



# D.C. Criminal Code Reform Commission

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(202) 442-8715 [www.ccrc.dc.gov](http://www.ccrc.dc.gov)

## MINUTES OF PUBLIC MEETING

WEDNESDAY, SEPTEMBER 5, 2018 at 10:00 AM

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

On Wednesday, September 5, 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](mailto: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) by phone until 10:30 AM

Jinwoo Park (Attorney Advisor)

Patrice Sulton (Attorney Advisor)

### Advisory Group Members and Guests in Attendance:

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

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

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

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

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

Don Braman (Council Appointee)

Paul Butler (Council Appointee)

**I. Welcome and Announcements**

- a. The Executive Director introduced agency summer law intern Morgen Gehrls.
- b. The Executive Director said that Advisory Group written comments to Draft Reports #23, #24, and #25 are due September 14, 2018.
- c. The Executive Director also noted that by end of September staff plans to distribute a new set of draft recommendations relating to sex offenses that are currently under Chapter 30, human trafficking, stalking, and additions to the general provisions.
- d. The Executive Director said that the meeting originally scheduled for September 19 will no longer be held. The next scheduled Advisory Group meeting will be held October 3, 2018.

**II. The Advisory Group discussed First Draft of Report No. 25: Merger.**

- a. The Public Defender Service (PDS) representative noted that the merger provision is drafted as a presumption, and wondered whether judges may potentially view this providing them with discretion to ignore the merger provisions as they see fit.
- b. Staff noted that current District law views merger rules as constituting a presumption, and that the merger provision was intended to follow current law and practice in this respect. Staff also explained, however, that it may be clearer to remove the presumption language, and the drafting would be straightforward.
- c. The Executive Director noted that staff will reconsider whether the merger provision should be framed in terms of a presumption.
- d. The Office of Attorney General (OAG) representative asked about the rule of priority under subsection (d). Specifically, he inquired whether the seriousness of offenses is determined by the statutory maximum penalties, mandatory minima, or other potentially relevant collateral consequences.
- e. Staff replied that it intended for offense classification and statutory maximum to be the central determinants, but noted the possibility of other relevant factors. Staff invited written comments on this issue, and explained that it would be revisited in subsequent drafts.

**III. The Advisory Group discussed First Draft of Report No. 23: Disorderly Conduct and Public Nuisance.**

- a. The Executive Director said that the draft revised disorderly conduct statute is codifies conduct under subsection (a) of the current disorderly conduct statute, and the draft revised public nuisance offense codifies other portions of the current disorderly statute. The Director noted that disorderly conduct and affrays addresses a narrow slice of conduct that falls short of being an assault or threat, or an inchoate form (e.g., attempt, accomplice liability) of these offenses. Disorderly conduct historically is about causing a breach of peace, a minimal type of harm that lies at the border of what should be criminal or not.
- b. OAG representative said he interprets the law enforcement limitation under the current statute to only apply to subsection (a)(3), and that it is not more broadly applicable to other conduct under the disorderly conduct statute.
- c. The Executive Director noted that when the current statute was drafted, there was concern about criminalizing conduct directed at police officers. Staff noted it was unclear whether the current statute allows for convictions under subsection (a)(1)

or (a)(2) for conduct directed at an on duty police officer. The same logic that led to the exception for law enforcement in (a)(3) appeared to apply to at least (a)(1), and (a)(1) could be interpreted to include fighting words. There does not appear to be discussion of this possibility in the legislative record.

- d. OAG noted that he believes that the D.C. Council specifically wanted to exclude “fighting words” directed at police officers, because officers are trained and should not allow themselves to be provoked into physical retaliation. He said he did not know if the legislative record included consideration of how subsections (a)(1) or (a)(2) addressed conduct directed at law enforcement. However, the Council allowed for conduct under subsections (a)(1) and (a)(2) directed at on duty officers to still constitute disorderly conduct.
- e. The Advisory Group discussed the hypothetical case of a person shouting at a crowd to harm a police officer. The OAG representative was concerned that this behavior would be decriminalized under the revised offense. Staff replied that, under the revised statute, the police officer exception would not apply because the conduct, whether words or gestures, was directed at the crowd, not at the officer.
- f. The OAG representative noted that commentary could clarify what constitutes conduct directed at a law enforcement officer.
- g. The Advisory Group discussed a number of hypothetical scenarios involving Person A (the actor), Person B (a person near the actor), and Person C (an uninvolved observer). In one instance, A’s conduct threatens harm to himself, alarming B. In another instance, A’s conduct threatens harm to B, alarming B. And, in another instance, A’s conduct threatens harm to B, alarming C. The group also considered the impact of whether B or C is a law enforcement officer engaged in his or her official duties.
  - i. The OAG representative noted that he is unaware of any charges or arrests for disorderly conduct when only two people are involved.
  - ii. The United States Attorney’s Office (USAO) representative said she is unconcerned with the number of people present, so long as another person reasonably fears that bodily injury or damage to property will result.
  - iii. The D.C. Council Committee on the Judiciary and Public Safety (“Council”) representative asked for further clarification about what factual information is relevant in determining reasonableness. In particular, is the reasonableness of the observer’s fear based only on facts known to the observer? Staff clarified that the revised statute does not use the term fear and instead refers to a reasonable belief that imminent and unlawful harm is likely.
  - iv. The PDS representative objected to criminalizing behavior that may lead to a reasonable belief of imminent harm, where that belief turns out to be mistaken. She offered a hypothetical wherein people are in fact rehearsing for a play.
  - v. Staff explained that breach of peace offenses are concerned with the public alarm the conduct causes, irrespective of whether the actor actually intends or attempts another criminal act.
  - vi. Professor Braman noted that the revised disorderly conduct statute requires recklessness, so where an actor is not aware that his behavior

would cause another person to fear harm or property damage, there would be no liability.

- vii. Staff also noted that recklessness requires that the defendant's conduct amount to a gross deviation from the ordinary standard of care, so many behaviors would not constitute disorderly conduct even if it does cause another person to reasonably fear injury or damage to property.
- viii. Professor Butler noted that the idea that the disorderly conduct offense is concerned only with public alarm and the appearance of disorder is in tension with the requirement that the person act intentionally or recklessly.
- ix. The OAG representative objected to extending the exception for conduct directed at a law enforcement officer to non-speech conduct. The group discussed a hypothetical in which a person's conduct threatens to harm a police car.
- x. The Executive Director requested Advisory Group members provide feedback on whether liability should apply in various hypothetical cases, and why or why not.

#### **IV. Adjournment.**

- a. The meeting was adjourned at 12:00 PM.