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
Senior Assistant Attorney General

DATE: September 13, 2019

SUBJECT: First Draft of Report #37, Controlled Substance and Related Offenses and First Draft of Report #38, Enlistment of Minors & Maintaining Location to Distribute or Manufacture Controlled Substances.

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 First Draft of Report #37, Controlled Substance and Related Offenses and First Draft of Report #38, Enlistment of Minors & Maintaining Location to Distribute or Manufacture Controlled Substances.[1]

COMMENTS ON THE DRAFT REPORT

RCC § 48-904.01a. POSSESSION OF A CONTROLLED SUBSTANCE

Paragraph (a)(2) lists the drugs, the knowing possession of which, would constitute first degree possession of a controlled substance.[2] While the list includes many of the more popular abusive

[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.

[2] RCC § 48-904.01a (2) states:

(1) The controlled substance is, in fact:

(A) Opium, its phenanthrene alkaloids, or their derivatives, except isoquinoline alkaloids of opium;

drugs, the Commentary does not explain the rational for choosing these drugs as opposed to other equally, or more, dangerous drugs. OAG proposes that rather than the Commission picking and explaining which Schedule I or Schedule II drugs be placed on the list,[3] that the Commission rely instead on the Schedules themselves. The law has already determined which drugs have the highest potential for abuse and which may lead to the most severe psychological or physical dependence (and, therefore, also deserve to be included in the list constituting the first degree offense).

D.C. Code § 48-902.03 states:

> The Mayor shall place a substance in Schedule I if the Mayor finds that the substance:
>
> (1) Has high potential for abuse; and
>
> (2) Has no accepted medical use in treatment in the United States or in the District of Columbia or lacks accepted safety for use in treatment under medical supervision.

D.C. Code § 48-902.05 states:

> The Mayor shall place a substance in Schedule II if the Mayor finds that:
>
> (1) The substance has high potential for abuse;
>
> (2) The substance has currently accepted medical use in treatment in the United States or the District of Columbia, or currently accepted medical use, with severe restrictions; and
>
> (3) The abuse of the substance may lead to severe psychological or physical dependence.

In conclusion, OAG proposes that § 48-904.01a (2) be redrafted to say, "the controlled substance is, in fact, a Schedule I or Schedule II drug under District law."

RCC § 48-904.01b. TRAFFICKING OF A CONTROLLED SUBSTANCE

(B) Any salt, compound, isomer, derivative, or preparation thereof which is chemically equivalent to or identical with any of the substances referred to in subparagraph (A) of this paragraph;
(C) Opium poppy or poppy straw;
(D) Cocaine, its salts, optical and geometric isomers, or salts of isomers;
(E) Ecgonine, its derivatives, their salts, isomers, or salts of isomers;
(F) Methamphetamine, its salts, isomers, or salts of its isomers;
(G) Phenmetrazine, or its salts; or
(H) Phencyclidine or a phencyclidine immediate precursor.

[3] Many of the drugs listed in RCC § 48-904.01a (2) are, in fact, Schedule II drugs.

Paragraph (g)(6) states that "In addition to any general penalty enhancements in RCC §§ 22E-605 – 22E-608, the penalty classification for any gradation of this offense may be increased in severity by one class when, in addition to the elements of the offense gradation, one or more" of a list of enhancements are present[4]. On page 17 of the Commentary it explains that this means that only one enhancement applies. This means that a person who plans on selling drugs at a school might as well take a gun with him because there will not be any additional penalty for carrying the firearm while distributing the controlled substance. OAG does not believe, however, that the choice should be between allowing for unfettered stacking of enhancements and only permitting one enhancement (no matter how many enhancements apply). Given the dangerousness of firearms, especially when possessed while distributing drugs, OAG suggests that this offense permit an enhancement for possession of a firearm and up to one additional enhancement when one or more of the remaining enhancements are present.

Paragraph (g)(6)(C)(i) establishes an enhancement for the trafficking of controlled substances "within 100 feet of a school, college, university, public swimming pool, public playground, public youth center, public library, or children's day care center" when there is signage. As the Commentary notes on page 14, the current law covers a wider number of locations and sets the footage at 1000 feet.

OAG has two suggestions relating to the distance portion of this provision. First, while OAG assumes that the phrase "within 100 feet of a school …" means within a 100 feet of the school's property line and not the building[5], the text of the provision should be clear on this issue. To improve the clarity of this provision, OAG suggests that the provision be amended to say, "within 100 feet of the property line of a school, college, university…" Second, while OAG does not oppose reducing the current 1000 foot distance from the designated facilities, 100 feet is too short. For example, the typical school bus is between 30 and 40 feet long. So, 100 feet

[4] The enhancements listed in RCC § 48-904.01b (g)(6) are:

(A) The actor is, in fact, 21 years of age or older, and distributes a controlled substance to a person who is, in fact, under 18 years of age;

(B) The actor knowingly possesses, either on the actor's person or in a location where it is readily available, a firearm, imitation firearm, or dangerous weapon in furtherance of and while distributing, or possessing with intent to distribute, a controlled substance; or

(C) The actor commits an offense under this section when in a location that, in fact:

(i) Is within 100 feet of a school, college, university, public swimming pool, public playground, public youth center, public library, or children's day care center; and

(ii) Displays clear and conspicuous signage that indicates controlled substances are prohibited in the location or that the location is a drug free zone.

[5] To interpret the provision as meaning 100 feet from the school building would mean that the enhancement would not apply when a drug transaction was taking place in a school's basketball court or parking lot.

would be a bit longer than 2 or 3 school buses.[6] We believe that the enhancement should apply to someone trafficking in controlled substances a mere 3 school buses distance from a school. As a compromise, OAG suggests that the distance be set at a 100 yards (i.e., 300 feet). One hundred yards is the length of a football field and so is an easy distance for many people to visualize. Changing the distance in RCC § 48-904.01b (g)(6)(C)(i) to 300 feet would also make the distance consistent with the proposal to set 300 feet as the distance for which first degree carrying a dangerous weapon, under RCC § 22E-4102(a)(2)(C)(i), would apply. Using the same distance for an enhancement for trafficking in controlled substances as is used to establish first degree carrying a dangerous weapon will avoid confusion by citizens as to which distance applies.

Paragraph (h)(1) establishes a new defense. It states, "It is a defense to prosecution under this section for distribution or possession with intent to distribute that the actor distributes or possesses with intent to distribute a controlled substance but does not do so in exchange for something of value or future expectation of financial gain from distribution of a controlled substance."

While OAG generally agrees that a person should not be guilty of trafficking of a controlled substance for sharing their drugs with someone so that they can get high together, we disagree with a blanket defense that requires the government to prove – in all circumstances - that a controlled substance was ultimately exchanged for something of value or the future expectation of financial gain. Take the following example. An undercover officer sees an actor take out a bag with 400 grams (.88 lbs.) of cocaine.[7] The actor says to another person, "here's the stuff." The actor then hands over the drugs and walks away. The police then arrest the two people. Notwithstanding that 400 grams exceeds the amount of cocaine that one would possess for personal use (or even to share), because no money was exchanged or discussed, the defense would seem to apply. Rather than have a blanket defense, paragraph (h)(1) should be amended to apply to situations where the actor and the other person are about to use the drugs together or where the actor transfers to another person enough controlled substance for a single use.

RCC § 48-904.10. POSSESSION OF DRUG MANUFACTURING PARAPHERNALIA and RCC § 48-904.11. TRAFFICKING OF DRUG PARAPHERNALIA

RCC § 48-904.10 (a) states that "A person commits possession of drug manufacturing paraphernalia when that person knowingly possesses an object… [t]hat has been used to manufacture a controlled substance…" However, paragraph (b) excludes from liability an object "…[t]hat has been used to package or repackage a controlled substance for that person's own

[6] See https://www.google.com/search?q=how+long+is+a+school+bus&rlz=1C1NHXL_enUS708US708&oq=how+long+is+a+school+bus&aqs=chrome.0.0l6.5399j1j7&sourceid=chrome&ie=UTF-8.

[7] Pursuant to RCC § 48-904.01b (a)(2)(D) this amount cocaine, if proven, would make the distribution of the drug first degree trafficking of a controlled substance.

use…" It is unclear from the text and the Commentary how this provision should be applied if the paraphernalia is used both to manufacture a controlled substance and to package a controlled substance for own's own use. To clarify that objects that are used to manufacture a controlled substance are illegal despite the fact that they may also be used for personal use, OAG suggests that paragraph (b) be amended to read:

(b) *Exclusions to Liability.* Notwithstanding subsection (a), it shall not be a violation:
(1) If the object possessed is 50 years of age or older[8]; or
(2) If a person possesses an object:
(A) That has been used solely to package or repackage a controlled substance for that person's own use; or
(B) With intent to use the object solely to package or repackage a controlled substance for that person's own use.

RCC § 48-904.10 limits liability for possession of drug paraphernalia to objects related to the manufacture of a controlled substance. As the Commentary points out on page 31, "The current D.C. Code general paraphernalia statute requires a person to use or possess with intent to use 'drug paraphernalia,' a defined term, to 'plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inhale, ingest, or otherwise introduce into the human body a controlled substance[.]'" [footnotes removed] RCC § 48-904.11, however, makes it an offense to traffic in objects that a person will use "to introduce into the human body, produce, process, prepare, test, analyze, pack, store, conceal, manufacture, or measure a controlled substance." It is unclear why the RCC takes the position that it should be illegal to traffic in these items when it is not illegal to possess them.

RCC PROPOSAL TO REPEAL D.C. CODE § 48-904.03a

In the First Draft of Report #38, the Commission proposes repealing D.C. Code § 48-904.03a. That provision states:

> (a) It shall be unlawful for any person to knowingly open or maintain any place to manufacture, distribute, or store for the purpose of manufacture or distribution a narcotic or abusive drug.
>
> (b) Any person who violates this section shall be imprisoned for not less than 5 years nor more than 25 years, fined not more than the amount set forth in § 22-3571.01, or both.

The Commentary, on pages 1 and 2, explain perceived ambiguities in this provision. It argues that under one interpretation the provision is not needed because:

[8] D.C. Code § 48-1101 currently states that the phrase "drug paraphernalia" "shall not include any article that is 50 years of age or older."

> Under RCC § 22E-210, a person is guilty as an accomplice if that person acts with the culpability required by the underlying offense, and purposely assists another person with the planning or commission of the conduct constituting the offense, or purposely encourages another person to engage in specific conduct constituting the offense.[9] The revised trafficking of a controlled substance statute requires that a person knowingly distributes, manufactures, or possesses with intent to distribute or manufacture, a controlled substance. Consequently, a person who knowingly opens or maintains a place, with the *purpose* of assisting another person in distributing, manufacturing, or storing for the purposes of manufacturing or distributing a narcotic or abusive drug could be liable as an accomplice to trafficking of a controlled substance.

Instead of simply repealing D.C. Code § 48-904.03a, OAG suggests that the Commission draft a more targeted provision that only applies to the manufacture of methamphetamine. The internet is replete with news and videos of exploding methamphetamine labs and mobile labs and the injuries that they cause.[10] The community must be protected from such hazards.

As noted in a flyer produced by U.S. Department of Justice's National Drug Intelligence Center:

> The chemicals used to produce methamphetamine are extremely hazardous. Some are highly volatile and may ignite or explode if mixed or stored improperly. Fire and explosion pose risks not only to the individuals producing the drug but also to anyone in the surrounding area, including children, neighbors, and passersby. Even when fire or explosion does not occur, methamphetamine production is dangerous. Simply being exposed to the toxic chemicals used to produce the drug poses a variety of health risks, including intoxication, dizziness, nausea, disorientation, lack of coordination, pulmonary edema, serious respiratory problems, severe chemical burns, and damage to internal organs.[11]

Given the dangerousness associated with methamphetamine production, OAG suggests that the RCC contain a provision which makes it an offence for a person to knowingly use a building, vehicle, or watercraft with the intent to manufacture methamphetamine therein.

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[9] The revised trafficking of a controlled substance statute specifies that the rules governing accomplice liability under RCC § 22E-210 apply to that offense.

[10] For example, see https://www.youtube.com/watch?v=U7MaaVtiGIQ, https://www.military.com/video/explosions/blast/meth-lab-explosion-almost-hits-cop/2034025445001, and https://www.complex.com/pop-culture/2011/12/the-25-scariest-meth-lab-explosion-photos/4.

[11] See https://www.justice.gov/archive/ndic/pubs7/7341/7341p.pdf.

MEMORANDUM

THE PUBLIC DEFENDER SERVICE
for the District of Columbia
CHAMPIONS OF LIBERTY

To:	Richard Schmechel, Executive Director D.C. Criminal Code Reform Commission
From:	Public Defender Service
Date:	September 16, 2019
Re:	Comments on First Draft of Report No. 37, Controlled Substance and Related Offenses

The Public Defender Service makes the following comments on Report #37, Controlled Substance and Related Offenses.

1) PDS recommends the full decriminalization of simple possession of controlled substances. Incarcerating individuals for the possession of controlled substances is a failed criminal justice policy and the wrong approach to a public health problem. There are many reasons why decriminalization would be the right approach for the CCRC. It is well-documented that there is discriminatory enforcement of drug possession laws against African-Americans. Much of the reasoning behind the Council's decriminalization of marijuana stemmed from the discriminatory enforcement of laws prohibiting possession of marijuana. The continued criminalization of drug possession leads to negative police encounters, burdensome supervision requirements for individuals on probation, and potentially devastating consequences for non-citizens. The resources dedicated to arresting and detaining individuals for simple possession of controlled substances would be better employed through a public health approach that provides treatment for addiction and encourages safe drug use practices.

In the absence of full decriminalization of simple possession, PDS makes additional recommendations related to possession of controlled substances.

2) In appendix A, the CCRC provides a mark-up of D.C. Code § 48-904.01. Beyond re-numbering, the RCC does not address D.C. Code § 48-904.01(e)(1). PDS recommends that the RCC expand D.C. Code § 48-904.01(e)(1) to allow on more than a single occasion for judges to sentence individuals to probation and dismiss the proceedings after the successful completion of probation. Recovery from drug addiction is often a long process that includes periods of relapse and abuse. Individuals who successfully complete probation under D.C. Code § 48-904.01(e)(1) may briefly relapse and may be subject to arrest, particularly if they use drugs outside in streets or alleys. Given the negative impact of a criminal conviction and our collective understanding

that individuals may relapse over a period of time, judges should have the ability to use their discretion to discharge drug possession convictions on more than one occasion pursuant to D.C. Code § 48-904.01(e)(1).

3) PDS recommends that the RCC adopt within Title 48, the provisions of D.C. Code § 7-403 that stem from the "Good Samaritan Overdose Prevention Act of 2012." D.C. Code § 7-403 provides immunity from prosecution for some drug offenses under circumstances where an individual seeks assistance for himself or other individuals in the event of a suspected drug overdose. This law encourages life-saving action for individuals suffering from a drug overdose. Including this provision within the substantive drug offenses would increase knowledge of that provision and could improve public health.

4) The RCC drug provisions grade offenses with regard to weight. RCC drug offenses do not include any requirement with respect to drug purity. Rather liability attaches when the individual possesses or traffics a measurable amount of the controlled substance. PDS has concerns about how the use of weight would disproportionately impact the possession or trafficking of controlled substances that are contained within edible substances. For instance, an individual selling an opium tea may sell eight ounces of liquid tea mixed with a measureable amount of opium. The eight ounces of tea would be roughly equal to "200 grams of any compound or mixture containing opium."[1] The sale of eight ounces of opium tea, regardless of its low purity level and its intended use by a single individual, would qualify as first degree trafficking of a controlled substance. This will typically be the case whenever controlled substances are baked into brownies, cakes, or otherwise mixed with a large quantity of inert substances.

   PDS recommends that the RCC address the disproportionate criminalization of all edibles by creating a different rule for measuring controlled substances that are mixed with edibles and that are intended to be eaten. PDS recommends the following language:

   <u>For controlled substances that are contained within edible products and that are intended to be consumed as food, candy, or beverages, the total weight of the controlled substance shall be determined by calculating the concentration of the controlled substance contained within the mixture and then calculating the total amount of controlled substance that is present. The weight of the inert edible mixture will not be added to determine the total weight of the controlled substance.</u>[2]

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[1] RCC § 48-904.01b(a)(2)(A).

[2] PDS spoke with Dr. Ian A. Blair, the A.N. Richards Professor of Systems Pharmacology and Translational Therapeutics at the University of Pennsylvania, about the complexity of testing edible items such as teas and cakes for the presence of controlled substances and about any difficulty in calculating a total weight for the controlled substance. Dr. Blair advised that testing for the level of concentration of a controlled substance in an edible items was possible; indeed, such testing would be easier than testing for controlled substances in tissues, serum, or blood, which are routine functions of toxicology labs. Dr. Blair further advised that calculating the total amount of the controlled substance when it is mixed with a large amount of tea, cake, or other

5) PDS supports the proposal discussed at the September 4, 2019 Public Meeting of the Commission that the weight for purposes of liability should exclude non-consumables, such as the containers used to transport the substance or the by-products of consuming the substance.

6) RCC § 48-904.10, possession of drug manufacturing paraphernalia prohibits the knowing possession of an object that "has been used to manufacture a controlled substance" or "with the intent to use the object to manufacture a controlled substance." PDS recommends eliminating liability in the first instance, when an individual knowingly possesses an object that has been used to manufacture a controlled substance. Many common items such as bowls, spoons, and pans are used to manufacture controlled substances. Individuals sharing homes with people who manufacture drugs may use the same bowls and pots for cooking and eating. In that sense, RCC §48-904.10 is too broad and will criminalize the possession of household items by individuals who did not use the items to manufacture controlled substances and who have no intent to use the items to manufacture controlled substances.

7) PDS has two concerns about RCC § 48-904.11, Trafficking of drug paraphernalia.

   First, while the exceptions for testing kits and needles delivered by community organizations tracks the current law, PDS believes the exception should go farther. The RCC should allow community-based harm reduction organizations the flexibility to distribute clean and safe drug use supplies to individuals who smoke drugs as well as to those who inject drugs. Sharing pipes and smoking with unsafe objects can cause cuts, burns, and the transmission of infectious diseases including hepatitis C.[3] The use of brillo pads rather than appropriately-sized screens can lead to brillo pads being inhaled by the user.

   Second, the RCC should allow the transfer or delivery of clean supplies from one user to another user. For example, if an individual cannot arrive at the needle exchange van during its hours of operation, a friend should be able to collect the supplies and transfer them. For public health reasons, including that the District has the nation's highest rate of HIV diagnosis[4], the acquisition and transfer of safe supplies should be encouraged.

   PDS recommends that the RCC use the following language:

   (a) *Exclusions to Liability.* Notwithstanding subsection (a), it shall not be a violation of this section:

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inert substance would involve multiplying the concentration of the controlled substance in the tea, cake, or other inert substance (example microgram/gram) by the total weight of the tea, cake, or other inert substance (example microgram/gram x total weight in grams).

[3] See, Crack Pipe Sharing Among Street-Involved Youth in a Canadian Setting, Tessa Cheng, Evan Wood, Paul Nguyen, Julio Montaner, Thomas Kerr, and Kora DeBeck, (2015). Available at: https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4305503/

[4] See: https://www.cdc.gov/hiv/statistics/overview/geographicdistribution.html.

(1) For a community-based organization to sell or deliver, or possess with intent to sell or deliver, testing equipment or other objects used, intended for use, or designed for use in identifying or analyzing the strength, effectiveness, or purity of a controlled substance; or
(2) For a community-based organization to sell or deliver, or possess with intent to sell or deliver supplies such as pipes and screens for the safer ingestion of controlled substances by inhalation; or
(3) For person authorized by subsection (b) of 48-1103.01 to deliver any hypodermic syringe or needle distributed as part of the Needle Exchange Program authorized under D.C. Code § 48-1103.01; or
(4) For an individual who received materials described in (a)(1)-(3) to transfer or deliver those materials to another individual; or
(5) For a person to sell or deliver or possess with intent to sell or deliver an object that is 50 years of age or older.

8) The RCC creates a penalty enhancement when, "the actor is, in fact, 21 years of age or older, and distributes a controlled substance to a person who is, in fact, under 18 years of age." This enhancement fails to include a mens rea element and thus would create an enhanced penalty even where the defendant reasonably believed that the individual to whom he or she sold controlled substances was over the age of 18. Imposing additional penalties without a scienter requirement diminishes the proportionality of punishment. For instance, two individuals who sold cocaine to two different people inside of an age 21 and up night club would be punished differently if one individual, who looked just as old as the other individual entered the club by using fake identification. Without further differences between the two defendants, one should not be subject to additional punishment under essentially the same facts. Rather, PDS recommends that the RCC include that the defendant was reckless as to the age of the individual to whom the defendant distributed the controlled substance.

   Further, PDS recommends adding language to the commentary to specify that the penalty enhancement should not apply in instances when a defendant distributes a controlled substance to one individual and that individual transfers the controlled substance to another individual who is under age 18. Unless the government proves that the defendant knew that the controlled substance would be transferred to a minor, the enhancement should not apply.

9) RCC § 48-904.01b and related provisions create a penalty enhancement under (g)(6)(C) when the actor commits an offense and is within "100 feet of a school, college, university, public swimming pool, public playground, public youth center, public library, or children's day care center." PDS recommends amending "public youth center" to read "public recreation center." The term "youth center" does not have a specific meaning within the District while recreation centers are well known and easily identifiable with signs that state "recreation center."

10) PDS recommends rewriting for clarity the language for one of the defenses to Trafficking of a Controlled Substance to read as follows:

It is a defense to prosecution under this section for distribution or possession with intent to distribute that the actor distributes or possesses with intent to distribute a controlled substance but does not do so in exchange for something of value or ~~future~~ expectation of future financial gain from distribution of a controlled substance.

Memorandum

Jessie K. Liu
United States Attorney
District of Columbia

Subject: Comments to D.C. Criminal Code Reform Commission for First Draft of Reports #37 and #38	Date: September 16, 2019

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

From: U.S. Attorney's Office for the District of Columbia

The U.S. Attorney's Office for the District of Columbia (USAO) and other members of the Code Revision Advisory Group of the D.C. Criminal Code Reform Commission (CCRC) were asked to review the CCRC's First Draft of Reports #37 and #38. USAO reviewed this document and makes the recommendations noted below.[1]

Comments on Draft Reports #37 and #38

I. General Comment.

1. USAO recommends adding the words "a compound or mixture containing [a controlled substance]" to every gradation of controlled substance offenses.

This language already exists in RCC § 48-904.01b(a)(2) and (b)(2), and in RCC § 48-904.01c(a)(2) and (b)(2). USAO recommends its additional inclusion in RCC § 48-904.01a(a)(2) and (b); RCC § 48-904.01b(c)(2), (d), and (e); and RCC § 48-904.01c(c)(2), (d), and (e).

The draft RCC language lists each drug by name, instead of incorporating the schedules. Current law incorporates the drug schedules, which are set forth at D.C. Code § 48-902.03 *et seq.* Under these schedules, many substances require "any material, compound, mixture, or preparation which contains any quantity of" the enumerated substance. Of the drugs specifically listed in the RCC, this language exists under current law for: cocaine, D.C. Code § 48-902.06(1)(D); ecgonine, D.C. Code § 48-902.06(1)(D); methamphetamine, D.C. Code § 48-902.06(3)(B); phenmetrazine, D.C. Code § 48-902.06(3)(C); and phencyclidine and its immediate precursors, D.C. Code § 48-902.06(4)(E)–(F). This language does not exist for opium, D.C. Code § 48-902.06(1)(A), or for opium poppy and poppy straw, D.C. Code § 48-902.06(1)(C).

[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.

Requiring proof of the controlled substance, instead of requiring proof of *a compound or mixture containing* the controlled substance, would require purity testing. Purity testing is not required under current law, and it would create an additional, unnecessary burden to conduct purity testing in each case.

USAO recommends, to eliminate the need for unnecessary purity testing, including this language in each gradation relating to controlled substances.

II. RCC § 48-904.01a. Possession of a Controlled Substance.

1. USAO opposes eliminating a felony offense for possession of liquid PCP.

Under current law, possession of liquid PCP is a felony offense, punishable by not more than 3 years' imprisonment and a corresponding fine. D.C. Code § 48-904.01(d)(1). USAO believes that the CCRC's recommendations regarding liquid PCP should track current law.

The law creating this felony offense, the Liquid PCP Possession Amendment Act of 2009 (L18-0196), is a relatively new law that went into effect in 2010. The Committee Report to that law notes that "PCP use has decreased nationally since the 1970s; however, there are remaining pockets of abuse including in the District of Columbia." Committee on Public Safety and the Judiciary Report on Bill 18-0566 ("Committee Report") at 2. The Committee Report cites to the Metropolitan Police Department ("MPD")'s assessment of the "rebound in the use of PCP," and cites to data from MPD as "further evidence that PCP associates with a higher incidence of criminal (and violent) behavior than is the case with other drugs." Committee Report at 2. Although the Commentary notes that eliminating the separate penalty for liquid PCP is supported by national legal trends (Commentary at 5), as the Committee Report indicates, D.C. has a unique PCP problem. Therefore, other jurisdictions may not need to address this PCP problem, which creates public safety issues, in the same way that D.C. does. Further, as the CCRC cites (Commentary at 3 n.7), the purpose of this bill was not to punish users. This is consistent with the Committee Report's finding "[p]ossession of liquid PCP is rarely consistent with personal use." Committee Report at 5. Because of the unique PCP problems in the District, and because possession of liquid PCP is consistent with distribution of PCP, USAO opposes the CCRC's recommendation to eliminate a felony offense for possession of liquid PCP.

2. USAO recommends creating only one gradation of possession of a controlled substance, which would apply to any controlled substance.

USAO believes that creating multiple gradations for possession of a controlled substance is unnecessary and overly complicates simple possession. The CCRC notes that, of the 29 reformed jurisdictions, a slight minority creates gradations for possession (Commentary at 5). USAO recommends that the CCRC follow the majority of jurisdictions and create only one gradation of possession.

3. USAO recommends, in subsection (e), changing the words "RCC § 48-901.02" to "D.C. Code § 48.901.02."

With USAO's changes, this subsection would provide:

". . . have the meanings specified in D.C. Code ~~RCC~~ § 48-901.02."

This change is not intended to be substantive. Given that there is no draft RCC § 48-901.02, USAO assumes that the CCRC intended to list the relevant D.C. Code provision.

III. RCC § 48-904.01b. Trafficking of a Controlled Substance.

1. USAO opposes creating an enhancement for possessing a firearm while committing the offense of trafficking of a controlled substances, instead of a stand-alone offense for the same.

Under current law, as part of the offense of Possession of a Firearm During Commission of Crime of Violence, an actor is prohibited from possessing a firearm "while committing a crime of violence or dangerous crime as defined in § 22-4501." D.C. Code § 22-4504(b). A "dangerous crime" is defined as "distribution of or possession with intent to distribute a controlled substance." D.C. Code § 22-4501(2). Under the RCC, however, the offense of Possession of a Dangerous Weapon During a Crime only applies to an offense against persons or burglary. RCC § 22E-4104. It would not apply to distribution or possession with intent to distribute a controlled substance.

USAO opposes this change in the law, which creates an enhancement for possession of a firearm while distributing or possessing with intent to distribute a controlled substance, instead of a stand-alone offense for this conduct. This change in law is inconsistent with both current D.C. law and comparable federal law to which the CCRC cites. 18 U.S.C. § 924(c)(1)(A) creates an enhanced punishment for possession of a firearm *either* during a crime of violence *or* during a drug trafficking crime. USAO recommends that the CCRC track both current law and comparable federal law in this respect.

2. To the extent that RCC § 48-904.01b(g)(6)(B) remains, USAO recommends removing the words "in furtherance of and."

With USAO's changes, RCC § 48-904.01b(g)(6)(B) would provide:

"The actor knowingly possesses, either on the actor's person or in a location where it is readily available, a firearm, imitation firearm, or dangerous weapon ~~in furtherance of and~~ while distributing, or possessing with intent to distribute, a controlled substance;"

The requirement that a firearm, imitation firearm, or dangerous weapon be used "in furtherance of and while" distributing or possessing with intent to distribute a controlled substance is a change from current law, which requires only that a person possess a firearm "while" distributing or possessing with intent to distribute a controlled substance. This change is

not warranted. A defendant creates an increased risk of danger by introducing a weapon to an offense. Even if a defendant does not use or display the firearm or other dangerous weapon, there is an additional level of risk created when a defendant has a weapon readily available. A firearm could inadvertently discharge, and another person could suffer injury as a result of that weapon. Of course, the presence of a firearm also increases the chances of the intentional use of the weapon at some point during the offense, and subsequent resultant injury. This is true even when the weapon is not used "in furtherance" of the underlying offense.

Further, the Commentary states that this language was taken from 18 U.S.C. § 924 (Commentary at 11). 18 U.S.C. § 924(c)(1)(A), however, provides for an increased punishment if the person "uses or carries a firearm, *or* who, in furtherance of any such crime, possesses a firearm" (emphasis added). The federal statute does not require that the firearm always be used in furtherance of a crime, but permits the firearm to be merely carried during an offense. Moreover, there is an enhancement in the federal statute for brandishing a firearm. 18 U.S.C. § 924(c)(1)(A)(ii). Presumably, for a firearm to be used "in furtherance" of a crime, it must, at a minimum, be brandished. Because the federal statute creates a penalty provision for cases in which the firearm was not brandished, *see* 18 U.S.C. § 924(c)(1)(A)(i), this statute is intended to punish both those who use the firearm in furtherance of a crime and those who possess the firearm, but do not necessarily use it in furtherance of a crime. Thus, the CCRC's reading of § 924(c)(1)(A) is too narrow, and does not include all of the permissible options under the statute.

Finally, the Commentary notes that "if a person sells a controlled substance while armed with a firearm, with intent to use the firearm if someone attempts to take the controlled substances from him without payment, the penalty enhancement would apply even if the person never actually uses or displays the firearm" (Commentary at 11 n.28). In most circumstances, however, it would be difficult, if not impossible, to prove this intent beyond a reasonable doubt, unless the actor actually uses the firearm. Rather, the fact that an actor possesses a firearm while trafficking a controlled substance should lead to an inference that the actor may use the firearm at some point. This inference should be codified in the statute, and require only that a person possess the firearm while committing the offense.

3. <u>USAO recommends removing the defense in RCC § 48-901.01b(h)(1) that creates a defense for distribution or possession with intent to distribute where an actor does not do so in exchange for something of value or future expectation of financial gain.</u>

As the CCRC acknowledges, creating this defense represents a change from current law. This defense is problematic for prosecution. If a person possesses drugs with intent to distribute them, but there is no proof of distribution, it will often be impossible for the government to overcome this defense. For example, despite possessing a large quantity of drugs that a drug expert would opine is more consistent with intent to distribute than person use, a defendant could claim that he had no intention to distribute them in exchange for value. He could claim, instead, that he possessed such a large quantity for the purpose of distributing them with friends. It will be difficult for the government to overcome this claim beyond a reasonable doubt, even where it is not true. Thus, although the CCRC's intent in creating this defense was to create a limited defense for those who provide small gifts to others (Commentary at 13), in reality, it would allow

traffickers to rely on this defense to justify their possession of quantities that are not intended for mere small gifts. USAO accordingly believes that this defense is inappropriate. Notably, the CCRC acknowledges that this defense is not supported by national legal trends, and that only one of the 29 reformed code jurisdictions has adopted this defense (Commentary at 19). The CCRC should stay in line with current law and the overwhelming majority of other jurisdictions and remove this defense.

IV. RCC § 48-904.01c. Trafficking of a Counterfeit Substance.

1. USAO reiterates the same objections here that it set out above for RCC § 48-904.01b.

V. RCC § 48-904.10. Possession of Drug Manufacturing Paraphernalia.

1. USAO opposes decriminalization of drug paraphernalia.

The RCC is essentially decriminalizing the offense of possession of drug paraphernalia (Commentary at 32 n.111). The RCC provides little support for this significant change, stating that "[t]his change improves the clarity and proportionality of the revised criminal code" (Commentary at 32).

Although there is no definition of "manufacturing" in the RCC, USAO assumes that the RCC term "manufacturing" relies on the definition at D.C. Code § 48-901.02(13). As the Commentary alludes to (Commentary at 32& n.115), this manufacturing definition likely would not include objects routinely used to distribute drugs, such as scales, zips, and other objects, because those objects were not necessarily "designed to" manufacture drugs. Thus, in addition to decriminalizing drug paraphernalia intended for personal use, the RCC has proposed decriminalizing drug paraphernalia intended for distribution as well.

The RCC notes that this change is not supported by national legal trends, stating that of the 29 reformed jurisdictions, none limit the scope of their statutes in a matter similar to the RCC's proposal, and that only two states have decriminalized drug paraphernalia in some way (Commentary at 34).

VI. Recommended Repeal of D.C. Code § 48-904.07. Enlistment of Minors.

1. USAO recommends incorporating the substance of D.C. Code § 48-904.07 into the enhancement set forth in RCC § 48.904.01b(g)(6)(A).

As proposed, RCC § 48-904.01b(g)(6)(A) provides an enhancement for trafficking of a controlled substance where: "The actor is, in fact, 21 years of age or older, and distributes a controlled substance to a person who is, in fact, under 18 years of age." USAO suggests supplementing this enhancement to also include an enhancement for an actor who "enlists, hires, contracts, or encourages any person under 18 years of age to sell or distribute any controlled substance for the profit or benefit of" the actor. Thus, to the extent that the conduct prohibited by D.C. Code § 48-904.07 is prosecuted under an accomplice liability theory, as contemplated by the Commentary in Report # 38 (at 3–4), there would be an enhanced penalty available for

enlisting a minor to distribute a controlled substance. This enhancement is consistent with the rationale for an enhancement for distributing a controlled substance to a minor, as it would deter adults from involving minors in the use and distribution of controlled substances.