



D.C. Criminal Code Reform Commission

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MINUTES OF PUBLIC MEETING

WEDNESDAY, DECEMBER 19, 2018, at 10:00 AM

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

On Wednesday, December 19, 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)

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
of Columbia)

Katarina Semyonova (Visiting Attendee of
the Public Defender Service for the District
of Columbia)

Kevin Whitfield (Representative of the D.C.
Council Committee on the Judiciary and
Public Safety) from 10:35

Dave Rosenthal (Designee of the Attorney
General for the District of Columbia)

Paul Butler (Council appointee) by phone

Don Braman (Council appointee)

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, 2018, are due December 21, 2018.
- b. The Executive Director noted that a small package of recommendations will be issued next week. Comments will be due seven weeks thereafter.
- c. The Commission is continuing its work on a comprehensive review and update of draft recommendations to date. Drug and weapon offense recommendations will follow. The Executive Director solicited any advance comments on potential reforms to drug and weapon offenses, formal or informal.

II. The Advisory Group discussed the First Draft of Report No. 27: Human Trafficking and Related Statutes.

- a. The Executive Director highlighted a concern that has arisen in individual conversations with Advisory Group members about the application of the anti-harboring provisions to people who provide humanitarian aid to trafficking victims, such as shelter, food, or currency. The Commission wishes to revise the draft statute to ensure these persons are not liable, and solicited any recommendations on how to best to do this.
- b. PDS objected to the use of the term “harbor” anywhere in the revised human trafficking statutes for its ambiguity and breadth. The term may criminalize conduct performed to benefit victims of human trafficking. Along with “transports” and “maintains by any means,” the term “harbor” seems to include people who have incidental relationships to a trafficking scheme. For example, PDS said that people—such as commercial drivers and landlords—who knowingly provide transportation or shelter without intending to facilitate trafficking should not be criminally liable, but are under the current District law and draft RCC statutes.
 - i. Staff noted that the verb “harbor” appears in most trafficking statutes in other jurisdictions, however, the term is not statutorily defined.
- c. Professor Braman suggested that, as in other areas of law, accomplice liability could address persons who aid, abet, or encourage, forced labor or forced commercial sex.
 - i. Staff noted that accomplice liability requires purposefully aiding and would not capture a person who acts with only knowledge or intent to aid, unlike current District law and the draft RCC statutes.
- d. Group members disagreed about whether a person who acts knowingly should be criminally liable. The group discussed a hypothetical in which a taxicab driver transports a person to an appointment knowing that the appointment is for coerced sex.
 - i. OAG distinguished between a one-time driver and a driver who routinely transports a victim at a particular time each day and posited that only the latter should be liable for trafficking.
 - ii. PDS said that a driver—even a routine driver—who knows a person is being transported to an appointment where sex will be coerced but is indifferent to the destination (e.g., a driver who would change course if the rider directed him to do so) should not be liable.
 - iii. Professor Braman said that accomplice liability handles these distinctions by allowing the factfinder to consider whether there is a criminal nexus or a stake in the venture when deciding whether the driver had the purpose to assist. He

- contrasted public welfare offenses, in which purpose can be inferred from the moment there is knowledge.
- e. The Executive Director noted that, in the hypothetical of a regular driver, there may also be liability for the separate offense of benefiting financially from the trafficking enterprise, both in current District law and the RCC.
 - f. Staff offered the phrase “knowingly provides substantial assistance or regular assistance” as a possible way to limit liability.
 - i. Professor Butler said that there is an unresolved policy disagreement about whether “knowingly providing regular assistance” should be included at all. He offered a hypothetical in which a pizza delivery driver regularly brings food to a location, knowing trafficking is occurring there.
 - ii. Staff clarified that the revised accomplice liability provision tracks current District case law and does not impose accomplice liability where a person aids with indifference (e.g., a sales clerk who sells a gun to someone knowing it will be used in a murder). Although such a person would not be liable as an accomplice to murder, he may still be liable for another offense such as trafficking the gun, depending on the policy choice that is made within the offense definition.
 - iii. Professor Butler recommended limiting trafficking liability to accomplice liability. Expanding trafficking liability beyond accomplice liability may capture innocent behavior. He offered a hypothetical in which hotel personnel regularly cleans a room after sex work.
 - iv. OAG reiterated its position that a driver who regularly and knowingly transports a trafficking victim to the site of the criminal act should be criminally liable. However, OAG agreed that a pizza delivery driver or housekeeping staff should not be liable, because their conduct occurs after the coerced sex and is not facilitating the coercion.
 - 1. PDS responded that the driver, delivery person, and housekeeping staff are similarly situated. All are providing food, transportation, or other maintenance services that are helpful to the enterprise. All have viable alternatives to not help the enterprise.
 - 2. Staff responded that it is unclear from the legislative history whether the term “maintains by any means” in the current District statute and the revised offense is intended to include all three hypotheticals.
 - 3. The Committee representative distinguished between services that are necessary to the enterprise and cases where the criminal act would occur without the service. He said an option was including an exception where the conduct is part of the person’s normal course of business.
 - g. Professor Braman explained that there are at least three approaches to consider: relying on accomplice liability, defining the main offense to include marginal participants, or separately penalizing marginal participants with a lesser penalty as part of a separate gradation or offense.
 - i. Staff explained that the current revised benefitting from human trafficking offense tracks current law and may penalize marginal participants who are not

accomplices or co-conspirators the same as primary persons involved in coercion.

1. PDS objected to criminalizing providing regular, knowing assistance and offered a hypothetical wherein a limousine driver appears for a shift and is directed by his boss (who unknowingly contracted with a trafficker) to transport a person who is a trafficking victim.
 2. Professor Butler said that the accomplice statute already addresses the culpability of persons who take action in support of another person's crime and objected to expanding accomplice liability based on the nature or severity of the offense.
- h. The Executive Director noted that another policy consideration that may have played a role in the breadth of the current statutes nationwide is the interplay between the criminal statutes and civil asset forfeiture provisions. D.C. Code 22-1838 provides the District's civil asset forfeiture law for human trafficking, and the draft RCC tracks this language. Case law from other jurisdictions indicates that law enforcement may effectively use prosecution or seizure of assets from marginal actors who provide infrastructure to the operation as a way to gather intelligence about and evidence against principals in the organization. However, he noted that there is no case law or other indicator of such practices in the District.
- i. OAG said that there must be a nexus between the asset and the criminality and seizure cannot be excessive.
 1. Staff noted that there is also ongoing Supreme Court litigation about proportionality of fines and civil asset forfeiture.
 - ii. Professor Braman said that the proper way to handle the concern about maintaining this kind of law enforcement strategy may be through civil seizure statutes. He said that the criminal code should not expand liability to reach everyone at the margins for the purpose of making those witnesses easier to "flip." Often, the more experienced player flips on the marginal player and the marginal player ends up getting all the time. Instead, he said that the code should have narrowly-scoped core statutes for serious conduct. If the legislature wants to address less serious conduct, it should draft a narrowly-scoped civil forfeiture or a separate criminal statute with a lower penalty. It is not desirable to draft broadly-scoped core statutes with big penalties just to help with those kinds of prosecutions.
- i. OAG noted that the District was recently given a low rating for its existing human trafficking laws by an advocacy group.
- j. PDS objected to the labeling of "trafficking" for conduct that is relatively less serious. PDS said that "trafficking" sounds worse than "forced commercial sex," although it includes lesser culpability. PDS suggested renaming "forced commercial sex" as trafficking and relying on accomplice liability to cover conduct that actually assists and aids in the forced commercial sex.
- i. Staff explained that the labels are relatively standard across jurisdictions. Staff said that "trafficking" is typically understood to mean transporting people who will be forced to provide labor or commercial sex acts, and actually coercing a person to provide labor or commercial sex acts is a separate offense. However, staff agreed that "human trafficking" carries a connotation of repeated conduct

and numerous trafficked persons, although the actual offenses do not require repeated conduct or more than one trafficked person.

- ii. Staff noted that forced commercial sex also constitutes sexual assault.
 - 1. PDS said it objected to forced commercial sex being prosecuted as sexual assault.
- k. The committee representative said a reform option is to narrow the benefitting from human trafficking offense to two specific modes of assistance, e.g. transportation and housing, which are the primary concern.
- l. OAG said it may recommend a different penalty structure for trafficking offenses to allow higher fines for business defendants than individual defendants.
 - i. The Executive Director noted that the District's current fine proportionality act does not include an exception for the human trafficking offenses, but does categorically allow a doubling of fines for business defendants. The RCC also provides for doubling. The Executive Director asked Advisory Group members who had participated in drafting the fine proportionality act whether there was prior Council consideration of an added fine for businesses engaged in human trafficking. Present members did not have any specific recollection.
- m. OAG asked whether CCRC staff has compiled a list of provisions that are in Title 22, but are not in Title 22A, but that will be enacted into Title 22E. The Executive Director noted that when Title 22 is enacted, the general part will not apply to any statutes that have not been revised. The Executive Director noted that conforming amendments will address these issues.

III. Adjournment.

- a. The Executive Director asked if members wished to discuss any further items on the agenda. With no further questions or comments, the meeting was adjourned at 11:31am.