggravated crime against nature under R.S. 14:89.1(A)(2), the provision that corresponds to the previous crime of aggravated incest under R.S. 14:78.1.

Nevertheless, Subsection E of R.S. 14:89.1 provides that “[t]he provisions of Act No. 177 of the 2014 Regular Session and the provisions of the Act that originated as Senate Bill No. 333 of the 2014 Regular Session incorporate the elements of the crimes of incest (R.S. 14:78) and aggravated incest (R.S. 14:78.1), as they existed prior to their repeal by these Acts, into the provisions of the crimes of crime against nature (R.S. 14:89) and aggravated crime against nature (R.S. 14:89.1), respectively. For purposes of the provisions amended by Act No. 177 of the 2014

Regular Session and the Act that originated as Senate Bill No. 333 of the 2014 Regular Session, a conviction for a violation of R.S. 14:89(A)(2) shall be the same as a conviction for the crime of incest (R.S. 14:78) and a conviction for a violation of R.S. 14:89.1(A)(2) shall be the same as a conviction for the crime of aggravated incest (R.S. 14:78.1).”

Subparagraph (A)(2)(a) of R.S. 14:89.1 provides that aggravated crime against nature includes “[t]he engaging in any prohibited act enumerated in Subparagraph (b) of this Paragraph with a person who is under eighteen years of age and who is known to the offender to be related to the offender as any of the following biological, step, or adoptive relatives: child, grandchild of any degree, brother, sister, half-brother, half-sister, uncle, aunt, nephew, or niece.” Paragraph (A)(2)(b) then provides a list of acts that are prohibited under R.S. 14:89.1(A)(2), including sexual intercourse, sexual battery, second degree sexual battery, carnal knowledge of a juvenile, indecent behavior with juveniles, pornography involving juveniles, molestation of a juvenile or a person with a physical or mental disability, crime against nature, cruelty to juveniles, parent enticing a child into prostitution, and any lewd fondling or touching of the person of either the child or the offender.

Research revealed that under both previous law in R.S. 14:78.1 and existing law in R.S. 14:89.1(A)(2), there are, in effect, two separate offenses relative to the crime of aggravated incest, now the crime of aggravated crime against nature under R.S. 14:89.1(A)(2), based on the age of the victim. The first of these offenses, which occurs when the victim was under the age of thirteen years and the offender was seventeen years of age or older, is punishable by imprisonment at hard labor for not less than twenty-five nor more than ninety-nine years pursuant to R.S. 14:89.1(C)(2), with at least twenty-five years of the sentence served without benefit of parole, probation, or suspension of sentence. The second type of offense of aggravated incest, now aggravated crime against nature under R.S. 14:89.1(A)(2), is committed when the victim was thirteen years of age or older or the offender was less than seventeen years old. The penalty provided for this offense by R.S. 14:89.1(C)(1) is a term of imprisonment with or without hard labor for not less than five years nor more than twenty years, a fine not to exceed fifty thousand dollars, or both.

Research also indicated that under the Supreme Court’s rule in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the age of the victim must be treated as an essential element of the “greater” offense and must be proved beyond a reasonable doubt to the finder of fact on the issue of guilt or innocence, i.e., to the jury in a case triable by jury. *See also Alleyne v. United States*, 133 S.Ct. 2151 (2013). As a result, although the offense of aggravated incest under R.S. 14:78.1, now aggravated crime against nature under R.S. 14:89.1(A)(2), could be treated as a single offense with separate penalty provisions, the Committee found it clearer to treat the offenses as two separate offenses for purposes of providing responsive verdicts depending on whether the victim is under the age of thirteen years.

In addition to this research, the Committee considered the identical nature of the definitions of aggravated crime against nature under R.S. 14:89.1(A)(2) and aggravated incest under R.S. 14:78.1 prior to its repeal and the statement in R.S. 14:89.1(E) that “a conviction for a violation of R.S. 14:89.1(A)(2) shall be the same as a conviction for the crime of aggravated incest (R.S. 14:78.1).” The Committee also considered the possibility that a proposal to amend

Code of Criminal Procedure Article 815, which provides for responsive verdicts in general, may be submitted to the legislature for consideration during the 2018 Regular Session. In light of these considerations, the Committee ultimately concluded that pursuant to Senate Concurrent Resolution No. 97 of the 2013 Regular Session and absent the filing of a proposal to amend Code of Criminal Procedure Article 815, the following proposed amendments to Code of Criminal Procedure Article 814 with respect to providing responsive verdicts for the crime of aggravated crime against nature under R.S. 14:89.1(A)(2) should be submitted to the legislature for consideration:

**Article 814. Responsive verdicts; in particular**

A. The only responsive verdicts which may be rendered when the indictment charges the following offenses are:

\* \* \*

13.1. Aggravated crime against nature as defined by R.S. 14:89.1(A)(2) with a victim under the age of thirteen years where the offender is seventeen years of age or older:

Guilty as charged.

Guilty of attempted aggravated crime against nature with a victim under the age of thirteen years where the offender is seventeen years of age or older.

Guilty of aggravated crime against nature where the victim is not proved to be under the age of thirteen years or where the offender is under seventeen years of age.

Guilty of attempted aggravated crime against nature where the victim is not proved to be under the age of thirteen years or where the offender is under seventeen years of age.

[Guilty of an offense alleged in the indictment as an element of aggravated crime against nature.]

Not guilty.

13.2. Aggravated crime against nature as defined by R.S. 14:89.1(A)(2) where the victim is not under the age of thirteen years or where the offender is under seventeen years of age:

Guilty as charged.

Guilty of attempted aggravated crime against nature.



[Guilty of an offense alleged in the indictment as an element of aggravated crime against nature.]

Not guilty.

\* \* \*

It should be noted that because an attempt to commit a substantive offense is typically considered a lesser included offense, attempted aggravated crime against nature as defined by R.S. 14:89.1(A)(2) is recommended as a responsive verdict for both aggravated crime against nature in proposed Article 814(A)(13.2) and aggravated crime against nature with a person under the age of thirteen years old in proposed Article 814(A)(13.1). Additionally, in proposed Article 814(A)(13.1), aggravated crime against nature as defined by R.S. 14:89.1(A)(2) is recommended as a responsive verdict for aggravated crime against nature with a person under the age of thirteen years old, which, as previously mentioned, subjects the offender to heightened penalty provisions.

However, the lesser included offense of what was the crime of incest under R.S. 14:78 and what is now the crime of crime against nature under R.S. 14:89(A)(2) is not recommended as a responsive verdict for either aggravated crime against nature in proposed Article 814(A)(13.2) or aggravated crime against nature with a person under the age of thirteen years old in proposed Article 814(A)(13.1). As defined by R.S. 14:89(A)(2), which is identical to the definition previously provided by R.S. 14:78, the offense of crime against nature requires the “the marriage to, or sexual intercourse with, any ascendant or descendant, brother or sister, uncle or niece, aunt or nephew, with knowledge of their relationship.” As a result, the offense of crime against nature under R.S. 14:89(A)(2) requires “marriage to. or sexual intercourse with” certain family members, whereas the offense of aggravated crime against nature under R.S. 14:89.1(A)(2) requires the commission of one of the enumerated prohibited acts with certain family members, including sexual intercourse but also sexual battery, molestation of a juvenile, and lewd fondling or touching, among others. Additionally, the offense of crime against nature under R.S. 14:89(A)(2) requires the relationship between the family members to be “by consanguinity,” whereas the offense of aggravated crime against nature under R.S. 14:89.1(A)(2) requires the relationship between the family members to be “biological, step, or adoptive relatives.”

In *State v. Ardoin*, 35 So. 3d 1065, 1067 (La. 2010), the Louisiana Supreme Court noted that the crime previously defined as aggravated incest under R.S. 14:78.1, which is now defined as aggravated crime against nature under R.S. 14:89.1, encompasses familial relationships based on “both consanguinity and affinity.” According to the Court, the legislative intent of this provision is to prohibit various forms of sexual relationships that are “disruptive of the family.” *Id.* at 1068 (citing *Heikkila v. State*, 98 S.W. 3d 805 (Ark. 2003)). Thus, in *Ardoin*, the defendant, the victim’s uncle by marriage, could be convicted of aggravated incest (now aggravated crime against nature under R.S. 14:89.1(A)(2)) with a young woman who was the defendant’s niece by virtue of his marriage to the victim’s aunt. *Id.* Both offenses of crime against nature under R.S. 14:89(A)(2) and aggravated crime against nature under R.S. 14:89.1(A)(2) require knowledge of the relationship between the relatives, including ascendants

and descendants, brothers and sisters, uncles and aunts, and nephews and nieces. However, the offense of crime against nature under R.S. 14:89(A)(2) includes only relationships based on consanguinity, whereas the offense of aggravated crime against nature under R.S. 14:89.1(A)(2) includes persons with a "biological, step, or adoptive relationship" and is therefore broader.

It should also be noted that the offense of aggravated crime against nature under R.S. 14:89.1(A)(2) is committed by engaging in specific acts enumerated in Subparagraph (b) that are themselves defined as criminal offenses under other statutory provisions, such as sexual battery, second degree sexual battery, carnal knowledge of a juvenile, indecent behavior with juveniles, pornography involving juveniles, molestation of a juvenile or a person with a physical or mental disability, crime against nature, cruelty to juveniles, and parent enticing a child into prostitution. As a result, if the offenses enumerated by R.S. 14:89.1(A)(2)(b) are alleged in the indictment as means of committing the offense of aggravated crime against nature, these offenses can arguably be considered as lesser included offenses due to their inclusion as elements of aggravated crime against nature under R.S. 14:89.1(A)(2). Additionally, under Code of Criminal Procedure Article 480, if an offense may be committed by doing one or more of several acts, or by one or more of several means, two or more of such acts or means may be charged conjunctively in a single count of an indictment, and proof of any one of the acts or means so charged will support a conviction. Arguably, then, each of the offenses enumerated by R.S. 14:89.1(A)(2)(b) could serve as a separate means of committing the crime of aggravated crime against nature under R.S. 14:89.1(A)(2) such that each of these offenses could potentially become a responsive verdict.

Nevertheless, the inclusion of each of the offenses enumerated by R.S. 14:89.1(A)(2)(b) as responsive verdicts for aggravated crime against nature in proposed Article 814(A)(13.2) or aggravated crime against nature with a person under the age of thirteen years old in proposed Article 814(A)(13.1) would result in an inordinately lengthy and excessively complicated list of responsive verdicts for juries to consider. Additionally, the original version of Code of Criminal Procedure Article 814 did not provide many lesser included offenses as responsive verdicts in order to simplify instructions to juries with respect to which verdicts should be considered. For example, attempted armed robbery, attempted simple robbery, and attempted burglary were not included as responsive verdicts for the crimes of armed robbery, simple robbery, or burglary under the original version of Code of Criminal Procedure Article 814, although they are provided as responsive verdicts in the current provision. *See, e.g.*, Article 814(A)(22), (24), and (42). In light of these policy concerns, the listing of the offenses enumerated by R.S. 14:89.1(A)(2)(b) as responsive verdicts for aggravated crime against nature in proposed Article 814(A)(13.2) and aggravated crime against nature with a person under the age of thirteen years old in proposed Article 814(A)(13.1) has been bracketed for consideration by the legislature.