



D.C. Criminal Code Reform Commission
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MINUTES OF PUBLIC MEETING

**WEDNESDAY, JULY 1, 2020, at 10:00 AM
WASHINGTON, D.C. 20001**

On Wednesday, July 1, 2020, 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 telephonically at (650) 479-3208 (access code: 160 625 4909). 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 (Senior Attorney Advisor)

Jinwoo Park (Senior Attorney Advisor)

Patrice Sulton (Senior Attorney Advisor)

Gabrielle Green (Attorney Advisor)

Advisory Group Members and Guests in Attendance:

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

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

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

Dave Rosenthal (Designee of the D.C. Attorney General's Office)

Elana Suttentberg (Visiting Attendee of United States Attorney for the District of Columbia)

Seema Gajwani (Visiting Attendee of the D.C. Attorney General's Office)

Don Braman (Council appointee)

Nishant Keerikatte (Visiting Attendee of the Office of the Deputy Mayor for Public Safety and Justice)

I. Welcome and Announcements.

- a. The Executive Director noted that the Council recently passed the Comprehensive Policing and Justice Reform Emergency Amendment Act of 2020. Two of the proposals track prior CCRC recommendations: providing a right to a trial by jury when the alleged victim of an assault is a law enforcement officer and repealing the offense for neglect to make an arrest.
- b. The Executive Director noted that the FY 21 budget passed by the Committee on the Judiciary and Public Safety makes CCRC a permanent agency with a due date for the agency's recommendations of March 30, 2021. This is a strong indication the Council is serious about moving forward with comprehensive code reform. The next budget vote is scheduled for July 7, 2020. While the legislation is not final, the agency is reviewing its work sequencing to maximize productivity with a March 30, 2021 deadline. CCRC welcome input on the sequencing of our work between now and March 30, 2021.
- c. The Executive Director noted that comments on outstanding reports are due July 20, 2020. After that, CCRC may take a break from the stream of new draft reports to the Advisory group. Remaining recommendations need to be developed to address obstruction of justice offenses, public order offenses, and codification of remaining general defenses.
- d. The Executive Director noted that, per his email yesterday, regular Advisory Group meetings on the first Wednesday of every month through December 1, 2021 from 10am to noon have been tentatively scheduled in anticipation of agency extension. Members are asked to please notify the Executive Director if a member has a regular conflict with continuing this time.
- e. The Executive Director noted 2019 data from the Superior Court of the District of Columbia is forthcoming, hopefully in coming weeks.

II. The Advisory Group discussed the written comments on the First Draft of Report #54, Prostitution and Related Statutes:

- a. The group discussed an OAG comment on page 4 of its comments regarding the overlap between the RCC prostitution and patronizing prostitution offenses. OAG's comment proposed a new subparagraph for each offense.
 - i. OAG explained that its proposed language is intended to distinguish between buying and selling conduct. OAG stated that "receiving" anything of value in the RCC prostitution offense necessarily implies someone "giving" anything of value in the RCC patronizing prostitution offense, and vice versa.
 - ii. USAO stated it believes the word "provided" in OAG's proposed language might suggest that the offenses are being narrowed to require that a sexual act or sexual contact be completed. USAO wants the drafting to remain clear that a sexual act or sexual contact does not have to occur for liability. USAO also stated that the name of the patronizing prostitution offense helps distinguish the offense from the prostitution offense, as well as the more serious penalty.
 - iii. The group discussed several drafting solutions that aimed to ensure the correct scope of conduct is covered, including:
 - 1. Sting operations involving undercover officers;

2. Conduct involving persons under age 18; and
 3. Third party payors that do not engage in or solicit to engage in the sexual conduct.
- b. The Executive Director explained that the current D.C. Code prostitution and solicitation statute, which has simpler drafting, does not distinguish between prostitution and patronizing. The RCC separates and punishes patronizing more severely based on the different blameworthiness of the conduct, consistent with a Nordic model.
- i. OAG stated that it agrees the offenses should be separated but believes the level of punishment should be the same.
 - ii. CCRC staff explained that simplifying the language as other states have done may mean more ambiguity and less clarity about who is doing what and when.
 - iii. None of the members objected to the CCRC keeping a comparatively more complicated drafting that accounts for multiple types of prohibited conduct in the prostitution and patronizing prostitution statutes.
- c. CCRC invited members to submit more proposed solutions to this thorny drafting challenge.

III. The Advisory Group discussed the written comments on the Second Draft of Report #35, Cumulative Update to Sections 201-213;

- a. The CCRC asked for clarification of an OAG recommendation to strike paragraph (c)(2) of RCC § 22E-204, regarding the legal causation requirement. Specifically, the CCRC asked how to reconcile the recommendation to require only reasonable foreseeability with another OAG comment suggesting that liability remain in a hypothetical involving basketball rivals. OAG's written comments had indicated that when a basketball player makes a game winning shot, knowing that the opponent will beat his teammates, the player is not guilty of assault because he has not satisfied the requirements of accomplice liability. CCRC staff noted that in this hypothetical, the opponent's volitional act was reasonably foreseeable, but it would be unjust to hold the player liable for the opponent's conduct.
- i. OAG stated paragraph (2) does not appear to affect outcomes. In the basketball hypothetical, the person does not satisfy the elements of assault.
 - ii. CCRC staff explained that the person in the basketball hypothetical does complete all of the elements of an offense, because he engaged in conduct knowing that bodily injury would result.
 - iii. OAG stated that under its recommendation, when there is an intervening volitional act, the actor may only be held liable if he or she satisfies the requirements of accomplice liability.
 - iv. OAG stated that it is preferable to avoid asking factfinders to decide whether something is "just;" their role is to decide the facts and apply the law, not to engage in jury nullification by substituting their judgment as to what conduct is criminal. OAG stated that if the term "justly" is retained the causation statute, the term should be defined to provide clear guidance on the requirements for liability.
- b. The CCRC asked for clarification of an USAO recommendation to define causation as "not too attenuated." The CCRC noted that

USAO's recommendation states that the passage of time or attenuation may negate legal causation, even when an intervening act is reasonably foreseeable. The CCRC staff asked what factors would determine whether volitional conduct of another was attenuated or not? CCRC also asked what factors group members think should determine whether an actor may "justly" be held responsible for the volitional act of others. For example, if the RCC upholds *Fleming*, 224 A.3d 213 (D.C 2020) (en banc) how should factfinders determine whether someone is justly responsible or whether conduct is not too attenuated?

- i. USAO and OAG did not offer any specific suggestions, but indicated they will review the issue.
- c. The CCRC asked for clarification of a PDS recommendation. Specifically, the CCRC asked whether it is PDS's position that intervening volitional acts always negate legal causation, unless the government proves beyond a reasonable doubt that the intervening act constituted self-defense or defense of others.
 - i. PDS stated that this is its position.
 - ii. CCRC staff offered a hypothetical in which A shoots B and B dies due to negligent medical care. Would the volitional act of the physician who performs the negligent medical care negate legal causation? CCRC staff noted that under current law, negligent medical care does not negate legal causation.
 - 1. PDS stated that A could be convicted of attempted murder or assault with intent to kill, but should not be deemed to have legally caused B's death.
 - iii. CCRC staff offered a hypothetical in which A shoots B with intent to kill and, in an attempt to escape, B injures themselves by tripping and falling or by speeding away in a car.
 - 1. PDS stated the fall is not an intervening volitional act, it's an independent volitional act. CCRC staff acknowledged that it had not defined the term "volitional act," but that the term is broad, and would include this type of conduct.
 - 2. PDS stated that B's conduct in this hypothetical is similar to acting in self defense.
- d. The Executive Director noted that they may follow up with CRAG members individually about this issue. The current draft is intended to be consistent with *Fleming*, however that case addressed special circumstances and is not binding law on causation generally, which is what the RCC recommendation addresses.

IV. The Advisory Group did not have any additional comments on the other written comments included in the agenda.

V. The Advisory Group discussed the First Draft of Report #60, Execution of Public Duty, Lesser Harm, and Temporary Possession Defenses; First Draft of Report #61, Abuse of Government Power General Enhancement, and First Draft of Report #62 – Impersonation of a District Official:

- a. The Executive Director noted some typographical errors in the First Draft of Report #61 that will be corrected and recirculated.
- b. USAO noted the title of the Impersonation of District Official provision may be confusing because it makes reference to both District and federal officials.

VI. Adjournment.

- a. There being no further questions from Advisory Group members concerning the draft reports now under review, the meeting was adjourned at 11:30 a.m.