

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Office of the Attorney General for the District of Columbia

Public Safety Division



MEMORANDUM

TO: Richard Schmechel
Executive Director
D.C. Criminal Code Reform Commission

FROM: Dave Rosenthal
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DATE: February 22, 2017

SUBJECT: Comments to D.C. Criminal Code Reform Commission First Draft of Report No. 2, Recommendations for Chapter 2 of the Revised Criminal Code - Basic Requirements of Offense Liability

The Office of the Attorney General for the District of Columbia (OAG) and the other members of the Code Revision Advisory Group of the D.C. Criminal Code Reform Commission (CCRC) were asked to review the Commission’s First Draft of Report No. 2, Recommendations for Chapter 2 of the Revised Criminal Code - Basic Requirements of Offense Liability (the Report). OAG reviewed this document and makes the recommendations noted below.¹

COMMENTS ON THE DRAFT REPORT

§ 22A-201, Proof of Offense Elements Beyond a Reasonable Doubt

On page 1, the Report begins with § 22A-201, Proof of Offense Elements Beyond a Reasonable Doubt. Subparagraph (c)(2) defines a result element. It states that a “Result element” means any consequence that must have been caused by a person’s conduct in order to establish liability for an offense.” The problem is that while “Conduct element” is defined on page 1 in 22A-201

¹ This review was conducted under the understanding that the structure of the code revision process allows the members of the Code Revision Advisory Group an opportunity to provide meaningful input without limiting the position that the members may take at any subsequent hearing that the Council may have on any legislation that may result from the Report.

(c)(1)² and “Conduct Requirement” is defined on page 9 in 22A-202 (a), the word “conduct,” itself, is not defined. It appears that the interpreter is left to assume that the word takes on the meanings associated with their usage in those separate definitions (or at least the one in 22A-201 (c)(1)). The need for the word “conduct” to be replaced, or defined, is highlighted by the Report’s observations on page 6. There it recognizes that conduct includes an action or omission. To make § 22A-201 (c) (2) clearer, we propose incorporating the concepts from pages 6 and substituting them for the word “conduct” in 22A-201(c)(2) The definition would then read “Result element” means any consequence that must have been caused by a person’s act or omission in order to establish liability for an offense.” The advantage of this definition is that the terms “act” and “omission” are defined in 22A-202.

§ 22A-202, Conduct Requirement

On page 9, in paragraph (c) the term “Omission” is defined. It states ““Omission” means a failure to act when (i) a person is under a legal duty to act and (ii) the person is either aware that the legal duty to act exists or, if the person lacks such awareness, the person is culpably unaware that the legal duty to act exists...” Neither the text of the proposed Code nor the Commentary explains what is meant by the term “culpably unaware.” The Code should define this term, or at least, the Commentary should focus on this term and give examples of when a person is “culpably unaware” that a legal duty to act exists as opposed to merely being unaware that there is a legal duty to act.

In § 22A-202 (d) the term “Possession” is defined. Included in that definition is a requirement that the person exercise control over the property “for a period of time sufficient to allow the actor to terminate his or her control of the property.” As noted in the Report, this is a departure from current District law. On page 15 of the Report it states “The latter temporal limitation dictates that a person who picks up a small plastic bag on the floor in a public space, notices that it contains drug residue, and then immediately disposes of it in a nearby trash can has not “possessed” the bag for purposes of the Revised Criminal Code...” What this definition of possession misses, or at least what the Commentary does not address, is that there are times when a person may be culpable for possession even in less time than it would take to “immediately dispose[] of it in a nearby trash.” Consider the following hypothetical. Two people walk over to a person who is selling heroin. One of them hands the seller money in exchange for the drug. As soon as the transaction is completed, the other person, who is an undercover police officer, arrests both the buyer and the seller. In that case, though the buyer literally had possession of the heroin for a fraction of a second, there is no question that the buyer knew that he or she possessed illegal drugs and intended to do so. In this situation, there is

² Subparagraph (1) states that a “Conduct element” means any act or omission, as defined in § 22A-202, that is required to establish liability for an offense.”

no reason why there should be a temporal limitation on how long the heroin must have been in the buyer's possession before a law violation would have occurred.

§ 22A-203, Voluntariness Requirement

On page 20, the Report defines the scope of the voluntariness requirement. Subsection (b)(1) states that an act is voluntary if the “act was the product of conscious effort or determination” or was “otherwise subject to the person’s control.” Based on the associated Commentary, it seems to be designed to capture circumstances, such as intoxication or epilepsy, when someone with a condition that can cause dangerous involuntary acts knowingly enters circumstances in which that condition may endanger others. The theory seems to be that, for example, driving while intoxicated is “subject to [a] person’s control” because the person can prevent it by not drinking and driving in the first instance. The same analysis applies to an accident that could arise due to an epileptic seizure. This makes sense; a person cannot willfully expose others to a risk at point X, and when the actual act that would constitute the offense takes place, insist that the act was not voluntary so that they cannot be held responsible for it. The question is whether there is some threshold of risk to trigger voluntariness here; otherwise, any involuntary act that was brought about in circumstances that were voluntarily chosen would be considered to be voluntary. Is this what was intended? If not, what is the threshold of risk that would “trigger” voluntariness here – and how would a court make that determination? Take the epilepsy example. Suppose a person knows that there is a .05% (or .005%) chance that he or she will experience an epileptic seizure if they don’t take their medication, but drives that way anyway. If a crash occurs, will driving the vehicle have been enough to trigger the “otherwise subject to the person’s control” prong of voluntariness or is it too remote? The Commentary should address this issue.

§ 22A-204, Causation Requirement

On page 29, the Report defines the “Causation Requirement.” In paragraph (a) it states “No person may be convicted of an offense that contains a result element unless the person’s conduct was the factual cause and legal cause of the result.” Paragraphs (b) and (c) then define the terms “Factual cause” and “Legal cause.” Section 22A-204 (b) states ““Factual cause” means:

- (1) The result would not have occurred but for the person’s conduct; or
- (2) In a situation where the conduct of two or more persons contributes to a result, the conduct of each alone would have been sufficient to produce that result.”

On pages 30 and 31, the Commentary addresses “Factual cause.” It states:

In the vast majority of cases, factual causation will be proven under § 22A-204(b)(1) by showing that the defendant was the logical, but-for cause of a result. The inquiry required by subsection 22A-204(b)(1) is essentially empirical, though also

hypothetical: it asks what the world would have been like if the accused had not performed his or her conduct. In rare cases, however, where the defendant is one of multiple actors that independently contribute to producing a particular result, factual causation may also be proven under § 22A-204(b)(2) by showing that the defendant's conduct was sufficient—even if not necessary—to produce the prohibited result. Although in this situation it cannot be said that but for the defendant's conduct the result in question would not have occurred, the fact that the defendant's conduct was by itself sufficient to cause the result provides a sufficient basis for treating the defendant's conduct as a factual cause.

While much of this explanation is intuitive, what may be more difficult for people to understand is how factual causation works when the result element is satisfied by a person's omission to act. Consider the following hypothetical. A father takes his toddler to the pool. He sees the child crawl to the deep end of the pool and fall in. The father sits there, doesn't move, and watches the child drown. In this situation it is awkward to think about the father's lack of movement as "performing" conduct, as opposed to doing nothing. The Commission should review whether there needs to be a third definition of "factual cause" that addresses acts of omission or whether merely an explanation and example in the Commentary about how to apply factual causation in cases of omission is sufficient. Clearly in this example, the father had a duty to perform the omitted act of saving his child. See § 22A-202 (c)(2).

§ 22A-206, Hierarchy of Culpable Mental States

On page 49, the Report defines the Hierarchy of Culpable Mental States. In paragraph (c) Recklessness is defined. It states

RECKLESSNESS DEFINED. "Recklessly" or "recklessness" means:

- (1) With respect to a result, being aware of a substantial risk that one's conduct will cause the result.
- (2) With respect to a circumstance, being aware of a substantial risk that the circumstance exists.
- (3) In order to act recklessly as to a result or circumstance, the person's conduct must grossly deviate from the standard of care that a reasonable person would observe in the person's situation.
- (4) In order to act recklessly as to a result or circumstance "under circumstances manifesting extreme indifference" to the interests protected by an offense, the

person's conduct must constitute an extreme deviation from the standard of care that a reasonable person would observe in the person's situation.³

While it is meaningful to say that recklessly means ... "With respect to a result, being aware of a substantial risk that one's conduct will cause a result, it is not meaningful to say that recklessly means "In order to act recklessly as to a result or circumstance, the person's conduct must grossly deviate from the standard of care that a reasonable person would observe in the person's situation." The formulation of paragraphs (3) and (4) do not flow from the lead in language. It lacks symmetry. While it appears that paragraph (3) relates in a meaningful way to paragraph (1), as paragraph (4) relates in a meaningful way to paragraph (2), the text does not explain how each of these sets of definitions relate to each other internally. A tenant of a well written definition for use in a Code provision is that, niceties of grammar aside, the definition should be able to be substituted for the defined term in the substantive offense and the sentence should retain its meaning. One cannot do that with the definition of recklessness.⁴ We propose that the definition of recklessness be redrafted so that the terms have more exacting meanings within the context of an offense.⁵ One way to accomplish this is to redraft the definition as follows:

RECKLESSNESS DEFINED. "Recklessly" or "recklessness" means:

(1) With respect to a result, being aware of a substantial risk that one's conduct will cause the result and that either the person's conduct *viewed as a whole* grossly deviates from the standard of care that a reasonable person would observe in the person's situation or under circumstances manifesting extreme indifference to the interests protected by an offense, the person's conduct must constitute an extreme deviation from the standard of care that a reasonable person would observe in the person's situation.⁶

³ It is unclear why the term "under circumstances manifesting extreme indifference" is in quotes in paragraph 4.

⁴ Similarly, it is unclear at this time whether the definition of "Factual Cause" in § 22A-204 suffers from the same infirmity. After seeing how this term is actually used in the revised Code it may need to be amended. At this time, the definition appears not to define "factual cause" as such, rather it appears to operate more like an if-then ("A person's is a factual cause of a result if the result would not have occurred without the conduct"). We will be able to evaluate this definition when we are able to take the phrase "the result would not have occurred but for the person's conduct" and substitute it for the term "factual cause" in the text of the Code. If the sentence has meaning than the definition works.

⁵ The same issues concerning the definition of Recklessness exists in the definition of Negligence.

⁶ In the proposed text we added, in italics the phrase "viewed as a whole." Italics was used to show that the phrase was not in the original Code text. This language is taken from the explanation of the gross deviation analysis on page 68 of the Report. Given the importance of this statement, we propose that it be added to the actual definition of Recklessness.

(2) With respect to a circumstance, being aware of a substantial risk that the circumstance exists and that either the person's conduct *viewed as a whole* must grossly deviate from the standard of care that a reasonable person would observe in the person's situation or under circumstances manifesting extreme indifference to the interests protected by an offense, the person's conduct must constitute an extreme deviation from the standard of care that a reasonable person would observe in the person's situation.

On page 58, in regard to § 22A-206(c)(3) it states "In many cases where a person consciously disregarded a substantial risk of prohibited harm, it is likely to be obvious whether the person's conduct constituted a "gross deviation" from a reasonable standard of care under § (c)(3). In these situations, further elucidation of this broad phrase to the factfinder is unnecessary. Where, however, it is a closer call, the discretionary determination reflected in § 22A-206(c)(3) is intended to be guided by the following framework."⁷ If this definition is to remain, the comment should be expanded to explain which part of (c)(3) the Commission believes is discretionary or otherwise explain this point. Paragraph (c)(3) does not contain the word "discretionary" nor does it use a term that would lead the reader to believe that any part of it could be discretionary.

Of perhaps greater concern is that the Commentary elucidates a precise three-factor test to determine whether something is a "gross deviation" but does not actually incorporate that test into the codified text. The Commission should consider whether a legal standard of that nature should be codified.

The definition of recklessness states that in order for someone to act recklessly, his or her conduct must "grossly deviate from the standard of care that a reasonable person would observe in the person's situation," and in order for that conduct to take place "under circumstances manifesting extreme indifference" to the interests protected by a particular offense, the conduct must be an "extreme deviation from the standard of care that a reasonable person would observe in the person's situation." The difference between "grossly deviating" and an "extreme deviation" is not clear, and the Report does not clarify it. On page 58 the Report states that "[t]he difference between enhanced recklessness [requiring extreme deviation] and normal recklessness [requiring gross deviation] is . . . one of degree." This does not sufficiently illuminate the distinction. Whether through additional explanations, examples, or a combination of the two, the Commentary should make clear the distinction between a gross deviation and an extreme deviation.

There is another aspect of the recklessness definition: being "aware of a substantial risk" which should be further explained. The Report maintains that "recklessness entails awareness of a

⁷ While we suspect the word "discretionary" means not that a court can choose whether to apply it, but rather that its application in any particular case requires significant case-specific judgment, the Report does not actually say that.

risk's substantiality, but not its unjustifiability." The language, however, is not altogether clear in that respect. Being aware of a substantial risk doesn't necessarily mean being aware that the risk is substantial – the very same kind of ambiguity that inspired element analysis to begin with. Take the following hypothetical. Suppose a person drives down a little used street at 150 miles an hour at 3:00 am. In order to be considered reckless, does the person have to be aware that there is a substantial risk that he will hit and kill someone or that if he hits someone they will be killed.

§ 22A-207 Rules of Interpretation Applicable to Culpable Mental State Requirement

On page 73, in § 22A-207 (b)(2), the proposed text states one of two ways that the Council can indicate that an element is subject to strict liability. It states that a person is strictly liable for any result or circumstance in an offense "[t]o which legislative intent explicitly indicates strict liability applies." This language is subject to multiple interpretations. If the phrase "legislative intent" is meant to include indicia from legislative history, it's not clear what it means for the legislative history to "explicitly indicate" something (leaving aside the tension in the phrase "explicitly indicate"). Does this provision mean that if a committee report explicitly says "strict liability should apply to X," that's good enough? What if there are contrary statements at the hearing, by a witness or a councilmember? If, alternatively, the phrase was meant to simply mean "when another statutory provision can fairly be read to indicate that strict liability should apply" the language should be modified to refer to other statutory provisions explicitly indicating that strict liability applies, rather than the "legislative intent explicitly" so indicated.

In the Commentary following the Rules of Interpretation Applicable to Culpable Mental State Requirement there are a few examples that demonstrate how the "rule of distribution" works. We believe that two additional examples are needed to fully explain how it works in situations of strict liability.

The first example in the Commentary explains how to interpret "knowingly causing bodily injury to a child" and the second, in the footnote, contrasts that explanation with the explanation for how to interpret "knowingly causing injury to a person, negligent as to whether the person is a child. Given the rule that strict liability only applies to the element specified (and does not follow through to subsequent elements), we suggest that the Commentary add two additional examples. The first would be where there is a mental state provided for the first element, the second element is modified by the phrase "in fact", and where there is no mental state associated with the third element. The purpose of that example would be to show that the mental state associated with the first element would also apply to the third element. The second example would contrast the previous examples with one where there is a mental state stated for the first element, the second element is modified by the phrase "in fact", and the third element is also modified with the phrase "in fact."

The following examples could be used, “Knowingly causing injury to a person, who is, in fact, a child, with a knife. Under the rules of interpretation the mental state of “knowingly” would apply not only to the causing injury to a person, but would also apply to the circumstance of the knife. This illustration could be contrasted with “Knowingly causing injury to a person, who is, in fact, a child, with what is, in fact, a knife.” We leave it to the Commission to decide where in the presentation of the Commentary it would be most informative to place these additional examples.

**Comments of U.S. Attorney's Office for the District of Columbia
on D.C. Criminal Code Commission Recommendations
for Chapter 2 of the Revised Criminal Code: Basic Requirements of Offense Liability
Submitted Feb. 22, 2017**

The U.S. Attorney's Office for the District of Columbia maintains the positions it previously has articulated in its correspondence on December 18, 2014, to the former D.C. Sentencing and Criminal Code Revision Commission, and on June 16, 2016, to Kenyan McDuffie (then chairman of the Committee on the Judiciary & Public Safety of the District of Columbia Council). In response to the request of the District of Columbia Criminal Code Reform Commission, we provide the following preliminary comments on the Recommendations for Chapter 2 of the Revised Criminal Code (Basic Requirements of Offense Liability) provided for Advisory Group review:

- Temporal Aspect of Possession (pages 15-17)
 - Section 22A-202(d) requires that the government prove that the defendant exercised control over property for period of time sufficient to provide an opportunity to terminate the defendant's control over the property.
 - Commission staff authors acknowledge that this approach takes a component of the "innocent or momentary possession" affirmative defense (the momentary possession component) and makes it an element that the government must now prove (versus an affirmative defense that the defendant must prove).
 - The Advisory Group should discuss this change further inasmuch as it is a substantive to D.C. law.

- Causation Requirement: § 22A-204
 - Factual Cause
 - Page 29: The Advisory Group should consider the "factual cause" definition in light of gun-battle liability, which is predicated upon "substantial factor" causation.

- Culpable Mental State Requirement: § 22A-205
 - Regarding mens rea as to results and circumstances (the last sentence of page 42), USAO-DC notes that, more recently, the D.C. Court of Appeals has held in *Vines* that “it is clear that a conviction for ADW can be sustained by proof of reckless conduct alone. If reckless conduct is sufficient to establish the requisite intent to convict a defendant of ADW, it necessarily follows that it is enough to establish the intent to convict him of simple assault.” *Vines v. United States*, 70 A.3d 1170, 1180 (D.C. 2013), as amended (Sept. 19, 2013). By “reckless conduct,” the D.C. Court of Appeals meant that the defendant was reckless as to the possibility of causing injury, *i.e.*, the defendant was reckless as to the result.