



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, JULY 31, 2019, at 10:00 AM

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

On Wednesday, July 31, 2019, 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)

Michael Serota (Sr. Attorney Advisor)
(by phone)

Rachel Redfern (Sr. Attorney Advisor)

Patrice Sulton (Attorney Advisor)

Advisory Group Members and Guests in Attendance:

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

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

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

Don Braman (Council Appointee)

Paul Butler (Council Appointee) (by phone)

I. Welcome and Announcements.

- a. The Executive Director noted this is Michael Serota's last Advisory Group meeting. The Commission appreciates his enormous contributions to the success of the project.
- b. The next Advisory Group meeting will take place on Wednesday, September 4, 2019.
- c. Next week, the Executive Director will send an email with the proposed meeting dates through September 2020, extending the current default meeting time on the first Wednesday of each month.

- d. Next week, the Commission will issue a report with recommendations for weapons offenses and related provisions. Written comments will be due in mid or late September.

II. The Advisory Group discussed the Advisory Group Comments on the First Draft of Report #36, Cumulative Update to Chapters 3, 7 and the Special Part of the Revised Criminal Code, and Advisory Group Memo #22 Supplemental Materials to the First Draft of Report #36.

- a. USAO, OAG, and PDS submitted written comments on Report #36 on July 8, 2019.
- b. The group discussed the definition of “bodily injury” in RCC § 22E-701.
 - i. Staff asked OAG to clarify the concern underlying its recommendation to redraft the definition to read, “‘bodily injury’ means physical pain, illness, scratch, bruise, abrasion, or any impairment of physical condition.”
 - ii. OAG clarified that it is not obvious that the phrase “impairment of physical condition” is intended to include a scratch, etc., because these injuries do not impair a bodily function.
 - iii. USAO agreed with OAG’s position and had no objection to OAG’s proposed language.
- c. The group discussed RCC § 22E-1301, sexual assault.
 - i. Staff asked OAG to clarify the concern underlying its recommendation that the word “overcomes” be placed with the phrase “overcomes resistance” in first degree and third degree sexual assault.
 - ii. OAG clarified that its recommendation is intended to be a grammatical drafting point about what or who “overcomes” refers to and not a substantive change.
 - iii. The Executive Director asked if reordering the relevant language in first degree and third degree sexual assault would address OAG’s concern and OAG said that it would.
- d. The group discussed the use of the phrase “under civil law” in several revised provisions, including the revised offenses of criminal abuse and criminal neglect of minors, criminal abuse and criminal neglect of vulnerable adults and elderly persons, trespass, burglary, and the definition of “position of trust with or authority over.”
 - i. Staff asked USAO to clarify the concern underlying its recommendation to remove the words “under civil law.”
 - ii. USAO explained that in some instances—particularly the special responsibility for care and discipline and property offenses—its recommendation is intended to clarify the drafting of the statute and not to substantively change the law.
 - iii. Staff noted that, with respect to custodial relationships, the drafting options include: (1) incorporating a lengthy laundry list of relationships recognized in District law; or (2) using more general language about the nature of the relationship. The RCC attempts to describe the nature of the relationship by a general reference to civil standards governing adult-child interactions.
 - iv. USAO agreed that it may be appropriate to look to civil law in some cases in which a custodial relationship or property rights are disputed.

However, in other cases, the rights of the people involved are obvious. USAO voiced concern that, in those cases, a cross-reference to civil law might mislead a reader to believe that a comprehensive review of the vast and confusing universe of civil law is required. USAO suggested the reference to civil law may remain in the offense commentary but be removed from the statutory language.

- v. PDS stated that, where rights are obvious, civil law provides a clear answer. However, for fact patterns where rights are less obvious, the revised language makes clear to the reader that civil law is the final determinative factor as to whether criminal liability will attach.
- vi. Professor Braman distinguished between custodial relationships (e.g., *in loco parentis*) and property rights. With respect to relationships between people, the drafting should either refer to some general legal responsibility or to a comprehensive list of relationships, which may prove difficult.
- vii. USAO clarified that, in the context of the revised justification defense for special responsibility for care, discipline, or safety, RCC § 22E-4XX, its main objection to the revised custodial relationships is not the reference to civil law, but the expansion of the class of people who can invoke *in loco parentis*. It should be limited to the parent or legal guardian, as it is under current law, and not broadened to include a person acting with the effective consent of a parent or guardian.
- viii. PDS objected to limiting *in loco parentis* to a parent or legal guardian only, explaining that it does not account for growing and changing ideas of family.
- ix. OAG offered a hypothetical in which a grandmother serves as a child's primary caregiver without formally petitioning a court for parental rights. OAG asked for clarification as to whether "under civil law" is intended to exclude said grandmother. OAG also asked for clarification as to whether the revised language is intended to include a day care employee charged with supervising a child during specified hours of the day.
- x. Staff noted that the terms "parent" and "guardian" are used in different and sometimes conflicting ways in the D.C. Code. In the revised statute, the terms effectively serve as placeholders for the range of relationships defined in civil law. Staff noted that the Commission will also issue recommendations for other general defenses.
- xi. USAO pointed out that there is also a catchall in the USAO proposed (b)(2) for someone who is acting in the role of parent.
- xii. Staff explained that the effective consent provision in the CCRC draft, which isn't included in the USAO proposed version, is intended to include less formal relationships, such as a neighbor who is babysitting.
- xiii. OAG noted that in many instances, a neighbor or day care worker may have permission to supervise and not have permission to physically discipline.
- xiv. Staff explained that, through the references to civil law and effective consent, the RCC aims to allow for flexibility to cover the instances described by OAG. For example, a parent may specify through a contract

- with a day care provider or agreement with a neighbor whether physical restraint, discipline, or isolation are permitted.
- xv. PDS noted that *in loco parentis* is not a full, unqualified defense. There are limits on degree of injury for which it is available.
 - xvi. USAO noted that there is also a reasonableness requirement in the defense.
- e. The group discussed the number of gradations in the revised theft offense, RCC § 22E-2101.
- i. Staff asked USAO to clarify the concern underlying its recommendation to reduce the number of gradations.
 - ii. USAO stated that its objection is not substantive, but a style point.
 - iii. Staff asked USAO its position as to whether the differences in value warrant separate treatment as a penalty matter.
 - iv. USAO stated that, at this time it could not say, the penalty recommendations will inform its position as to whether the gradation distinctions are proportionate.
 - v. USAO noted that in some cases loss of a small value to one victim could have a greater impact than the loss of a large value to another victim.
 - vi. Staff noted that the District's current two-tier structure has fewer gradations than most other jurisdictions, and some jurisdictions have more gradations than that proposed in the RCC.
- f. The group discussed RCC § 22E-1205, offensive physical contact.
- i. USAO said that in addition to its written comments about making offensive physical contact a lesser included offense of assault, it wished to raise the possibility of lowering the culpable mental state from knowledge to recklessness (which would aid making the offense a lesser included, given the reckless culpable mental state for assault).
 - ii. Staff noted that there may be examples of reckless offensive physical contact that are not intuitively criminal. Staff offered a hypothetical in which a person recklessly brushes by someone riding the Metrorail (not inflicting bodily injury and not amounting to an assault).
 - iii. PDS offered a hypothetical in which a person sneezes on another person.
 - iv. Staff also noted that both degrees of the revised offensive physical contact require an intent that the contact be offensive, which effectively raises the mental state above recklessness. Assault does not include a similar intent requirement. Staff said that it is not uncommon to require a higher culpable mental state for an actus reus that is less serious. For example, homicide is one of the few offenses that provides liability for negligence because the actus reus is the most serious.
 - v. USAO offered a hypothetical in which a person recklessly brushes past another person on the Metrorail and causes the most minor of bodily injuries, such as causing a small scratch. USAO said that is counterintuitive that such an encounter amounts to an assault, whereas if the same conduct leaves no "bodily injury," as defined in the RCC, it does not amount to offensive physical conduct.

- vi. Staff said that, regardless of the culpable mental state differences, there may be ways of redrafting the offensive physical contact offense as a lesser included of assault. However, staff noted that, as drafted, the harm involved in causing offensive physical contact is categorically different than causing a “bodily injury,” as defined in the RCC.
- vii. USAO noted that, where the government does not have evidence of a bodily injury in an assault case (e.g., an encounter is caught on video tape but a witness is uncooperative), it would be useful to have the option of obtaining a conviction for offensive physical contact without having to prove pain or injury.
- viii. PDS objected to USAO’s reasoning, stating that, at a certain point, such trivial conduct should not be a crime.
- g. The Executive Director asked if there were further questions or comments on the First Draft of Report #36. Nothing being raised, the next agenda item was discussed.

III. The Advisory Group discussed First Draft of Report #37, Controlled Substance Offenses and Related Provisions.

- a. OAG asked for clarification of the revised trafficking counterfeit substances offense. OAG believes that current D.C. Code § 48-904.01(c) prohibits labeling an uncontrolled substance as a controlled substance. However, the penalties provision in the revised statute accounts only for the amount of a mislabeled or misrepresented controlled substance. OAG noted that no other offense in current law appears to address labeling an uncontrolled substance as a controlled substance. OAG recommended a separate penalty be provided for such a fact pattern.
 - i. Staff explained that the revised statute did not intend to narrow current District law and kept the current definition of “controlled substance,” D.C. Code § 22-48-904.02, which refers to a “controlled substance.”
 - ii. The Advisory Group reviewed the current statute which provides: “‘Counterfeit substance’ means a controlled substance which, or the container or labeling of which, without authorization, bears the trademark, trade name, or other identifying mark, imprint, number or device, or any likeness thereof, of a manufacturer, distributor, or dispenser other than the person who in fact manufactured, distributed, or dispensed the substance.”
 - iii. Staff noted the referent of the phrase “or the container or labeling of which” appears to be a controlled substance, not any substance. However, staff said it was not aware of any case law on point, and will review this question in greater detail.
 - iv. OAG said that its limited review of case law did not find anything on point either.
 - v. Professor Butler noted that where fake drugs are being sold and there is a legal impossibility, the government may proceed on an attempt theory.
 - vi. Staff noted that the where fake drugs are being sold, a person has also committed fraud, a property crime.
- b. OAG noted that it is searching for legislative history to better understand the rationale for the exception to liability for 50-year-old paraphernalia.

- i. OAG and staff agreed that the legislative history for these offenses and definitions is very scant.
- ii. Staff explained that, although there are many improvements that could be made to the schedules and definitions in the current District drug offenses, the RCC left most intact because there are broader implications for civil provisions in Title 48 that rely on them.
- c. The Executive Director asked if there were further questions or comments on the First Draft of Report #37. Nothing was raised.

IV. Adjournment.

- a. The meeting was adjourned early at 11:22 a.m.