D.C. Criminal Code Reform Commission

Performance Oversight Hearing

2019 Testimony

Introduction

Thank you for holding this oversight hearing on the D.C. Criminal Code Reform Commission (CCRC). My name is Richard Schmechel. I am the agency's Executive Director and I'm happy to testify today on behalf of the agency. I will keep my testimony brief. For more information I would like to note that the agency's 2018 Annual Report, and all the agency's draft recommendations for code reform to date, are posted on the agency's website, www.ccrc.dc.gov. Any member of the public may review the agency's work there and submit comments.

The CCRC began operation as a new, independent District agency just over two years ago, on October 1, 2016. The agency is tasked with submitting to the Mayor and the Council comprehensive criminal code reform recommendations that meet certain statutorily-specified goals.[1] These goals include revising criminal statutes to use clear and plain language, to apply consistent definitions, to describe all offense elements that must be proven, to reduce unnecessary overlap and gaps between criminal offenses, to adjust penalties to be proportionate, and to enact Title 22 of the D.C. Code.

I want to emphasize that the agency's statutory mandate is focused on changes to the substantive criminal law of the District—the law regarding how crimes are defined and punished. Most of this mandate is simply a matter of good governance, for example making sure criminal statutes are clear (e.g. using modern language) and complete (e.g., codifying rights of self-defense and all the elements of offenses). However, some aspects of the agency's mandate address core criminal justice reform issues (e.g., the severity of sentences, the use of mandatory minimum sentencing, and the boundary between criminal and non-criminal behavior). Other criminal justice reform matters, including criminal procedure (e.g., statutes of limitations, record sealing), and Executive branch actions (e.g., prosecutorial priorities and policing methods) are not within the agency's purview.

CCRC Process of Developing Criminal Code Reform Recommendations

In developing its recommendations for revised criminal statutes, the CCRC examines three main sources of information. First, the CCRC carefully researches existing District law, both statutes and binding case law (from courts). Agency staff prepares a detailed legal commentary that describes how draft reform recommendations would or could change existing District law.

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[1] D.C. Code § 3-152(a) ("By September 30, 2019, 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; (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.").
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Second, with analytical support from the Lab in the Office of the City Administrator and data from the D.C. Superior Court, the Metropolitan Police Department, and other sources, the CCRC analyzes available information on current use of the D.C. Criminal Code. This information is used to develop recommendations about the grading of offenses and penalty proportionality. Third, the CCRC looks outside the District to other jurisdictions' criminal laws, changes to criminal offenses recommended by the American Law Institute (a national body of judges and legal practitioners that developed the Model Penal Code), and best practices recommended by criminal law experts in academia. While the District's criminal laws should not mechanically follow other jurisdictions, identifying trends in other jurisdictions and where the District is an outlier nationally can be an important indicator of where reform recommendations are appropriate.

When the agency has assembled a draft of its reformed criminal statutes and supporting legal commentary, these are shared with the CCRC's Advisory Group, a statutorily-designated group of stakeholders who review the draft statutory language and commentary and provide feedback. The Advisory Group consists of designees of the United States Attorney for the District of Columbia, the Director of the Public Defender Service, the Attorney General for the District of Columbia, Professor Paul Butler of Georgetown University, Professor Don Braman of George Washington University, the designee of the Deputy Mayor for Public Safety, and the designee of this Committee.[2] Depending on the nature and extent of the Advisory Group's comments, additional drafts of the recommended statutory language and accompanying commentary may be prepared and re-circulated for Advisory Group comments. Ultimately, a majority vote of the Advisory Group's voting members is required for any recommendations to be submitted to the Council and the Mayor.[3]

2018 Activities

In 2018, the CCRC's work to develop reform recommendations addressed three main topics. First, the agency continued to develop draft recommendations for new "general provisions" that will apply to all reformed criminal statutes. Such general provisions address several of the agency's statutory mandates[4] by providing common definitions and rules of liability that apply to all

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[2] The current voting members of the Advisory Group 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); Renata Kendrick Cooper, Special Counsel for Policy and Legislative Affairs, United States Attorney's Office for the District of Columbia (Designee of the United States Attorney for the District of Columbia); 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); and Dave Rosenthal, Senior Assistant Attorney General, Office of the Attorney General for the District of Columbia (Designee of the Attorney General for the District of Columbia).

The current non-voting members of the Advisory Group are: Kevin Whitfield, Policy Advisory, Committee on the Judiciary and Public Safety (Designee of the Chairperson of the Council Committee on the Judiciary and Public Safety); and Helder Gil, Chief of Staff, Office of the of the Deputy Mayor for Public Safety and Justice (Designee of the Deputy Mayor for Public Safety and Justice).

[3] D.C. Code § 3-153.

[4] D.C. Code § 3-152(a) ("(1) Use clear and plain language; (2) Apply consistent, clearly articulated definitions; (3) Describe all elements, including mental states, that must be proven; (10) Propose such other amendments as the

revised offenses (e.g. theft, assault, etc.). In 2018, statutory provisions and legal commentary were drafted concerning solicitation, accomplice liability, rules of merger for related offenses, and several other matters specified in our Annual Report. The CCRC's draft general provisions follow the basic design of the American Law Institute's Model Penal Code, which has been adopted by a majority of states and has recently been cited by the D.C. Court of Appeals (DCCA).[5]

Secondly, the agency developed draft recommendations for a wide variety of specific offenses, addressing several of the agency's statutory mandates.[6] These draft recommendations modernize the structure and language of the most serious, and frequently-sentenced District offenses, consistent with the general definitions, rules, and principles for establishing liability as set out in the new draft general provisions. Specifically, in 2018, the CCRC issued new draft recommendations concerning homicide, kidnapping, sex offenses, human trafficking, and other crimes specified in our Annual Report. The CCRC's legal commentary explains how and in what way the draft recommendations would or could change District law. Often, it is unclear if the recommended language would change District law because current statutes and case law are ambiguous.

Third, the CCRC, with the help of the Lab in the Office of the City Administrator, completed a preliminary analysis of Superior Court data for adult misdemeanor and felony dispositions 2010-2016. The results of that preliminary analysis were shared with the CCRC's Advisory Group in July 2018. The CCRC also completed a test survey of District public opinion regarding the relative severity of offenses, in anticipation of a more robust survey in 2019.

Plans for the Remainder of FY 19

At present, the CCRC is working on an across-the-board update to its earlier draft recommendations that will incorporate changes based on feedback from its Advisory Group and further staff review. In June, or earlier, the CCRC will present to the Advisory Group draft recommendations regarding controlled substance offenses, including possession of drug paraphernalia. Then, in or by July, the CCRC will issue to the Advisory Group draft recommendations for weapon possession offenses, although the CCRC has already incorporated higher gradations for use of weapons into its recommendations for particular offenses (e.g., assault).

Commission believes are necessary . . . .").

[5] *See, e.g., Carrell v. United States*, 165 A.3d 314, 320, 324 (D.C. 2017) (*en banc*).

[6] D.C. Code § 3-152(a) ("(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 . . . (7) Organize existing criminal statutes in a logical order; (8) Identify any crimes defined in common law that should be codified, and propose recommended language for codification, as appropriate . . . (10) Propose such other amendments as the Commission believes are necessary . . . .").

The other major set of recommendations the agency is assembling in FY 19 concern imprisonment penalties for all offenses reviewed to-date. Significant work has already been done regarding penalty proportionality. The CCRC's new draft general provisions set out eight standardized penalty classes for felonies and five classes for misdemeanors. The draft recommendations for specific offenses also typically include more gradations, breaking offenses down into their more and less serious forms of conduct, which allows the law to fine-tune appropriate punishments. However, the agency's work this summer will go further and match the revised offenses' gradations to the new standardized penalty classes, thereby setting the authorized imprisonment and fines for all the revised offenses. To do this, the agency will create an ordinal ranking of revised offenses by seriousness and match groups of these offenses (of similar seriousness) to standardized penalty classes. The ordinal ranking will be developed using information gathered from analysis of: statutory maximum and minimum sentences under current law; sentences actually imposed by District judges in practice; sentencing recommendations of the D.C. Sentencing Commission; and surveys of public opinion about the relative seriousness of offenses.

Plans for FY 20

Looking beyond this fiscal year, the agency's workflow will depend on whether and to what extent the agency's authorization and funding is extended. A full year extension will allow the agency to provide additional code reform recommendations for a range of serious (e.g. obstruction of justice, bribery, and public corruption) and common (e.g. failure to appear in court, prostitution) criminal statutes in need of revision. Details of the particular crimes the agency is targeting for revision are provided in the agency's 2019 Work Plan and Schedule, provided to the Committee as part of its responses to pre-hearing questions. A full year extension will also allow the agency to develop recommendations for general defenses (e.g. self-defense) that, despite their importance to the criminal justice system, have never been legislatively codified in the District.

Closing

In closing, I want to recognize the members of the agency's Advisory Group for their service. They've reviewed well over a thousand pages of legal research, statistical information, and draft statutory text, and meet monthly to discuss the agency's draft work. Their dedication is critical to our success. I also would like to thank this Committee, the Council, and the Mayor for their ongoing support of a careful, comprehensive review of District criminal statutes. The District deserves criminal laws that are clear, complete, consistent, proportionate, and reflect current District norms. It is a privilege to support these efforts.