D.C. Criminal Code Reform Commission

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To: Councilmember Charles Allen,
Chairperson, Committee on the Judiciary and Public Safety

From: Richard Schmechel,
Executive Director, D.C. Criminal Code Reform Commission (CCRC)

Date: July 14, 2017

Re: Testimony for the June 22, 2017 Hearing on the *Sexual Assault Victims' Rights Amendment Act of 2017*

I. Introduction.

Thank you for the opportunity to provide written testimony to the Committee on the Judiciary and Public Safety for the record of the public hearing on the Sexual Assault Victims' Rights Amendment Act of 2017, held on June 22, 2017. I write on behalf of the Criminal Code Reform Commission (CCRC).[1]

The CCRC is a small, independent District agency that began operation October 1, 2016. The CCRC's mission is to prepare comprehensive recommendations for the Mayor and Council on reform of the District's criminal statutes. Specifically, the CCRC's work is focused on developing possible reforms to the District's "substantive" criminal statutes—i.e., laws that define crimes and punishments, such as assault and sexual abuse.

The CCRC's present testimony relates only to Section 5 of the Sexual Assault Victims' Rights Amendment Act of 2017, which would establish a new criminal offense entitled "Unlawful removal of another person's clothing." The new offense, section 22-3006(a), would criminalize "the remov[al of] another person's clothing. . . without the person's consent."[2] The new provision would be part of the District's Sexual Abuse offenses and be punishable by up to 180 days imprisonment.

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[1] The CCRC's testimony is based on the research of Mr. Christopher Herr, a CCRC Summer Legal Intern, working *pro bono* under the supervision of the CCRC Executive Director. The CCRC thanks Mr. Herr for his contributions.

[2] The full text of the draft offense is as follows:

> "22-3006a. Unlawful removal of another person's clothing.
>
> (a) It shall be unlawful for a person to remove another person's clothing covering the immediate area of their body parts, as described in D.C. Official Code § 22-3001(9), without the person's consent; provided, that this prohibition shall not include the removal of clothing that is intended:
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> "(1) To provide medical or lifesaving care to the person; or
>
> "(2) By a parent, guardian, or caretaker as part of the normal course of responsibility of the parent, guardian, or caretaker to a person who is unable to understand the nature of the act or give knowing consent due to age, diminished capacity, or medical condition.
>
> "(b) A violation of this section shall be subject to the penalties in D.C. Official Code § 22-3006."

2017 Washington DC Legislative Bill No. 222, Washington DC Council Period Twenty-Two.

The CCRC makes no recommendation at this time regarding the advisability, drafting, or penalties of 22-3006(a), though if passed into law it may be reviewed as part of the CCRC's comprehensive review of District criminal statutes. Nonetheless, the CCRC's research on the relationship between the conduct criminalized by draft 22-3006(a) and existing criminal laws in the District and other jurisdictions may be useful to the Council's review of the draft legislation.

II. Summary of Findings on Proposed Section 22-3006a.

CCRC's legal research has identified several ambiguities in the current statute as currently drafted. First, the statute is silent as to whether the defendant must have an intent to harm the victim or gain sexual arousal, whether accidental or mistaken removal of clothing is criminalized, and whether coercing someone to undress is criminalized. Second, assuming these ambiguities are resolved in a manner consistent with other District offenses' minimal requirement that the accused not act by mistake or accident, the conduct prohibited by the proposed statute appears to already be criminalized by the District's existing sexual abuse and assault statutes. Lastly, a survey of other jurisdictions identified only one state, Minnesota, which specifically addresses by criminal statute the removal of clothing. However, model legislation is under development by the American Law Institute that would address removal of clothing with criminal intent as a sex crime.

III. Ambiguities in the Proposed Statute.

CCRC's legal research has identified three ambiguities in the proposed section 22-3006(a) as currently drafted.

First, the proposed statute is unclear as to whether the defendant must have an intent to harm the victim or gain sexual arousal. Section 22-3006(a) refers to "another person's clothing covering the immediate area of their body parts, *as described in D.C. Official Code § 22-3001(9)*".[3] In turn, D.C. Official Code § 22-3001(9), defines the word "sexual contact" as "the touching with any clothed or unclothed body part or any object, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person."[4] A narrow reading of the proposed offense's reference to § 22-3001(9) is that it is about only the immediate area[5] of the listed body parts ("genitalia, anus, groin, breast, inner thigh, or buttocks"). However, a broader reading of the phrase "as described in D.C. Official Code § 22-3001(9)" might also include the intent requirement in the sexual contact definition, thereby requiring the accused to act "with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person."[6] The ambiguity is important, because there is no other mental state requirement specified in the proposed offense.

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[3] 2017 Washington DC Legislative Bill No. 222, Washington DC Council Period Twenty-Two (emphasis added).

[4] D.C. Code Ann. § 22-3001(9) (West 2009).

[5] The phrase "covering the immediate area" is arguably a fourth ambiguity in the current statute insofar as it doesn't clearly indicate whether the clothing must be in contact with the victim's skin (e.g. underwear) or an outer layer (e.g. shorts).

[6] *Id.*

A second ambiguity in the proposed offense is whether accidental or mistaken removal of clothing is criminalized. If the proposed statute is a matter of strict liability—i.e., there is no mental state requirement as to the various elements of the offense—then even accidental or mistaken removal of clothing would be criminalized. For instance, a boy who accidentally tears off another boy's shirt when grappling for a football may be committing a criminal act. Or, a wife who mistakenly thinks her husband consented to having his shirt removed while he slept may be committing a criminal act. While many District offenses currently are unclear as to what mental state requirements are part of the offense,[7] this ambiguity in the proposed 22-3006(a) is almost certain to lead to litigation. Given that there is liability for even reasonable mistakes and accidents when an offense is a matter of strict liability, courts generally have read into statutes silent about mental states some requirement that distinguishes criminal conduct from innocent mistakes and accidents.[8]

A third ambiguity in the proposed statute is whether it criminalizes causing someone to undress. The plain language of the proposed statute suggests that the accused must be the one to undress the victim—"It shall be unlawful for a person to remove another person's clothing…."[9] This suggests that if a victim removed his or her clothing under the command of an assailant, such an act would not be liable under the draft section 22-3006(a). However, in at least one case, a local court has construed language in a sexual abuse statute that appeared to require the defendant to perform an act on another person to include causing the victim to perform the prohibited act.[10] Such a construction also would be in line with several other sexual abuse statutes which explicitly apply to a person who "engages in or causes [the prohibited conduct] with or by another person."[11] Currently, though, the draft section 22-3006(a) is unclear as to causing the victim to undress.

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[7] See, e.g. the District's assault statute, D.C. Code 22-404 which is silent as to culpable mental state requirements. However, local courts have construed the assault statute as to not include accidental or innocent acts. *Davenport v. United States*, 60 A.2d 226 (D.C.1948). Note, also, that misdemeanor sexual abuse, the offense arguably the most analogous to the proposed offense and punished the same, specifies a mental state requirement as to the victim's lack of consent, as well as in the sexual contact definition used by the offense:

> "Whoever engages in a sexual act or sexual contact with another person and who should have knowledge or reason to know that the act was committed without that other person's permission, shall be imprisoned for not more than 180 days and, in addition, may be fined in an amount not more than the amount set forth in § 22-3571.01."

These mental state requirements would allow for someone to claim they were (reasonably) mistaken about whether they had permission to engage in the contact or had an innocent intent, and did the action by accident.

[8] See Elonis v. United States, 135 S. Ct. 2001, 2009, 192 L. Ed. 2d 1 (2015)

> "The fact that the statute does not specify any required mental state, however, does not mean that none exists. We have repeatedly held that "mere omission from a criminal enactment of any mention of criminal intent" should not be read "as dispensing with it." *Morissette v. United States*, 342 U.S. 246, 250 (1952). This rule of construction reflects the basic principle that "wrongdoing must be conscious to be criminal." *Id.* at 252. As Justice Jackson explained, this principle is "as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil." *Id.* at 250. The "central thought" is that a defendant must be "blameworthy in mind" before he can be found guilty, a concept courts have expressed over time through various terms such as mens rea, scienter, malice aforethought, guilty knowledge, and the like. *Id.* at 252; 1 W. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 5.1, pp. 332–333 (2d ed. 2003)."

[9] 2017 Washington DC Legislative Bill No. 222, Washington DC Council Period Twenty-Two.

[10] Pinckney v. United States, 906 A.2d 301, 306–07 (D.C. 2006).

[11] *See* D.C. Code Ann. § 22-3004 (West 2013); D.C. Code Ann. § 22-3005 (West 2013).

IV. Duplication of Proposed Statute with Existing District Law.

Assuming the abovementioned ambiguities are resolved in a manner consistent with other District offenses—i.e., that there is some culpable mental state requirement for the statute, that mistakes and accidents are defenses to liability, and that the conduct reaches causing another person to undress—the conduct prohibited by the proposed statute appears to already be criminalized.

The District's existing sexual abuse statutes criminalize many likely instances of the non-consensual removal of another's clothing. Specifically, the misdemeanor sexual abuse statute already prohibits any removal of clothing that occurred via touching of the clothed or unclothed body parts referenced in the proposed statute ("genitalia, anus, groin, breast, inner thigh, or buttocks . . . .").[12] Practically, removal of clothing is highly likely to involve some degree of contacting the victim's body through the clothing, thereby triggering liability under the misdemeanor sexual abuse statute.[13] Liability under the proposed section 22-3006(a) would be redundant in the case of such conduct (assuming mental state requirements are also met). Moreover, in the event that sexual contact did not occur in the process of removing a person's clothing, the conduct may still be criminalized as an attempt to engage in sexual contact (or a sexual act).[14] Consequently, assuming the requisite intent to commit the proposed offense is equivalent, the actual conduct seems to mostly be criminalized under the current misdemeanor sexual abuse statute or the attempt to commit that offense.

The District's existing assault statute also appears to criminalize the non-consensual removal of another's clothing. Since the D.C. Code does not define the elements of assault, local courts have construed the offense's elements to include several types of conduct likely to occur in the non-consensual removal of another's clothing. First, a person is liable for assault where he or she engages in conduct that would reasonably place the victim in fear of some immediate harm.[15] Where a person removes another's clothing covering intimate areas of their body without consent (and not by mistake or accident), it seems likely the person would be placing the victim in fear of further harm in the form of a sexual contact or act (unless they were unconscious and therefore unaware of the accused's act). The second main form of assault, battery, makes a person liable for an attempt to commit any form of offensive touching,[16] and in at least two cases the District Court of Appeals has upheld a battery conviction where the accused actually touched objects in the victim's hand, not the victim's body.[17] Although District courts have not ruled specifically on whether removal of clothing absent touching of the body would constitute a battery-type assault,[18]

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[12] D.C. Code Ann. § 22-3001(9) (West 2009).
[13] Note, other sexual abuse statutes also criminalize sexual contact in various circumstances. See, e.g., § 22-3009.02. Second degree sexual abuse of a minor.
[14] *See* D.C. Code Ann. § 22-3018 (West 2013).
[15] McGee v. U.S., 533 A.2d 1268, 1270 (D.C. 1988).
[16] Comber v. United States, 584 A.2d 26, 50 (D.C. 1990).
[17] Mahaise v. United States, 722 A.2d 29, 30 (D.C. 1998); Watson v. United States, 979 A.2d 1254, 1256–57 (D.C. 2009).
[18] Removal of clothing has been found to constitute an assault in other jurisdictions with common law-type assault, similar to the District's law. *See e.g.,* Nash v. State, 766 So. 2d 310, 310 (Fla. Dist. Ct. App. 2000)*;* Taylor v. State, 450 A.2d 1312, 1315 (Md. Ct. Spec. App. 1982).

case law upholding assault liability for an unwanted touching of items on the immediate person of the victim suggests there is also liability for touching the person's intimate clothing. Finally, District case law establishes that there is assault liability where there is an unwanted sexual touching, even if the victim did not experience negative feelings at the accused's action or was unaware of the act.[19] Moreover, in the sexual touching type of assault the accused need not have intended to gain sexual satisfaction from the act, though the act must not be by mistake or accident.[20] In sum, assault liability for nonconsensual removal of clothing can be found not only where the victim was frightened or bodily touched, but where the victim was unconscious and only the clothing was touched (if case law extending liability to items on the immediate person of the victim applies to clothing).

Moreover, under the District's most relevant sexual abuse and assault statutes, the conduct of removing another person's clothing from intimate areas without consent appears to already be subject to the same maximum imprisonment penalty as in the proposed statute: 180 days.

V. Prevalence of Proposed Statute in Other Jurisdictions

Lastly, a survey of other jurisdictions identified only one state, Minnesota, which criminalizes the removal of clothing. However, even the Minnesota law has significantly different requirements compared to section 22-3006(a).

Fewer than half of American jurisdictions have statutes that address contact with clothing at all, and of these, all but Minnesota does so in a manner identical to that in the District's offenses involving "sexual contact"—*contact though clothing* that directly covers an intimate area.[21] Minnesota, the sole exception, specifically includes the removal of clothing in its definition of sexual contact as part of its crime of Criminal sexual conduct in the fifth degree.[22] Specifically, the Minnesota statute provides:

> "A person is guilty of criminal sexual conduct in the fifth degree:
> (1) if the person engages in nonconsensual sexual contact; or
> (2) the person engages in masturbation or lewd exhibition of the genitals in the presence of a minor under the age of 16, knowing or having reason to know the minor is present.
>
> For purposes of this section, "sexual contact" has the meaning given in section 609.341, subdivision 11, paragraph (a), clauses (i), (iv), and (v), but does not include the intentional touching of the clothing covering the immediate area of the buttocks. *Sexual contact also includes the intentional removal or attempted removal of clothing covering the complainant's intimate parts or undergarments, and the nonconsensual touching by the complainant of the actor's intimate parts, effected by the actor, if the action is performed with sexual or aggressive intent*."[23]

[19] Matter of A.B., 556 A.2d 645, 647 n.3 (D.C. 1989).
[20] *Id.* at 649.
[21] *E.g.* ARK. CODE ANN. § 5-14-101 (West 2009) ("Sexual contact means any act of sexual gratification involving the touching, directly or through clothing, of the sex organs . . . ."); ME. REV. STAT. ANN. TIT. 17-A, § 251 (2003) ("Sexual touching means any touching of the breasts, buttocks, groin or inner thigh, directly or through clothing . . . .").
[22] MINN. STAT. ANN. § 609.3451 (West 2015).
[23] *Id.* (emphasis added).

Notably, the Minnesota statute specifically requires sexual or aggressive intent, unlike the proposed statute for the District.

However, notwithstanding the apparent lack of other jurisdictions' statutes addressing removal of clothing without consent, model legislation is under development by the American Law Institute (ALI) that would address removal of clothing with criminal intent as a sex crime. The ALI is considering changes to its Model Penal Code (MPC) that are similar to Minnesota's approach. Draft MPC section 213.0(6) includes in the definition of Sexual Contact "lifting or removing clothing of another . . . ."[24] Notably, whereas the Minnesota code fails to account for a person other than the assailant (i.e. the victim) lifting or removing the clothing, the MPC draft includes "causing a person" to lift or remove in its definition of sexual contact. The draft MPC "Offensive sexual conduct" provision also includes an intent clause that would eliminate liability for accidents.[25] The ALI's draft commentary highlights the need to differentiate contact that is sexual in nature from that which is more akin to assault, and says that it "aims to distinguish between assaults committed to facilitate other crimes, even other sexual crimes, and offensive contact where the sexual intent is the purpose of the contact itself."[26] However, it should be noted that the ALI's work to revise the MPC sexual assault offenses remains incomplete and further changes regarding its draft recommendations are to be expected.

VI. Relevant forthcoming CCRC Draft Recommendations.

Per its statutory mandate, the CCRC will develop draft recommendations to revise the District's assault and sexual abuse statutes by September 30, 2018. These recommendations will include revised statutory language that will clarify the mental states required for all revised offenses and reduce unnecessary overlap (duplication) among criminal offenses.

For questions about the above research or the CCRC's work, please do not hesitate to contact our office.

Submitted by
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D.C. Criminal Code Reform Commission

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[24] MODEL PENAL CODE § 213.0(6) (AM. LAW INST., Proposed Official Draft 2015).

[25] Excluding any removal of clothing that was accidental. *See* MODEL PENAL CODE § 213.6(2) (AM. LAW INST., Proposed Official Draft 2015) ("[W]hen done for the purpose of sexual gratification, sexual arousal, or sexual degradation . . . .").

[26] MODEL PENAL CODE § 213.5 statutory commentary at 117 (AM. LAW INST., Proposed Official Draft 2014).