



D.C. Criminal Code Reform Commission

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MINUTES OF PUBLIC MEETING

WEDNESDAY, OCTOBER 3, 2018 at 10:00 AM

CITYWIDE CONFERENCE CENTER, 11th FLOOR OF 441 4th STREET NW
WASHINGTON, D.C. 20001

On Wednesday, October 3, 2018, at 10:00 am, the D.C. Criminal Code Reform Commission (CCRC) held a meeting of its Criminal Code Reform Advisory Group (Advisory Group). The meeting was held in Room 1112 at 441 Fourth St., N.W., Washington, D.C. The meeting minutes are below. For further information, contact Richard Schmechel, Executive Director, at (202) 442-8715 or richard.schmechel@dc.gov.

Commission Staff in Attendance:

Richard Schmechel (Executive Director)

Rachel Redfern (Chief Counsel for
Management & Legislation)

Michael Serota (Chief Counsel for Policy
& Planning) by phone

Jinwoo Park (Attorney Advisor)

Patrice Sulton (Attorney Advisor)

Advisory Group Members and Guests in Attendance:

Laura Hankins (Designee of the Director of
the Public Defender Service for the District
District of Columbia)

Katarina Semyonova (Visiting Attendee of
the Public Defender Service for the of
Columbia) to 11:45

Kevin Whitfield (Representative of the D.C.
Council Committee on the Judiciary and
Public Safety) to 11:40

Dave Rosenthal (Designee of the Attorney
General for the District of Columbia) from
11:30

Renata Kendrick Cooper (Designee of the United
States Attorney for the District of Columbia) from
10:20

I. Welcome and Announcements

- a. The Executive Director noted that Advisory Group written comments on first drafts of reports # 26-30, which were distributed on September 26, are due December 21, 2018. Although the distributed documents themselves state a due date of December 19, since the email providing the documents stated a due date of December 21 that later date will be the effective due date.
- b. The Executive Director noted that staff is working on updates and second drafts of earlier reports based on Advisory Group comments, and new documents are planned for distribution at the end of January 2019. Advisory Group comments on the September 26 set of reports are expected to be incorporated into revised drafts to be produced by January 2019. From late December 2018 to late January 2019 staff will distribute for Advisory Group review a few draft recommendations for review.
- c. The Executive Director also noted that after these updates, staff plans to develop first draft recommendations relating to controlled substance offenses and weapon offenses.
- d. The Executive Director also noted that the next Advisory Group meeting is scheduled for November 7, 2018.

II. The Advisory Group discussed Advisory Group Written Comments to First Draft of Report No. 25: Merger.

- a. The Advisory Group discussed the Public Defender Service's (PDS) suggestion to restructure the merger provision as a mandatory rule instead of a presumption. Staff noted that it agrees with this suggestion, and in a subsequent draft plans to eliminate the presumption language and clarify that the merger rule is mandatory.
- b. The Advisory Group discussed the Office of the Attorney General's (OAG) suggestion to clarify, by statute, that the merger principle governing logically inconsistent offenses, RCC § 22A-212(a)(3), entails a pure legal analysis (i.e., the offenses must be logically inconsistent *as a matter of law*). Staff noted that it agrees with this suggestion, and in a subsequent draft plans to statutorily incorporate relevant language already included in the explanatory note.
- c. The Advisory Group discussed comments from PDS and OAG relating to the rule of priority that governs the determination of which offense shall remain when two or more offenses merge. Staff noted that PDS' suggestion—that the offense with the longest statutory maximum sentence should remain—was the clearest and simplest of available approaches, and in a subsequent draft plans to statutorily clarify this point.
- d. The Advisory Group discussed OAG's comment concerning slight revision of RCC § 22A-212(e)(2). Staff noted that it agreed with OAG's suggestion to replace the phrase "has been affirmed" with "has been decided," and in a subsequent draft plans to statutorily incorporate this language.
- e. The Advisory Group discussed OAG's comment concerning how the merger provision applies to the situation of a defendant who has been convicted of both RCC and non-RCC offenses. Staff noted that it agreed with OAG's point that, pursuant to of RCC § 22A-103, the merger provision would not apply to convictions for non-RCC offenses, regardless of whether those convictions are accompanied by convictions for RCC offenses. Staff explained that it would consider statutory revisions to RCC § 22A-103 that more clearly communicate this point in a subsequent draft.

III. The Advisory Group discussed Advisory Group Written Comments to First Draft of Report No. 23: Disorderly Conduct and Public Nuisance.

- a. Staff discussed OAG’s comment relating to the definition of a “public building” as used in the draft public nuisance statute. Staff noted that the intent was to cover buildings that hold hearings or public meetings of record. The PDS representative noted that the proposed definition is too broad. Staff noted that it would not include government officials in a coffee shop discussing official government business.
 - i. The PDS representative asked whether relying on the definition of meeting as defined under the Open Meetings Act would be workable.
 - ii. Mr. Whitfield noted that the definition of public meeting could be a solution to narrow the scope of the definition of public buildings, but excludes courts.
- b. The Advisory Group discussed OAG’s comment regarding the requirement under the draft disorderly conduct statute that the defendant must create a risk of harm to another person. The OAG comment was concerned about whether disorderly conduct would include a person who uses fighting words that could provoke injury to the speaker.
 - i. Staff clarified that the draft disorderly conduct offense was intended to include fighting words that provoke violence toward the speaker and intended to exclude dangerous stunts that create a risk of harm to oneself. Staff asked for the group’s position on amending “bodily injury to another person” to “bodily injury to any person” to better reflect the intended meaning.
 - ii. The PDS representative noted that it is unlikely that a person who instigates violence could do so in a way that *only* creates risk of self-harm, but not harm to others. Staff offered a hypothetical in which a single person yelled fighting words at a group of people.
 - iii. Mr. Whitfield asked whether staff discussed drafting a separate fighting-words offense to address speech instead of conduct. Staff replied that it has considered drafting a separate offense but preferred the statute focus on the intent and effect of the conduct and not the manner, to avoid First Amendment concerns about content-neutrality.
- c. The PDS representative asked about the use of the word “unlawful.” Staff clarified that (1) the draft language does not require that the present conduct itself be unlawful, and (2) the draft language does not require that the reasonable observer *believe* that the present conduct is unlawful, but (3) the future result which the person believes will occur must actually be unlawful.
- d. The PDS representative raised concerns that innocent conduct could be unduly criminalized. For example, two young people who are consensually roughhousing could cause a person to reasonably believe that an unlawful bodily injury is immediate and likely. Staff explained that even consensual conduct may amount to disorderly conduct if it recklessly causes public alarm. Staff also distinguished breach of peace offenses from attempted crimes.
- e. Mr. Whitfield asked whether “unlawful” requires violation of a criminal law, or also civil laws.

- f. The USAO representative asked whether the current disorderly offense serves as a plea-down offense. The Executive Director noted that it's not clear, but it doesn't appear that it is often used as a plea down offense and noted that the completed crimes of assault, destruction of property, and theft are prosecuted by a different agency (USAO) than disorderly conduct (OAG).
- g. The PDS representative raised concerns that racial bias plays a role in perceived criminality. For example, a store security guard might quickly assume that a black teenager is poised to shoplift. Staff noted that the reckless mental state and the requirement that the belief be reasonable require a degree of objectivity. Staff also noted that, while breach-of-peace offenses are necessary to authorize police intervention, there are many procedural reforms that could address concerns about officer retaliation, racial profiling, and the direct and collateral consequences of an arrest. Most notably, the District requires or permits a full custodial arrest in many instances that other jurisdictions would require issuance of a citation instead. The Executive Director explained that the Commission will also consider recommending a low-level penalty class that places limits on police authority and may be appropriate for low level crimes such as disorderly conduct.
- h. The Advisory Group discussed OAG's comment that the revised disorderly conduct statute would change law by excluding conduct directed at law enforcement officers, such as inciting a crowd to "stone the cops." The Executive Director noted that the hypothetical raised by OAG would constitute other more serious offenses.
- i. The Advisory Group discussed OAG's comments relating to the noise provision in the draft public nuisance statute, which suggested eliminating the requirement that the defendant was located in an area open to the general public or communal area of multi-unit housing. Staff asked PDS whether it would oppose eliminating the public location requirement for all nuisance offenses. The PDS representative objected to eliminating this requirement.
- j. The Advisory Group discussed PDS's comment that suggested adding a warning requirement for disorderly conduct. The OAG representative noted that many cases of disorderly conduct do not occur in the presence of police officers, and disagreed with adding the warning requirement. The OAG representative noted that in some disorderly cases a more serious offense could have been charged, and that there's some benefit to having an alternative less serious offense.
 - i. Staff noted that some jurisdictions treat refusal to comply with a police warning as an aggravated form of disorderly conduct, and grading on this is an option. The PDS representative objected to this type of gradation structure.
- k. The Advisory Group discussed PDS's comment that "public gathering" can be defined to "means" any funeral or similar proceeding, instead of "includes." The OAG representative said he agreed with this proposal.
- l. The Advisory Group discussed PDS's suggestion that public nuisance and disorderly conduct should be jury demandable offenses. The OAG representative did not agree with this proposal, especially because many disorderly cases do not involve First Amendment concerns.

- m. The Advisory Group discussed whether language defining a “public meeting” that relies on the meaning of that term in the District’s Open Meetings Act could be incorporated into the revised public nuisance statute. The OAG representative stated he would review the open meetings act language and inform the Commission of OAG’s position.
- IV. The Advisory Group did not discuss the Advisory Group Written Comments to First Draft of Report No. 24: Failure to Disperse and Rioting.**
- a. The Executive Director noted the agenda for the next meeting will include the written comments to failure to disperse and rioting in case the Advisory Group wishes to discuss those items.
- V. Adjournment.**
- a. The meeting was adjourned at 12:00 PM.