



## D.C. Criminal Code Reform Commission

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### **BY ELECTRONIC DELIVERY ONLY**

The Honorable Muriel Bowser  
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The Honorable Phil Mendelson  
Chairman, Council of the District of Columbia  
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Dear Mayor Bowser, Chairman Mendelson, Councilmembers:

On behalf of the D.C. Criminal Code Reform Commission (CCRC), I present for your consideration the attached report, containing recommendations for reforms to District of Columbia criminal statutes, and supporting materials.

The report fulfills, in relevant part,<sup>1</sup> the agency's statutory duties under D.C. Code § 3-152(a)-(c). The materials comprising the report are lengthy and detailed. The recommendations consist of revised statutory language for Title 22 and other criminal statutes in the D.C. Code and a legal commentary describing the proposed language and how it changes current District law. The recommendations are the product of extensive consultation with statutorily-designated District stakeholders and experts, careful review of model legislation and other jurisdictions' best practices, research into relevant social science literature, and analysis of relevant District criminal justice data. The supporting materials provide a record of this consultation process as well as background information on the legal research and data analysis that was performed.

This transmittal memorandum briefly describes the CCRC's statutory duty, the organization of the report's recommendations and supporting materials, and the process used by the CCRC to develop the report. Summaries of major recommendations, highlights of relevant social science and legal research, and additional data analysis will be released later this year.

### *CCRC Duty to Issue Recommendations and Supporting Materials*

The CCRC is an independent agency in District government that began operation October 1, 2016. The agency's mission has been to develop comprehensive recommendations for the Mayor and D.C. Council on revision of District criminal statutes. The agency is an advisory body with no

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<sup>1</sup> Previously, in a report transmitted to the Mayor and Council on May 5, 2017, the CCRC provided recommendations to enable the adoption of Title 22 as an enacted title of the District of Columbia Official Code. <https://lims.dccouncil.us/Legislation/RC22-0053>.

regulatory, legislative, or judicial authority. Any changes recommended by the CCRC cannot go into effect without legislative action by the District’s elected officials.

Since its inception, the agency’s work has focused primarily on the District’s substantive criminal statutes—the laws that establish the scope of criminal conduct and authorize penalties. These statutes have never undergone a comprehensive review or reform since Congress first codified the D.C. Code in 1901. Amended and augmented by different legislative bodies over time, the District’s criminal statutes today vary widely in their clarity, completeness, consistency, and proportionality. Many existing statutes use outdated and unclear language, fail to completely state the elements that establish guilt, or use inconsistent definitions and terminology. The authorized penalties for many District crimes often do not reflect the seriousness of the underlying conduct because of overlap and gaps in how crimes are defined, failures to distinguish between variations in how an offense is committed or its resulting harm, and changing norms about the relative severity of offenses and the use of incarceration penalties.

The structure and drafting of the District’s substantive criminal statutes stand in sharp contrast to that of most other U.S. jurisdictions. Most states comprehensively restructured and redrafted their criminal statutes in the mid-20<sup>th</sup> century following the issuance of the Model Penal Code (MPC) by the American Law Institute in 1962. The MPC was most influential with respect to its definitions of the culpable mental states that must be proven in crimes (sometimes referred to as “mens rea”) and its comprehensive approach to drafting offenses that emphasized a clear, complete, and consistent statement of all elements instead of reliance on “common law” judicial rulings. The District is among the minority of jurisdictions that did not engage in such MPC-based, comprehensive reform. Over time, the District’s piecemeal legislative amendments have been unable to fix pervasive, structural problems with the D.C. Code. A review of criminal codes by law professor Paul Robinson used objective factors like clarity, consistency, and completeness to assess all 52 U.S. criminal codes (50 states, the federal criminal code, and the District). The District was ranked at the bottom—45<sup>th</sup> of the 52 reviewed jurisdictions.<sup>2</sup>

The CCRC’s statutory duties require the agency to issue comprehensive recommendations to rectify these issues and modernize the District’s criminal statutes. Specifically, D.C. Code § 3–152(a) states:

“By March 31, 2021, the Commission shall submit to the Mayor and the Council comprehensive criminal code reform recommendations that revise the language of the District’s criminal statutes to:

- (1) Use clear and plain language;
- (2) Apply consistent, clearly articulated definitions;
- (3) Describe all elements, including mental states, that must be proven;
- (4) Reduce unnecessary overlap and gaps between criminal offenses;
- (5) Eliminate archaic and unused offenses;
- (6) Adjust penalties, fines, and the gradation of offenses to provide for proportionate penalties;
- (7) Organize existing criminal statutes in a logical order;

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<sup>2</sup> Paul H. Robinson, Michael T. Cahill, and Usman Mohammad, *The Five Worst (and Five Best) American Criminal Codes*, 95 NW. U. L. REV. 1, 61 (2000).

- (8) Identify any crimes defined in common law that should be codified, and propose recommended language for codification, as appropriate;
- (9) Identify criminal statutes that have been held to be unconstitutional and recommend their removal or amendment;
- (10) Propose such other amendments as the Commission believes are necessary; and
- (11) Enable the adoption of Title 22 as an enacted title of the District of Columbia Official Code.”

In addition to specifying these goals for the CCRC’s recommendations, D.C. Code § 3–152(b) also specifies that the recommendations must include “charging, sentencing, and other relevant statistics regarding the offenses affected by the recommendations;” and must “explain[] how and why the recommendations change existing District law.” Further, D.C. Code § 3–152(c) requires the CCRC to “consult with the Code Revision Advisory Group established pursuant to § 3-153” and to “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.”

Over the course of nearly four and a half years the CCRC staff has worked to fulfill these statutory duties with the assistance of its statutorily-designated Advisory Group members. The recommendations and supporting materials developed over that time period are presented here.

### *Scope and Organization of the CCRC Recommendations and Supporting Materials*

The CCRC recommendations consist of two documents. First, there is statutory text for a revised D.C. Code Title 22 and several revised criminal statutes elsewhere in the D.C. Code—collectively referred to as the Revised Criminal Code (RCC). The content and organization of the revised Title 22 text broadly reflect the approach used in the Model Penal Code and adopted by most states.<sup>3</sup> There is a “General Part” that provides definitions for new and commonly used terms, rules of liability, rules of interpretation, defenses, and a standardized penalty classification scheme. There also is a “Special Part” that specifies language for nearly 300 offenses and gradations. The RCC is close to 200 pages in length and addresses crimes that, in recent years, have accounted for over 97% of all adult convictions.<sup>4</sup>

Second, the recommendations include a legal commentary on each section of the RCC. The legal commentary explains in detail the provisions in each section, integrating newly defined terminology and, in many instances, relevant research articles and cross-references to models in other jurisdictions. The legal commentary also addresses significant changes to current District law, citing to the case law or laws affected. The RCC commentary is nearly 1900 pages in length and is intended to be a reference document to guide legislative review.

There are 11 supporting documents to the CCRC recommendations:

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<sup>3</sup> The Model Penal Code (MPC) is a comprehensive set of recommendations for state criminal statutes that is issued by the American Law Institute. The MPC has recently been used by the D.C. Court of Appeals (DCCA) in particular cases to resolve statutory ambiguities in D.C. Code criminal statutes. *See, e.g., Carrell v. United States*, 165 A.3d 314, 320, 324 (D.C. 2017) (*en banc*).

<sup>4</sup> Analysis by the CCRC based on Superior Court adult disposition data.

- (1) *Appendix A. Table of Correspondence: RCC to Current D.C. Code Statutes.* This document provides readers with a correspondence table between RCC statutes and current D.C. Code statutes. For clarity, D.C. Code general enhancements appear in a separate column from other D.C. Code statutes.
- (2) *Appendix B. Table of Advisory Group Draft Documents.* This document presents a table of all Advisory Group draft documents organized by Report or Memorandum number and name, date issued to the Code Revision Advisory Group, and, for reports only, date comments were received by the CCRC. “Reports” that are listed contain draft recommendations for reform of criminal statutes. “Memoranda” that are listed contain background information only, no draft recommendations.
- (3) *Appendix C. Advisory Group Comments on Draft Documents.* This document includes all written comments by Advisory Group members on the CCRC draft reports containing reform recommendations. The comments are organized by date received, ending with the most recent comments.
- (4) *Appendix D. Disposition of Advisory Group Comments & Other Changes from Draft Documents.* This document is a compilation of all CCRC written responses to Advisory Group members’ written comments (see Appendix C) as well as an elaboration on any additional, substantive changes that were made to the drafts on CCRC initiative. This Appendix is organized in chronological order with the most recent responses and explanations of changes appearing at the end.
- (5) *Appendix E. Table of RCC Specific Offense Classifications.* This document organizes all RCC statutes by citation number as well as by offense class rank. This Appendix is intended to serve as an easy reference for the relative severity of all RCC offenses. For clarity, the general enhancement penalties appear separate from the rest of the statutes.
- (6) *Appendix F. District Charging and Conviction Data: 2010-2019, 2015-2019 and 2018-2019.* This document offers a summary of District charging and conviction data for 2010-2019, 2015-2019, and 2018-2019. The Appendix highlights the columns CCRC believes to be most relevant, but a full Excel copy can be found online at [ccrc.dc.gov/page/ccrc-documents](http://ccrc.dc.gov/page/ccrc-documents). Please note that this analysis was completed by the CCRC based on Superior Court adult disposition data. Important details on the methodology used in the analysis are provided in this Appendix.
- (7) *Appendix G. Comparison of RCC Offense Penalties and District Charging and Conviction Data.* This document aligns the data analysis presented in Appendix F with RCC offenses and corresponding penalties. This Appendix is intended to serve as a reference for how sentences imposed during 2010-2019 and 2015-2019 compare to current and RCC statutory maxima. The Appendix includes RCC maxima for enhanced and unenhanced sentences for greater clarity. Please note that the data analysis was completed by the CCRC based on Superior Court adult disposition data. Important details on the methodology used in the analysis are provided in Appendix F.

- (8) *Appendix H. D.C. Voluntary Sentencing Guidelines Rankings.* This document is the current Voluntary Sentencing Guidelines Rankings as they appear in the D.C. Sentencing Commission’s 2020 Voluntary Sentencing Guidelines Manual (publicly available at [sdc.dc.gov/publication/2020-voluntary-sentencing-guidelines-manual](http://sdc.dc.gov/publication/2020-voluntary-sentencing-guidelines-manual)). Specifically, this Appendix includes Appendices A, B, C-I, and D of the Sentencing Commission’s Manual.
- (9) *Appendix I. Public Opinion Data.* This document contains the CCRC’s public opinion research on the District’s perception of relative offense severity. This data was collected over several surveys and was used to inform RCC penalty recommendations.
- (10) *Appendix J. Research on Other Jurisdictions’ Relevant Criminal Code Provisions.* This document is comprised of CCRC staff research on other jurisdictions’ criminal code provisions and was submitted piecemeal to the Advisory Group with earlier drafts of the RCC. Please note that much of the research included in this Appendix was conducted several years ago, has not been updated to reflect the final RCC language or citations, and may contain internal references and citations that are no longer accurate due to the reorganization of material originally submitted in multiple documents. Additionally, please note that much of the research stems from meta-analyses conducted by law professors Wayne R. LaFave and Paul H. Robinson. Although we believe these to be credible and thorough sources, independent, up-to-date analysis is recommended for the status of other jurisdictions’ provisions.
- (11) *Appendix K. Future Issues to be Addressed & Known Conforming Amendments.* This document summarizes a list of issues that remain to be addressed but fall outside the scope of the RCC. Some of these issues will require a conforming amendment to target inconsistencies between D.C. Code and RCC provisions. Other issues are ones that the CCRC believes need reform but would require a substantive review that the CCRC did not have the time or capacity to address.

### *Development of the CCRC Recommendations and Supporting Materials*

The goals, sources, and methodology specified in D.C. Code § 3–152 have guided the development of the CCRC’s recommendations and supporting materials.

At the inception of the CCRC in 2016 a work plan was created that mapped out four sequential (though overlapping) phases:

*Phase 1.* Facilitate enactment of Title 22 of the D.C. Code, which contains most District offenses, and propose other minor amendments to District criminal statutes. Phase 1 recommendations are intended to ease the administrative burden of future amendments to District criminal laws.<sup>5</sup>

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<sup>5</sup> Phase 1 was completed May 5, 2017, when the CCRC issued a report to the Mayor and Council that provided recommendations to enable the adoption of Title 22 as an enacted title of the District of Columbia Official Code. <https://lims.dccouncil.us/Legislation/RC22-0053>. This current report does not further address the CCRC’s May 2017 recommendations.

*Phase 2.* Develop key general definitions, essential interpretive rules, and the most important culpability principles applicable to all reformed offenses, including general defenses (e.g. self-defense). Phase 2 recommendations are intended to facilitate the clear and comprehensive drafting of reformed offenses, which will be consistently interpreted and applied by the courts.

*Phase 3.* Develop reformed individual offenses consistent with general provisions using language that is accessible, intuitive, and complete. Phase 3 recommendations are intended to clearly, completely, and consistently articulate District offenses.

*Phase 4.* Review all reformed offenses together as a whole, creating an ordinal ranking of offense severity and establishing the classification of all individual offenses. Phase 4 recommendations are intended to facilitate proportionate penalties for all reformed District offenses.

These four phases followed an overarching logic: prepare Title 22 for reform, create a general framework applicable to all reformed offenses, reform offenses using that general framework, and then reform the penalties to be proportionate for all changed offenses. However, it was recognized at the outset that it is neither possible nor desirable for the CCRC to issue or finalize all the recommendations for each phase before starting the next phase. Fundamental to comprehensive criminal code reform is that provisions are reviewed and revised together, rather in isolation, to ensure the entire legal framework is clear, complete, consistent, and proportionate. A new revision to one statute may trigger additional revisions to previously reviewed statutes. In addition, as described below, the CCRC recommendations are based on the feedback from a statutorily-designated Advisory Group. This required staff to take breaks as they awaited and then reviewed Advisory Group comments. Consequently, while development of the CCRC reform recommendations generally followed the above four-phase sequence, the process throughout was iterative, involving multiple drafts of possible reforms.

The starting point for the CCRC's drafting of reforms to District criminal statutes has been existing District law—statutory law and case law—as well as current court practice. Rather than starting with a blank slate or adopting large swathes of model legislation from another entity or jurisdiction, the CCRC has sought to preserve applicable law where doing so is consistent with agency's statutory duties. Consequently, while there are many recommended changes to District law that are detailed in the CCRC's legal commentary, the recommendations are consistent with many past court decisions and existing interpretations of law.

To draft reform its recommendations, the CCRC also examined code reforms in other jurisdictions—particularly recent reforms—as well as current sentencing practices in D.C. Superior Court and recommendations by the ALI and other criminal law experts. CCRC analysis of court data on adult dispositions, provided in Appendices F and G of the attached report, highlights differences between statutorily authorized penalties (and enhancements) and actual practice in recent years. The ALI's recent update to the Model Penal Code regarding sentencing provisions was also used to guide the CCRC's drafts of major reforms to penalties. Social science literature on the costs, benefits, and effectiveness of incarceration also informed the CCRC's draft

recommendations on penalties. The current Voluntary Sentencing Guidelines of the D.C. Sentencing Commission and CCRC public opinion polling, Appendices H and I of the attached report, respectively, also provided important insight into the relative severity of criminal offenses by current criminal justice practitioners and District residents.

Once drafted, the CCRC issued its reform recommendations to its statutorily-designated Advisory Group for comments. The Advisory Group was comprised of seven members – two Council appointees and one designated individual from each of the following: the U.S. Attorney for the District of Columbia, the Attorney General of the District of Columbia, the Director of the Public Defender Service for the District of Columbia, the Deputy Mayor for Public Safety and Justice, and the Chairperson of the Committee on the Judiciary and Public Safety.<sup>6</sup> Advisory Group members had the opportunity to submit written comments on the draft recommendations and discuss the drafts at the Advisory Group’s public monthly meetings. Complete minutes and recordings of the Advisory Group’s meetings are available online through the District’s Office of Open Government and all Advisory Group written comments are included as Appendix C of the attached report.

The CCRC staff updated its draft recommendations based on Advisory Group comments. However, as Advisory Group members often took conflicting positions and/or took positions that appeared to conflict with the agency’s statutorily-specified duties, many comments were not incorporated in the final report. A written record of how each Advisory Group member’s comments were handled was created and is included as Appendix D of the attached report.

On March 24, 2021 the five voting members of the CCRC’s Advisory Group voted unanimously, 5-0, to approve the CCRC’s submission of the attached recommendations (and supporting materials) to the Council and Mayor.<sup>7</sup>

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In closing, I would like to express my gratitude to the Mayor and Council for their continued support of this agency’s mission to develop criminal code reform recommendations. I also wish to briefly recognize some of the many individuals and institutions who contributed to the creation of these recommendations and supporting materials over the past four-and-a-half years.

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<sup>6</sup> The current Advisory Group voting members are: Don Braman, Associate Professor of Law, George Washington University School of Law (Council Appointee); Paul Butler, Professor of Law, Georgetown University Law Center (Council Appointee); Laura Hankins, General Counsel, Public Defender Service for the District of Columbia (Designee of the Director of the Public Defender Service for the District of Columbia); Dave Rosenthal, Senior Assistant Attorney General, Office of the Attorney General (Designee of the Attorney General for the District of Columbia); and Elana Suttentberg, Special Counsel for Legislative Affairs, United States Attorney’s Office for the District of Columbia (Designee of the United States Attorney for the District of Columbia). The current Advisory Group non-voting members are: Kevin Whitfield, Policy Advisor, Committee on the Judiciary and Public Safety (Designee of the Chairperson of the Committee on the Judiciary and Public Safety); and Helder Gil, Chief of Staff, Office of the Deputy Mayor for Public Safety and Justice (Designee of the Deputy Mayor for Public Safety and Justice).

<sup>7</sup> At the vote members were asked if they “approve for submission to the Council and Mayor the submitted criminal code reform recommendations and background materials, subject to any final typographic changes recommended by agency staff.”

The past and present CCRC Advisory Group members provided invaluable feedback and insight on draft recommendations: Don Braman, Paul Butler, Renata Cooper, Helder Gil, Laura Hankins, Dave Rosenthal, Elana Suttenger, and Kevin Whitfield. The D.C. Courts and the D.C. Sentencing Commission provided critical data on current court practice and sentencing guidelines. An array of other individuals aided the CCRC's legal and data analysis these past years, including: Chanell Autrey, Ron Gainer, Seema Gajwani, Karissa Minnich, Kate Mitchell, Bryson Nitta, Sam Quinney, Nell Schaffer, Katya Semyonova Nathan Wenstrup, Elizabeth Wieser, and Dr. Kevin Wilson.

Finally, I want to recognize the expertise and dedication of the present and past CCRC staff members who are principally responsible for making this report a reality: Margarita Bronshteyn, Jinwoo Park, Rachel Redfern, Michael Serota, and Patrice Sulton.

Criminal code reform involves issues on which values can differ sharply and reasonable disagreements exist. Notwithstanding disagreements that they may have had with particular aspects of the CCRC recommendations, the above individuals and institutions have persevered, dedicating their time and energy to this effort to improve the District's criminal statutes. The attached final report and record provided in the supporting materials are better for their efforts.

Upon request, the CCRC remains available to assist with interpretation of the recommendations and supporting materials in the attached report. In addition, the CCRC's forward-looking duty under D.C. Code § 3-152(d) will be to: "[P]rovide, upon request by the Council or on its own initiative, a legal or policy analysis of proposed legislation or best practices concerning criminal offenses, procedures, or reforms, including information on existing District law, the laws of other jurisdictions, and model legislation." It has been a privilege to work on these matters on behalf of the District.

Thank you for your consideration,



Richard Schmechel  
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D.C. Criminal Code Reform Commission

C:

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