D.C. Criminal Code Reform Commission
441 Fourth Street, NW, Suite 1C001S, Washington, DC 20001
(202) 442-8715 www.ccrc.dc.gov

MINUTES OF PUBLIC MEETING

WEDNESDAY, JUNE 6, 2018 at 10:00 AM
CITYWIDE CONFERENCE CENTER, 11th FLOOR OF 441 4th STREET NW
WASHINGTON, D.C. 20001

On Wednesday, June 6, 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 of the Public Defender Service for the District of Columbia)

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

Katerina 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)

Alicia Washington (Visiting Attendee of the Attorney General for the District of Columbia)

I. Welcome and Announcements

a. The Executive Director noted that the next meeting is scheduled for July 11, 2018, at 10:00 AM, and that July 13, 2018, is the due date for written comments on outstanding draft reports.

b. The Executive Director noted that the next set of draft reports will likely address one or more of the following topics: sex offenses, human trafficking, merger, and disorderly conduct and rioting offenses.

c. The Executive Director also noted that the Commission may issue some updated charging, conviction, and sentencing statistics prior to the next meeting. He said the agency had worked hard to clean the data and make it accessible, but would appreciate feedback from Advisory Group members as to any statistics which seemed unusual and may reflect data entry or analysis errors.

II. The Advisory Group discussed written comments to First Draft of Report #20, Abuse & Neglect of Children, Elderly, and Vulnerable Adults.

a. The Advisory Group discussed OAG's proposal to change the names of the draft revised "child abuse" and "child neglect" offenses, due to possible confusion with the civil offenses.

   i. Staff noted that the Advisory Group had previously discussed not using the word "criminal" in offense names, which would complicate renaming the revised offenses "criminal child abuse" and "criminal child neglect."

   ii. Staff proposed as alternative names "child cruelty," instead of child abuse," and "child endangerment" instead of "child neglect."

   iii. The OAG representative said it does not have strong preference as to what specific names are used, so long as the labels are different from the civil offenses.

   iv. The Council Committee representative asked whether the term "minor" can be used instead of the term "child." OAG noted that the term "minor" can be confusing as the current code defines the age requirement for "minor" differently in several places.

b. The Advisory Group discussed hypothetical cases in the OAG written comments concerning the revised child abuse offense.

   i. Staff noted that the revised third degree child abuse statute would cover the hypotheticals raised due to the definition of "bodily injury," and depending on the facts of the case, there could be liability for a higher gradation.

   ii. OAG stated that it wanted to ensure that the revised offenses would cover these hypotheticals.

   iii. Staff noted that in subsequent drafts, commentary could include hypotheticals that clarify the scope of the offense.

iv. PDS noted that it had previously raised concerns with how the term "bodily injury" was defined for offenses against persons, particularly in requiring "pain" instead of "significant pain."

c. Staff separately addressed a hypothetical in OAG's written comments of a parent intentionally blowing smoke into a baby's face or feeding a baby containing drugs. Staff said that "impairment of physical condition" in the definition of "bodily injury" would cover this situation, and as such, it would constitute third degree child abuse.

d. The Advisory Group discussed PDS's comment that the required age gap in the revised child abuse offense should be four years instead of two years, like the required age gap in the current child sex abuse offenses.

   i. Staff noted that the current child cruelty statute does not have any required age gap, and the two-year gap in the revised statute was taken from the current statute enhancing certain crimes committed against minors. Staff said that in reformed jurisdictions that require an age gap in their child abuse or assault gradations involving children, a larger age gap, such as four or five years, was typical.

   ii. The D.C. Council Representative noted that four years seemed a reasonable age gap requirement.

   iii. Staff noted an alternative option was to exclude any age requirement from the revised child abuse offense, and instead limit the offense to parents, legal guardians, or those that have assumed the obligations of a parent. Offenses against children based solely on the age of the child and the age of the defendant would be covered by the revised assault offense.

   iv. PDS expressed interest in eliminating liability based on age from the revised child abuse statute, and limiting liability to particular relationships between the defendant and complainant.

   v. OAG stated it would have to review this issue further and had no comment at the time.

e. PDS asked about the scope of persons who "have assumed the obligations of a parent" and whether a teenage babysitter would qualify.

   i. Staff stated that the "person who has assumed the obligations of a parent" language in the revised child abuse offense and the parental discipline defense was intended to incorporate District case law interpreting *in loco parentis*.

   ii. Staff stated that it would review the case law and the commentary to make sure the scope of the offense and defense is clear.

f. Staff discussed PDS' written comment that "physical force that overpowers a child" should be excluded from the revised child abuse statute.

i. Staff noted that the current statute includes "bodily injury," which DCCA case law interprets broadly, and that DCCA case law also states that assaultive conduct is included in the current child cruelty offense. Consequently, while not clearly established, current District law may well include within the child cruelty statute any harm sufficient to constitute an assault.

ii. PDS stated that its opinion as to inclusion of "physical force that overpowers a child" in the revised statute may depend on whether the revised offense includes an age-based prong for liability, or is limited to parents, guardians, and those in *loco parentis*.

iii. Staff stated that "overpowering physical force" needs to be examined across all offenses, including robbery and assault. Although it would be ideal to have the same requirements for injury and physical force across offenses against persons, it may not be possible.

iv. OAG also noted that the Advisory Group may need to revisit many of these decisions when penalties are discussed to ensure that penalties are proportionate with the conduct criminalized under each offense.

g. Staff discussed PDS' written comment that the word "reasonable" under subsection (f)(2) of the parental discipline defense in the revised child abuse offense should be omitted. Staff noted that the defense would still require "reasonable" discipline, but reasonableness would not be a requirement for getting the defense to the trier of fact or for getting a jury instruction. Staff noted that, based upon the District's civil child abuse laws, subsection (f)(1)(D) lists several types of conduct that are per se unreasonable and to which the parental discipline defense does not apply. Staff stated that omitting the "reasonable" requirement from the burden of proof subsection may conflict with the inclusion of these per se exclusions.

i. PDS said their concern was not that the factfinder must find the discipline reasonable, but that a judge could prevent the factfinder from presenting such a defense.

h. Staff discussed PDS' written comment regarding a merger provision for the revised abuse and neglect of a child, elderly person, and vulnerable adult offenses and the assault offenses. Staff noted that it is working on a broader merger provision that may address this issue. However, multiple convictions for the same conduct under both sets of offenses is not intended, and if necessary, a specific provision could be drafted later.

III. The Advisory Group discussed written comments to First Draft of Report #18, Solicitation and Renunciation.

a. Staff noted that OAG made two drafting suggestions for the general provision on renunciation, which the CCRC will take into account when developing subsequent drafts.

b. The Advisory Group discussed PDS' comment regarding removal of the requirement on non-consummation from the general provision on renunciation.

   i. Staff described the basis of PDS' rationale to be the provision of an incentive to renounce to an actor who believes: (1) there is some chance that the crime will not actually be thwarted despite his or her reasonable efforts; and (2) there is little chance that his or her involvement will be prosecuted or realized by law enforcement.

   ii. Staff noted that PDS raised important policy considerations, which are supported by legislative practice in reform jurisdictions. Staff also noted, however, that the RCC may add (in the future) an incentive to renounce in the form of a provision that provides a withdrawal defense to accomplice liability. If added, this provision would mean that, in the situation described by PDS, the actor still benefits from trying to disrupt the criminal effort even where he or she is unsuccessful by avoiding liability for the completed offense as an aider and abettor.

c. OAG asked what "reasonable" means in the context of PDS' recommended "reasonable efforts" revision to the general provision on renunciation.

   i. The D.C. Council Representative pointed out the importance of clarity in the definition of defenses, and explained the kinds of problems that use of a vague term, such as "reasonable," could lead to in the context of a renunciation defense.

   ii. Staff noted that it would further consider PDS' recommendation, and, if the CCRC opts for a "reasonable effort" standard, that staff would consider ways to clarify the factors that relate to reasonableness in this context through commentary.

IV. The Advisory Group Discussed written comments to First Draft of Report #19, Homicide Offenses.

a. The Advisory Group discussed an OAG comment, which requested further clarification of the term "substantial planning." OAG had asked whether "substantial planning" requires a high degree of intricacy, or whether a simple plan could suffice.

   i. Staff noted that the term is intended to have the same meaning as under current law. Although limited, the case law interpreting the term suggests that "substantial planning" does not require intricacy, only that the

defendant thought about and planned the murder for a considerable amount of time. Staff noted that it can add further clarification to subsequent drafts of the commentary.

b. The Advisory Group discussed an OAG comment that the aggravated murder statute should specifically include causing death "by displaying" a dangerous weapon. OAG raised a hypothetical case in which the weapon facilitated causing death of another, but did not actually inflict the fatal wound.
    i. Staff replied that the words "by means of" in the draft statute are not intended to require that the weapon actually inflict the fatal wound. The element would be satisfied if the weapon facilitated the crime, and was a but for cause of the homicide. Staff noted that this issue applies to other offenses against persons, and that subsequent drafts of the commentary can clarify that the weapon does not need to directly inflict the injury.
c. The Advisory Group discussed OAG's comment that identified a typo in the first draft of the commentary.
    i. Staff said that the first drafted erroneously stated that mitigating circumstances include acting with "the reasonable belief that the use of deadly force was necessary[.]" The report should have stated that mitigating circumstances include acting with an "*unreasonable* belief that the use of deadly force was necessary[.]" Staff noted that subsequent drafts would correct this error.
d. The Advisory Group discussed OAG's comments relating to the effect of mitigating circumstances. OAG suggested that the mitigation provision should be redrafted to state that if the government can prove all other elements of murder, but cannot prove the absence of mitigating circumstances, then the defendant "is guilty of" manslaughter, instead of the current draft language which states that the defendant "may be found guilty" of manslaughter.
    i. Staff noted that it generally agrees that OAG's suggested language accurately reflects current law. A person who otherwise satisfies all elements for murder and lacks any defense, but who committed the homicide with mitigating circumstances, is guilty of manslaughter. Staff said the issue is a drafting question as to how the Code should communicate this point and would consider re-drafting the mitigation provision per OAG's recommendation.
    ii. PDS said it strongly objected to OAG's proposed revision on this point, and expressed concern that the proposed language could lead judges to instructing juries to convict a defendant of manslaughter. Instead juries should make a determination as to mitigation, and then separately decide whether the defendant is guilty of manslaughter.

iii. Staff noted that regardless of the statutory language, judges would need to properly instruct juries as to what facts it must find before returning a verdict. Staff stated that either drafting formulation should lead to the same result.

iv. Staff noted that it would review and consider re-drafting the effect of mitigation provision in light of the Advisory Group's comments.

e. The Advisory Group discussed OAG's comments that mitigating various forms of murder to manslaughter can lead to disproportionate penalties. For example, OAG noted that both the RCC first and second degree murder are mitigated downwards to first degree manslaughter.

i. Staff noted that this effect of mitigating circumstances in the RCC largely follows current law. Staff also noted that intuitions as to proportionality may be unclear, and it may be proportionate to penalize causing the death of another knowingly or with recklessness manifesting extreme indifference to human life the same in the presence of mitigating circumstances.

ii. Staff also noted that OAG's concerns could be addressed if aggravating factors are placed in separate statutes.

f. The Advisory Group discussed PDS's comment that proposed eliminating aggravated murder as separate offense and having a separate statute providing aggravating factors and a penalty enhancement for murder.

i. Staff noted that this would not be a substantive change in and of itself, and that under either approach the government would still have to prove the presence of the aggravating factor beyond a reasonable doubt.

ii. PDS clarified that it also proposed eliminating aggravated manslaughter as a distinct offense.

g. The Advisory Group discussed PDS's suggestion that causing the death of another by means of a dangerous weapon should be omitted an aggravating factor.

i. PDS clarified that it proposes omitting causing death of another by means of a dangerous weapon as an aggravating factor for all homicide offenses (including manslaughter). PDS said that, absent such a change, the fact that over 90% of all homicides (according to MPD statistics) involve a weapon means that virtually all homicides would be "aggravated" under the RCC. PDS said that the high penalties for any murder conviction would be sufficient to provide punishment for homicides, and use of a weapon shouldn't add additional time.

ii. Staff noted that both at the top and bottom of any system consisting of a small number of penalty classes there may be special difficulty in differentiating crimes. There is little room at the top of these classes for distinguishing conduct constituting first degree murder.

h. PDS further noted that it generally objects to use of any aggravating factors, arguing that the statutory maxima for homicide offenses are sufficient to account for various aggravating circumstances.
    i. OAG noted that it is difficult to make these decisions without knowing the applicable penalties.

i. The Advisory Group discussed PDS's comment that if aggravating circumstances are retained, the factors based on extreme physical pain or mental suffering, or mutilating or desecrating the body are unfairly prejudicial, and should be determined at a bifurcated proceeding.
    i. Staff asked whether PDS preferred using language based on the current statute, or if PDS had any other models.
    ii. PDS noted that the procedure used for the insanity defense may work as a model, but that the current statute does not appear to comply with Supreme Court *Apprendi* requirements.

j. The Advisory Group discussed PDS's comment that the mitigation provision should be edited to more broadly include unreasonable belief that deadly force was necessary to prevent another person, not only the decedent, from causing death or serious bodily injury. Specifically, PDS raised the hypothetical of a defendant who uses lethal force in imperfect self defense, and accidentally kills a bystander. PDS argued in that case, mitigation should also apply.
    i. Staff noted that it is unaware of any D.C. Court of Appeals case law on this issue and solicited members' help in identifying any relevant authorities.
    ii. PDS said that it was not aware of any relevant District case law, and had based its recommendation on principles of basic fairness, culpability, and consistency with other RCC provisions.
    iii. Staff said it would consider re-drafting the mitigation definition.

k. The Advisory Group discussed PDS's comment that the homicide statutes should specify that manslaughter is a lesser included offense of murder.
    i. Staff stated that it was still drafting a general provision on merger that may address this issue, and if not, staff will revisit the issue at a later time.

V. **Adjournment**.

a. The meeting was adjourned at 12:00 PM. Audio recording of the meeting will be made available online for the public.