



D.C. Criminal Code Reform Commission

441 Fourth Street, NW, Suite 1C001S, Washington, D.C. 20001
(202) 442-8715 www.ccrdc.dc.gov

ADVISORY GROUP MEMORANDUM #39

To: Code Revision Advisory Group
From: Criminal Code Reform Commission (CCRC)
Date: December 24, 2020
Re: Supplemental Materials to the First Draft of Report #68

This Advisory Group Memorandum supplements the First Draft of Report #68, *December 2020 RCC Cumulative Update* with a few additional notes and various attachments with relevant research and background information.

Submission of Written Comments on the First Draft of Report #68 due Jan. 29, 2021

The CCRC requests that Advisory Group members' written comments on the First Draft of Report #68 focus on new changes that are presented for the first time in this Report. Please refrain from repeating prior comments that were not incorporated in this Report; all prior comments have been preserved in the record that will be presented to the Council and Mayor.

Notes on Report Organization & Scope.

- *Due to the volume of materials, the statutory language is not repeated before each commentary entry. Instead, the compilation of draft RCC statutes is intended to be read alongside the commentary.*
- *RCC § 22E-603 is highlighted in gray to indicate that penalty class authorized terms of imprisonment are not subject to review as part of this Report, and the Report does not include an update to the spreadsheet assigning classes to particular offenses. By January 15, staff expects to release for Advisory Group review an update to RCC § 22E-603, Authorized Terms of Imprisonment, along with a Fourth Draft of Report #41, Ordinal Ranking of Maximum Imprisonment Penalties, and an updated memorandum with relevant court statistics. Further commentary on how specific offenses relate under RCC § 22E-214, Merger of Related Offenses may also be provided in this timeframe. One month will be given for written comments on those materials, staggering somewhat the volume of material.*
- *Unlike most first drafts of reports with new recommendations, this Report does not include a section comparing the revised statute to national legal trends. Prior*

sections comparing RCC statutes to national legal trends have been compiled in Appendix J at the end of this Memo, as reference material.¹ Such other jurisdiction analyses may be submitted to the Council and Mayor as background materials but will not be part of the RCC statutory language and Commentary that the Advisory Group is asked to vote upon.²

- *There are two DCCA cases that the CCRC is still examining and may require changes to its recommendations: Fleming v. United States*, 224 A.3d 213, 227 (D.C. 2020), cert. denied, 207 L. Ed. 2d 1059 (June 15, 2020) (en banc) (regarding causation generally and specifically for second degree non-felony murder); *Lucas v. United States*, 240 A.3d 328 (D.C. 2020) (regarding causation generally and specifically for the bias enhancement). As noted in the App. D2 entries responding to Advisory Group comments on causation and the hate crimes enhancement, the CCRC welcomes new comments on RCC provisions related to these cases.
- *There are some notable changes that have implications for multiple provisions:*
 - First, most sections of the report have been reviewed to add “in fact” for defenses and exclusions to clarify that no defined culpable mental state is required for those sections. Many defenses may nonetheless require that the actor “reasonably believed [X].” “Reasonably believed” is not a defined culpable mental state and does not conflict with the use of “in fact.” Staff will continue to review sections to make sure that all criminal provisions where a culpable mental state might be expected is either given a defined culpable mental state or designated, by use of “in fact,” as not requiring a defined culpable mental state.
 - Second, as discussed in the Appendix D2, the CCRC recommends eliminating the separate effective consent defense in Chapter 4 of the General part and devolving the offense as needed to be in specific offenses in the Special part. On further review, it became clear that applying the general language to particular offenses was difficult and it did not sufficiently address the permutations that arise for particular offenses.
- *The CCRC expects the agency’s final recommendations to the Mayor and Council to follow the general format and presentation of the Report (RCC statutory language and Commentary) with additional information arranged in a manner*

¹ However, please note that such national legal trends materials are not being updated to track changes in national legislation, nor do they necessarily address new changes to the RCC statutory text.

² The consideration of national legal trends in the formulation of reform recommendations is part of the agency’s mandate, but the agency’s deliverables to the Council and Mayor do not include such analysis. See D.C. Code § 3-152 (“(b) The comprehensive criminal code reform recommendations required by subsection (a) of this section shall be in the form of a report that: (1) Includes draft legislation or other specific steps for implementing the recommendations; (2) Includes charging, sentencing, and other relevant statistics regarding the offenses affected by the recommendations; and (3) Explains how and why the recommendations change existing District law. (c) In preparing the comprehensive criminal code reform recommendations required by subsection (a) of this section, the Commission shall: (1) Consult with the Code Revision Advisory Group established pursuant to § 3-153; and (2) Review criminal code reforms in other jurisdictions, recommend changes to criminal offenses by the American Law Institute, and survey best practices recommended by criminal law experts.”).

corresponding to the Appendices in this Memo. Consequently, Advisory Group comments on formatting errors and typos are most welcome. Staff also continues to update the definitions that are cross-listed at the end of offenses and commentary cross-references due to changes in the RCC development as well. However, please provide a list of technical corrections to matters such as these that are non-substantive separately from your formal written comments.

Appended Background Materials.

- *Red-ink, marked-up copy* of all statutes in Report #68 that compare the current RCC statute to the last draft that was distributed to the Advisory Group.
- *Appendix B* is simply a short table of the names and dates of all CCRC reports and memoranda.
- *Appendix C* is a compilation of all written comments received to-date, with standardized numbering.
- *Appendix D2* provides the CCRC staff's record of the disposition of Advisory Group written comments not previously addressed, and other changes recommended by the CCRC staff on RCC sections that are the subject of the Report. (Note, the "D2" just distinguishes CCRC responses in this update with responses in "D1" in the early 2020 cumulative update.)
- *Appendix J* is a compilation of the "National legal trends" section of prior reports. Please note that these materials have not been updated to reflect legislative changes and may no longer be in synch with current RCC numbering or recommendations that have changed since the analysis was first done.
- (Note that Appendices A, E-I are not included in this report, but are reserved for court statistics, the table of recommended penalty classes for each offense, public opinion surveys, and other background documents.)