



D.C. Criminal Code Reform Commission
Performance Oversight Hearing
Testimony

COMMITTEE ON THE JUDICIARY & PUBLIC SAFETY HEARING
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DISTRICT OF COLUMBIA CRIMINAL CODE REFORM COMMISSION
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Introduction

Thank you for holding this oversight hearing on the D.C. Criminal Code Reform Commission (the “CCRC”). My name is Richard Schmechel. I am the agency’s Executive Director and I’m happy to testify today on behalf of the agency. Beyond my testimony I would refer anyone interested in more information about the agency’s activities to check out its website, www.ccrdc.gov, where all the agency’s draft recommendations for code reform to date, are posted. Any member of the public may review the agency’s work there and submit comments.

The CCRC began operation as a new, independent District agency just over three years ago, on October 1, 2016. The agency is tasked with submitting to the Mayor and the Council comprehensive criminal code reform recommendations that meet certain statutorily-specified goals.¹ These goals include revising criminal statutes to use clear and plain language, to apply consistent definitions, to describe all offense elements that must be proven, to reduce unnecessary overlap and gaps between criminal offenses, to adjust penalties to be proportionate, and to enact Title 22 of the D.C. Code.

Many of these goals are simply a matter of good governance. However, some aspects of the agency’s goals address core criminal justice reform issues where there may be strong disagreement (e.g., the severity of sentences, the use of mandatory minimum sentencing, and the boundary between criminal and non-criminal behavior).

I also want to emphasize that the agency’s statutory mandate is focused on recommending changes to the *substantive* criminal law of the District—i.e., the law specifying how crimes are defined and punished. Many other criminal justice reform matters, such as statutes of limitations, record sealing, and policing methods are not within the agency’s purview.

How does the CCRC develop code reform recommendations?

In developing its recommendations for revised criminal statutes, the CCRC examines three main sources of information. First, the CCRC researches existing District law, both statutes and binding case law (from courts). Agency staff prepares a detailed legal commentary that describes how draft reform recommendations would or could change existing District law.

Second, with data from the D.C. Superior Court and other sources, the CCRC analyzes available information on the current *use* of the D.C. Criminal Code. This information is of particular help in

¹ D.C. Code § 3-152(a) (“By September 30, 2019, the Commission shall submit to the Mayor and the Council comprehensive criminal code reform recommendations that revise the language of the District’s criminal statutes to: (1) Use clear and plain language; (2) Apply consistent, clearly articulated definitions; (3) Describe all elements, including mental states, that must be proven; (4) Reduce unnecessary overlap and gaps between criminal offenses; (5) Eliminate archaic and unused offenses; (6) Adjust penalties, fines, and the gradation of offenses to provide for proportionate penalties; (7) Organize existing criminal statutes in a logical order; (8) Identify any crimes defined in common law that should be codified, and propose recommended language for codification, as appropriate; (9) Identify criminal statutes that have been held to be unconstitutional and recommend their removal or amendment; (10) Propose such other amendments as the Commission believes are necessary; and (11) Enable the adoption of Title 22 as an enacted title of the District of Columbia Official Code.”).

developing recommendations about the grading of offenses and penalty proportionality.

Third, the CCRC looks outside the District to other jurisdictions' criminal laws, changes to criminal offenses recommended by the American Law Institute (ALI),² and best practices recommended by criminal law experts nationally. While the District's criminal laws should not mechanically follow other jurisdictions, identifying trends in other jurisdictions and where the District is an outlier nationally can be an important indicator of where reform recommendations are appropriate.

When the agency has assembled a draft of its reformed criminal statutes and supporting legal commentary, these are shared with the CCRC's Advisory Group,³ a statutorily-designated group of stakeholders who review the draft statutory language and commentary, and provide feedback.

Based on the Advisory Group's comments, the CCRC drafts are updated then re-circulated for further Advisory Group review and comment. This redrafting may be repeated several times. The goal of this iterative process is not consensus. The stakeholders at the table all care greatly about improving criminal justice, but they have differing perspectives on what criminal justice is and how to do better. Many of the policy questions confronted by the CCRC are hard questions on which reasonable persons can disagree. The goal of the drafting process is to ensure the accuracy of the agency's work, uncover (and preserve) differences of opinion, and seek as much agreement as possible. Ultimately, by statute, the CCRC must secure a majority of the Advisory Group voting members' consent for the recommendations to be submitted to the Council and the Mayor.⁴

What were the agency's main accomplishments in 2019?

There are six agency activities since the agency's 2019 oversight hearing that I would like to highlight.

First, in early March and April 2019 the CCRC completed an across-the-board cumulative update of draft reform recommendations to date, reconciling Advisory Group comments with each other and statutory mandate. The update prompted a wave of new Advisory Group comments beyond

² The ALI is the national body of judges and legal practitioners that developed the Model Penal Code.

³ The current voting members of the Advisory Group are: Don Braman, Associate Professor of Law, George Washington University School of Law (Council Appointee); Paul Butler, Professor of Law, Georgetown University Law Center (Council Appointee); Renata Kendrick Cooper, Special Counsel for Policy and Legislative Affairs, United States Attorney's Office for the District of Columbia (Designee of the United States Attorney for the District of Columbia); Laura Hankins, General Counsel, Public Defender Service for the District of Columbia (Designee of the Director of the Public Defender Service for the District of Columbia); and Dave Rosenthal, Senior Assistant Attorney General, Office of the Attorney General for the District of Columbia (Designee of the Attorney General for the District of Columbia).

The current non-voting members of the Advisory Group are: Kevin Whitfield, Policy Advisor, Committee on the Judiciary and Public Safety (Designee of the Chairperson of the Council Committee on the Judiciary and Public Safety); and Helder Gil, Chief of Staff, Office of the of the Deputy Mayor for Public Safety and Justice (Designee of the Deputy Mayor for Public Safety and Justice).

⁴ D.C. Code § 3-153.

what was anticipated. While welcome, addressing these comments has been a major challenge this past year.

Second, in July 2019 the CCRC issued its first draft recommendations for reform of the District's controlled substance statutes. Prominent among these recommendations is the decriminalization of personal possession of drug paraphernalia in certain circumstances (not including the sale of items or their use in manufacturing or distribution) and the grading of distribution and possession with intent to distribute drug crimes by the weight of the substance involved, which distinguishes minor trafficking.

Third, in August 2019 the CCRC issued its first recommendations for reform of statutes concerning possession of dangerous weapons (including firearms). Notable among these recommendations is the decriminalization of the possession of a self-defense spray (though misuse may still be prosecuted) and the regrading of prohibited weapons offenses to better distinguish the seriousness of various items, like a machine gun versus brass knuckles.

Fourth, in October 2019 the CCRC issued to its Advisory Group an array of information and analysis for assessing whether District statutory penalties are proportionate. This included detailed statistics on D.C. Superior Court dispositions of adult charges, both felonies and misdemeanors, brought 2009-2018. The agency's analysis differentiates charge and conviction information, and provides by decile the length of sentences imposed. In addition, the agency released the results of several robust (400 respondent) surveys of District voters' opinions on the relative severity of certain criminal harms. Voters were asked to compare crime scenarios (e.g. residential burglary or theft of \$5,000) against various defined bodily injuries on a 12 point scale. Both measures—court statistics showing recent practices and polling data—differ sharply from District laws in many respects and provide an evidence-based approach to assessing where penalty reforms may be needed.

Fifth, also in October 2019, using the court statistics and public polling data just mentioned, as well as current statutory penalties and the rankings in the District's Voluntary Sentencing Guidelines, the agency issued to its Advisory Group a draft "ordinal" ranking of its revised offenses. This ordinal ranking didn't recommend a maximum or minimum penalty. Instead, the ranking ordered revised offenses by their relative seriousness and suggested groupings of these offenses (of similar seriousness) into 9 felony penalty classes and 5 standardized misdemeanor penalty classes. The draft ordinal ranking varied significantly from the absolute statutory penalties in the current D.C. Code for burglary and certain firearm-related crimes. Accompanying the draft ordinal rankings were draft recommendations for a modest expansion of the right to a jury for crimes carrying a possible imprisonment penalty. Over 40 states provide greater access to trial by jury than the District, with over 35 providing a jury of peers for every criminal charge involving any amount of jail or prison-time.

Sixth, in November 2019 the CCRC issued its first recommendations for reform of various obscenity and privacy-related offenses. The draft recommendations include the elimination of outdated statutes concerning the creation of “obscene, indecent, or filthy” writings or images, or items for “immoral” uses. Under the draft recommendations the creation or trafficking of obscene images of a minor would remain criminal, as would the unsolicited distribution of obscene materials.

What are the agency’s plans for the remainder of FY 20?

In the next week the CCRC will release a second across-the-board update to its earlier draft recommendations that will incorporate changes based on feedback from its Advisory Group and further staff review. New and updated draft recommendations for penalties will be released in March that address the maximum and minimum imprisonment penalties for each class of crimes. In April, the agency plans to release recommendations for a few additional offenses, including prostitution and bail reform act violations, as well as additional defenses.

However, the primary goal the agency is working toward in FY20 is the release of a report containing the final draft of all recommendations the CCRC has developed to-date. This report will be submitted to the agency’s Advisory Group for a vote, with subsequent distribution to the Mayor and Council. The precise timing for will depend on several factors, but currently the agency is working toward the release of this final draft in late May or early June (no later than July), and an Advisory Group vote in late June or early July (no later than early September).

The report will consist of: 1) statutory text for a new Title 22 and other D.C. Code offenses, comprised of a general part (providing common definitions and rules of liability applicable to revised offenses) and a new special part (consisting of dozens of particular offenses); 2) a detailed legal commentary explaining how and why the revisions change current District law; 3) an appendix providing a copy of all Advisory Group written comments on the drafts and final versions of recommendations; and 4) appendices providing statistical information on charging and sentencing, practices in other jurisdictions, and other background information.

The agency’s work for the remainder of FY20 will depend chiefly on whether and to what extent the agency’s authorization and funding is extended into FY21. At a minimum the agency will seek to create legislative summaries of the CCRC recommendations and relevant statistics.

What are the agency’s plans if it continues into 2021?

By this September, the CCRC expects to issue draft recommendations to crimes that, cumulatively, have accounted for over 85% of all adult convictions in recent years. If the agency’s mandate is extended half-way through FY21 and work proceeded on schedule, that number would go to over 96%. This is in addition to the many new criminal provisions and codification of certain general defenses that the CCRC will be recommending. Details of the particular crimes

the agency would target for revision are provided in the Agency Work Plan and Schedule, provided to the Committee as part of its responses to pre-hearing questions. With extension through FY21, reform recommendations for nearly all crimes in current use could be prepared.

Conclusion.

In closing, I want to recognize the members of the agency's Advisory Group for their service. I also would like to thank this Committee, the Council, and the Mayor for their ongoing support of a comprehensive review of District criminal statutes. It is a massive, complex task that raises a host of difficult questions about what criminal justice is and how to do better. The task is complicated by the fact that the District, unlike most jurisdictions in the United States, has never undergone a comprehensive update of its offenses and penalties. So the challenge isn't just moving the law of 2000 or 1980 to the present, but in many instances the District's laws are essentially the same as when Congress wrote them for the District in 1901. Change is long overdue, but it's happening.

With the release of the CCRC recommendations later this year District leaders will have a detailed blueprint for how to modernize its criminal laws to be clear, complete, consistent, proportionate, and better reflect current District norms. While a great deal of work lies ahead to review, amend, and move comprehensive reform legislation forward, I think the agency's work will be an essential and major step forward. On behalf of myself and all the CCRC staff, it is a privilege to support these efforts. Thank you.

I'd welcome any questions the Committee may have.