D.C. Criminal Code Reform Commission

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MINUTES OF PUBLIC MEETING

WEDNESDAY, JULY 5, 2017 at 2:00PM
CITYWIDE CONFERENCE CENTER, 11th FLOOR OF 441 4th STREET NW
WASHINGTON, D.C. 20001

On Wednesday, July 5, 2017 at 2:00 pm 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 1107 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 & Planning)

Michael Serota (Chief Counsel for Policy & Legislation) via phone

Jinwoo Park (Attorney Advisor)

Bryson Nitta (Attorney Advisor)

Advisory Group Members and Guests in Attendance:

Paul Butler (Council Appointee) via phone

Donald Braman (Council Appointee)

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

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)

Josh Turner (Visiting Attendee of the Office of the Attorney General for the District of Columbia) via phone

I. Welcome

a. The Executive Director noted that the Board of Ethics and Government Accountability will provide an ethics training for Advisory Group members during the last hour of the meeting scheduled for September 6, 2017.

b. The Executive Director also noted that he emailed copies of the American Law Institute's new Model Penal Code Sentencing recommendations to Advisory Group Members.

c. The Executive Director apologized for technical difficulties at the conferencing center, which made the connection to members calling in somewhat difficult to hear.

II. Discussion of Advisory Group Written Comments on the Second Draft of Report No. 2, Recommendations for Chapter 2 of the Revised Criminal Code—Basic Requirements of Offense Liability

a. Staff generally agreed with the Office of the Attorney General (OAG) comment that the word "one's" should be replaced by "his or her." However, staff pointed out that this wording may need to be reconsidered after addressing the *mens rea* of accomplice and conspiratorial liability.

b. Staff also generally agreed with substituting the word "one's" with "his or her" in the explanatory commentary.

c. Staff stated that it will incorporate a footnote into the explanatory commentary in response to OAG's comments, which will include examples of offenses using "with intent" language in place of "with knowledge."

III. Discussion of Advisory Group Written Comments on the First Draft of Report No. 5, Recommendations for Chapter 8 of the Revised Criminal Code—Offense Classes & Penalties

a. OAG suggested alternate wording for the definition of "felony" that separately includes offenses punishable by a term of imprisonment that is more than one year, or punishable by death, in the case of a felony from a jurisdiction that permits the death penalty. Staff agreed to adopt the alternate wording. No other members had comments on the point.

b. OAG had suggested adding the words "or unless otherwise provided by statute" to the definition of "felony" under § 22A-801(a) to ensure that some offenses can be categorized as felonies, despite carrying maximum sentences of one year or less.

   i. The Executive Director noted that the general provisions already have provisions limiting the effect of the general provisions (including this definition of "felony") to Title 22A and permitting, as explained in the commentary, deviations in more specific offenses. However, he said that this OAG comment raised a more general issue, namely, should the general provisions include a more explicit provision clarifying that individual statutes may diverge from the general provisions, and providing courts direction in how to resolve potential conflicts between the general provisions and any specific statutes.

   ii. The Public Defender Service (PDS) representative expressed concern that a general provision might apply too broadly, and could be problematic if a later statute conflicts with the general provisions in a way that the legislature did not intend or foresee. No other members had comments on the point.

   iii. The Executive Director said that the CCRC would consider the matter further.

c. OAG noted that under § 22A-803, words "not more than" was redundant in some penalty statutes. Staff agreed with these suggestions.
d. OAG also noted that the initial draft had incorrectly stated that offenses punishable by six months are jury demandable. Rather, offenses are jury demandable if they are punishable by *more* than six months. Staff agreed, and will provide updated language.
e. OAG had also questioned whether it is necessary to allege pecuniary gain or loss in indictments, except when the degree of loss triggers a heightened penalty. Staff agreed that better drafting is possible, and will provide re-drafted language upon further consultation with the OAG.
f. OAG raised an issue with the rule allowing heightened penalties for organizational defendants. The initial draft only applied these heightened penalties to offenses for felonies and Class A misdemeanors.
   i. The Executive Director said that, while the CCRC was open to this recommendation, one possible justification for limiting application of the heightened penalties is that such penalties for low-level misdemeanors could trigger a right to a jury trial for offenses that ordinarily are non-jury demandable. He noted that, per the Supreme Court ruling in *Blanton*, the presumption that offenses carrying imprisonment penalties greater than six months are jury demandable is a presumption that would not apply in instances where the offense carries imprisonment of less than six months but severe fines that indicate it is not merely a petty offense. The Executive Director asked the OAG to consider the possible effects of such an increase in fines on jury demandability and update the CCRC on the OAG position. No other members had comments on the point.
g. PDS commented on the rule regarding when offenses are jury demandable. PDS noted that offenses with a 180 day maximum sentence should be jury demandable by default, and that the Council should be required to explicitly state when an offense is non-jury demandable. PDS said this better reflected the importance of the right to jury trials.
   i. The Executive Director noted that the CCRC's primary concern is clarifying the law, whether the default is jury-demandable or not. He also noted that current law makes the default non-jury demandability.
   ii. The United States Attorney's Office (USAO) representative stated that the offenses punishable by 180 days or less should be non-jury demandable as a default. She also noted, however, the importance of being transparent and setting clear rules to help guide future legislative decisions.
   iii. Professor Butler agreed with the PDS position regarding the default and that the legislature should need to specify when an offense is non-jury demandable. He also agreed with the USAO statement about the need for transparency and the need to help guide future legislative decisions.
h. PDS raised concerns with creating penalty classifications based on the maximum allowable sentences authorized under current law.
   i. The Executive Director asked if the number of penalty classes—apart from the maximum they carry—is too many for PDS.
   ii. PDS said that the proposed penalty classification scheme has too many classes.

iii. Professor Braman noted that he would like to have data on the range of actual sentences imposed for various criminal offenses.
iv. No other members had comments on the point.

IV. Discussion of First Draft of Report No. 6, Recommendations for Chapter 8 of the Revised Criminal Code—Penalty Enhancements; and of Advisory Group Memo No. 10—Penalty Enhancements.

a. PDS asked about § 22A-805(a), which limits application of penalty enhancements when an offense contains an element in one of its gradations that is equivalent to an enhancement. PDS asked for clarification how this provision would operate.
    i. Staff clarified that the intent of the language is to prevent stacking a general enhancement to a crime that by design includes the enhancement's prohibited circumstances or results in some manner—whether in the base offense definition, the gradations, or in another provision applicable to that offense. Staff stated that it would re-review the draft language to ensure clarity.

V. Discussion of First Draft of Report No. 7, Recommendations for Chapter 3 of the Revised Criminal Code—Definition of a Criminal Attempt; and of Advisory Group Memo No. 11—Definition of Criminal Attempt

a. PDS asked whether there is any current District case law supporting the proposed approach to hybrid impossibility.
    i. Staff noted that the limited District case law, as well as national legal trends, are consistent with the proposed rule for hybrid impossibility.
    ii. PDS suggested that hybrid impossibility might not be covered by the general attempt statute, but that specific offenses could be drafted to cover cases of hybrid impossibility.
b. PDS also asked about current District law relating to the "reasonably adapted" language.
    i. Staff replied that there is very limited case law on this point, and that staff research included examination of cases from other jurisdictions, and other academic sources. The proposed language is consistent with the limited District case law and national legal trends.
c. PDS also had questions about application of the proposed attempt liability rules to hypotheticals presented in the report. PDS was concerned that some hypotheticals might not actually constitute attempts, and could lead courts to inappropriately find attempt liability when similar fact patterns arose in later cases.
    i. Staff said it would appreciate details of any inaccuracies in the hypotheticals and would review them again for accuracy.
d. PDS was concerned about imposing attempt liability for incomplete attempts, as well as the possibility of multiple punishments in cases where the defendant completes a lesser version of an offense, but had intent to commit a more serious version of the offense. For example, if a defendant commits a simple assault, and had intent to inflict a more serious injury, convictions for both simple assault and attempted felony assault should not be permitted.
    i. Staff noted that issues of proving attempted assaults and other offenses against persons graded by the degree of harm inflicted on the victim poses

difficulties under current law, but it is well established that a person may be convicted of attempting a crime more serious than the injury actually inflicted. Staff will review examples and hypotheticals in the commentary, however, to see if they may be clarified or changed in a way that avoids unnecessary evidentiary questions, which may arise in assault-type cases of attempt.

VI. Adjournment.

a. The meeting was adjourned at 4:15 pm. Audio recording of the meeting will be made available online for the public.