



D.C. Criminal Code Reform Commission

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MINUTES OF PUBLIC MEETING

WEDNESDAY, APRIL 5, 2017 at 2:00PM

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

On Wednesday, April 5, 2017 at 2:00pm, 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 4th 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:

Rachel Redfern (Chief Counsel for Management & Legislation)

Michael Serota (Chief Counsel for Policy & Planning)

Jinwoo Park (Attorney Advisor)

Bryson Nitta (Attorney Advisor)

Advisory Group Members and Guests in Attendance:

Paul Butler (Council Appointee), until 2:45 PM

Donald Braman (Council Appointee), via phone

Laura Hankins (Designee of the Director of the Public Defender Service for the District of Columbia), until 3:00 PM.

Renata Kendrick Cooper (Designee of the United States Attorney for the District of Columbia)

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

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

I. Welcome

- a. Rachel Redfern, Chief Counsel for Management & Legislation (CCML), called the meeting to order.
- b. The CCML noted that the deadline is April 24, 2017 for Advisory Group written comments on two reports, the First Draft of Report No. 3, Recommendations for Chapter 2 of the Revised Criminal Code—Mistake, Deliberate Ignorance, and Intoxication, and the First Draft of Report No. 4, Recommendations for Chapter 1 of the Revised Criminal Code—Preliminary Provisions.
- c. The CCML noted that two new reports on draft general provisions for attempts and classification of offenses will be submitted for Advisory Group review in late April, after the deadline for Advisory Group written comments on the First Drafts of Reports Nos. 3 and 4. Additionally, a report on general enhancements may be issued by the end of April or early May.
- d. The CCML reminded everyone that the previously scheduled May 3, 2017 Advisory Group Meeting has been moved to Wednesday, May 17, at 2:00-4:00 p.m.

II. Vote on Report No. 1: Recommendations for Enactment of D.C. Code Title 22 and Other Changes to Criminal Statutes (Voting Draft).

- a. The CCML stated that, if approved, Report No. 1 and the accompanying appendices would be sent to the Council and the Mayor by the end of April. An electronic copy of this transmission will be sent to the Advisory Group. Prior to sending the materials, the redline edits currently in the Voting Draft version would be removed.
- b. The CCML noted that any Advisory Group member may submit a written statement to accompany the final version of Report No. 1 and the appendices. The deadline for such a statement is April 26, 2017. The statement would be appended to the final version of Report No. 1 and the appendices.
- c. The CCML stated that a majority of the five voting members of the Advisory Group was necessary to approve Report No. 1 and the appendices. A “yes” vote meant approving the Report and appendices and sending them to the Mayor and the Council.
- d. The CCML conducted a roll-call vote. All five voting members of the Advisory Group voted “yes,” with no abstentions.¹

¹ The five voting members of the Advisory Group are currently: 1) Professor Donald Braman (Council Appointee); 2) Professor Paul Butler (Council Appointee); 3) Ms. Renata Kendrick Cooper (Designee of the United States Attorney for the District of Columbia); 4) Ms. Laura Hankins (Designee of the Director of the Public Defender Service for the District of Columbia; and 5) Mr. Dave Rosenthal (Designee of the Attorney General for the District of Columbia).

III. Discussion of First Draft of Report No. 3: Recommendations for Chapter 2 of the Revised Criminal Code—Mistake, Deliberate Ignorance, and Intoxication.

- a. Professor Butler asked about the relationship between the general provision on deliberate ignorance, § 22A-208(c), and current District law. Staff replied that the provision is generally in accordance with District law. The D.C. Code is silent on the issue of deliberate ignorance, while the DCCA has generally recognized the applicability of the willful blindness doctrine through case law.² However, staff explained that reported DCCA decisions addressing this doctrine are scant, and those that do exist provide limited direction on the approach to willful blindness doctrine envisioned by the DCCA. The proposed general provision would fill this gap with an approach modeled on the common law, rather than the Model Penal Code.
- b. Professor Butler explained that the willful blindness doctrine is a legal fiction, which can allow convictions even when the defendant lacks the required mental state. Staff agreed, but noted that in some instances the deliberately ignorant actor may be as culpable as the knowing actor.
- c. The Public Defender Services (PDS) representative asked whether the general provision on deliberate ignorance, § 22A-208(c), requires that the defendant have the *sole* purpose of avoiding criminal liability, or if the defendant can have other simultaneous purposes. The PDS representative and Professor Butler highlighted a variety of examples drawing out the significance of this point. Staff noted that it is ambiguous based upon the proposed draft language, and that this was an issue worthy of further consideration both as a matter of drafting and policy.
- d. The PDS representative stated she would be more comfortable with the recklessness requirement currently utilized in § 22A-208(c)(1) if § 22A-208(c)(2) was drafted in a manner that clearly required that the defendant have the sole purpose of avoiding criminal liability. Absent that, the PDS representative suggested that § 22A-208(c)(1) should incorporate a separate “high probability” requirement (instead of recklessness).
- e. The PDS representative asked: (1) why the term “self-induced,” rather than “voluntary,” is used in the intoxication imputation provision, § 22A-209(c); (2) why the term is not defined; and (3) how a variety of policy issues dealing with the definition of the term should be resolved (including the unexpected interaction of multiple pills, which lead to severe intoxication). Staff replied that the term “self-induced,” rather than “voluntary,” was used in § 22A-209(c) to avoid confusion with the general definition of voluntariness. Staff explained that the term is not defined because a statutory definition of the phrase is a minority trend,

² As explained in Report No. 3, staff uses the phrase “deliberate ignorance” to describe the underlying problem and “willful blindness doctrine” to describe the judicially-developed solution applied by the courts.

and because the definition utilized in that minority trend may be problematic for a variety of reasons.

1. Professor Butler noted the importance of legislatively resolving important policy issues rather than leaving them to the courts.
- f. The Office of the Attorney General (OAG) representative asked why the general intoxication provision does not specifically address the relationship between intoxication and negligence under § 22A-209(b)—whereas that provision does address the relationship between intoxication and purpose, knowledge, and recklessness. Staff explained that the topic is generally addressed in the explanatory note, and that there exists a range of difficult policy issues that fall within the scope of the relationship between intoxication and negligence. The OAG representative said he understood why it was left out, but suggested the section might still be clearer if it includes language addressing this issue.

IV. Discussion of First Draft of Report No. 4: Recommendations for Chapter 1 of the Revised Criminal Code—Preliminary Provisions.

- a. The OAG representative raised the issue of which offenses might implicate the rule in § 22A-101(c), which states that offenses committed prior to the effective date of the Revised Criminal Code are subject to laws in effect at that time. Under the rule, an offense is “committed prior to the effective date” if any one of the elements of the offense was satisfied prior to the effective date.
- b. The PDS Visiting Attendee asked how this rule would work if conspiracy were a theory of liability, but if conspiracy itself were not charged.
- c. Staff noted that this issue may become clearer when the Commission begins work on revising the conspiracy offense. However, if any element of an offense is committed before the effective date of the Revised Criminal Code, then the old law would apply.
- d. The OAG representative also asked about the importance of the word “structure” in § 22A-102, which proposes codifying rules of interpretation for the Revised Criminal Code. OAG asked whether structure was actually a part of the “plain language” of the statute. If so, OAG suggested that the statute could be redrafted such that the “plain language” includes the text’s structure as a matter for primary consideration when interpreting a statute. Staff said that DCCA case law seemed to consider structure as both an aspect of plain language and as a secondary consideration. Staff suggested that the current draft does the best job of maintaining the current ambiguity in District law.
- e. The OAG representative also asked about the phrase “if necessary” in § 22A-102(a). The OAG representative said it was not clear from the statute when courts should go beyond plain language and look at structure, history, and purpose. Staff replied that current District case law is unclear: no DCCA opinion

has clearly stated when looking beyond the plain language of a statute is “necessary.” The draft proposed language was merely intended to retain current law with this ambiguity intact.

- f. Finally, the OAG representative recommended using the phrase “applies only to this title” instead of the phrase “this title alone” in § 22A-103(a). Staff said that this drafting preference would be considered.

V. Adjournment.

- a. The meeting was adjourned at 3:30 pm.
- b. Staff will e-mail Advisory Group members the deadlines for written comments on the First Drafts of Report No. 3 and No. 4, as well as written statements to be appended to the final version of Report No. 1 and the appendices on enactment.