



D.C. Criminal Code Reform Commission

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MEMORANDUM

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: October 21, 2019
Re: Written Testimony for the October 17, 2019 Hearing on B23-318 – the “Community Safety and Health Amendment Act of 2019”

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 “Community Safety and Health Amendment Act of 2019” (hereafter “bill”), held on October 17, 2019. I am presenting written testimony on behalf of the Criminal Code Reform Commission (CCRC).

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 comprehensive recommendations to reform the District’s “substantive” criminal statutes—i.e., laws that define crimes and punishments.

To date, the CCRC has not issued draft or final recommendations regarding most of the statutes in D.C. Code Title 22, Chapter 27 that would be amended or repealed by the bill. However, the CCRC has reviewed D.C. Code prostitution statutes that involve force, fraud, or coercion in conjunction with its review of human trafficking offenses, including the procuring statute in D.C. Code § 22-2707 that the bill would amend.¹ Consequently, the analysis in this

¹ The CCRC has researched and drafted recommendations for human trafficking offenses under current Chapter 18A of Title 22. The CCRC’s draft recommendations for some human trafficking offenses may affect some prostitution offenses under current Chapter 27, that are not amended or repealed by the bill. Specifically, the latest CCRC draft recommendation is to use the revised human trafficking offenses to replace certain prostitution statutes currently codified in D.C. Code §§ 22-2705-2708 to the extent that they criminalize compelling a person to engage in prostitution, or to use threats, force, fraud, deception, or intimidation to cause another person to engage in prostitution. Many of these statutes are quite old, having been passed piecemeal since 1901. The CCRC draft recommendation to replace the D.C. Code’s current assortment of statutes regarding forced prostitution with modern human trafficking charges (or, sex assault charges) would create consistency across offense elements and penalties. The D.C. Code’s current distinction between sexual violence against sex workers and other victims would be eliminated. The CCRC’s latest draft recommendations regarding human trafficking offenses, and other statutes, can be found at: <https://ccrc.dc.gov/sites/default/files/dc/sites/ccrc/publication/attachments/4-15-19-Compilation-of-RCC-Draft-Statutory-Language.pdf>.

testimony does not directly address the bill's repeal of D.C. Code §§ 22-2701, 2722-2725 and relates only to the bill's amendments to D.C. Code § 22-2707 and some general background information. The CCRC analysis identifies a number of issues with the scope and clarity of the exception to liability under § 22-2707 proposed by the bill.

II. Overview of the Bill's Changes to Prostitution Statutes.

The bill was introduced by Councilmembers Bonds, Grosso, Nadeau, and R. White, and co-sponsored by Councilmember Allen. The bill would repeal or amend several sections in Chapter 27 of the current D.C. Code that relate to prostitution. Specifically, the bill would:

1. Repeal D.C. Code § 22-2701, which currently makes it a crime to engage in, or solicit, prostitution.
2. Repeal D.C. Code §§ 22-2723-2725, which specify property that is subject to seizure and forfeiture; and impoundment of vehicles used in furtherance of a prostitution-related offense.
3. Amend D.C. Code § 22-2707, which currently makes it a crime to receive anything of value in exchange for arranging or causing any individual to engage in prostitution, a sexual act, or sexual contact. The amendment provides an exception to liability under this statute if 1) the person arranges for prostitution involving himself or herself; or 2) the individuals involved are at least 18 years old and have an agreement that is voluntary and freely-given; and 3) and arrangement involves no force, fraud, coercion, or any violation of the Prohibition Against Human Trafficking Amendment Act of 2010.
4. Repeal D.C. Code § 22-2713 (a), which states that whoever shall erect, establish, continue, maintain, use, own, occupy, or release any building, erection, or place used for the purpose of lewdness, assignation, or prostitution in the District of Columbia is guilty of a nuisance.
5. Repeal D.C. Code § 22-2722, which makes it a crime to keep a bawdy or disorderly house.

III. Analysis of Proposed Changes to D.C. Code § 22-2707.

The bill's proposed language would bar liability under § 22-2707 when two conditions are met. First, the defendant either arranged for prostitution involving himself or herself; or the individuals involved are at least 18 years old and have an agreement that is voluntary and freely-given. Second, and arrangement did not involve force, fraud, coercion, or any violation of the Prohibition Against Human Trafficking Amendment Act of 2010. While the CCRC takes no position at this time on the bill's policy goals, this amendment appears consistent with the bill's apparent policy goal of decriminalizing prostitution absent force, fraud, or coercion.

However, the specific language of bill's proposed amendment of D.C. Code § 22-2701 does not specify culpable mental states or define relevant terms. This creates significant ambiguity as to the scope of criminal liability under the proposed amendments to D.C. Code § 22-2701.

The bill's exception to liability does not specify culpable mental states applicable to the conditions required under the exception. Under the draft language in the bill, a person may be convicted under D.C. Code § 22-2707 if either of the two conditions are not satisfied. However, it is unclear whether a defendant must be aware that one or more of the conditions are not satisfied. For example, if a person arranges for a person who is, in fact, under 18 years of age, to engage in prostitution, must the defendant be aware of that person's age? It is unclear if the exception would apply if the defendant arranged for a person to engage in prostitution that he reasonably, though incorrectly, believed was older than 18. Similarly, it is unclear if the person must be aware that the arrangement did not involve force, fraud, coercion, or a violation of the Prohibition Against Human Trafficking Amendment Act of 2010. It also is unclear if the exception would apply if the defendant arranged to engage in prostitution with another person, reasonably believing that the other person voluntarily agreed to do so, when unbeknownst to the defendant, a third party coerced the other person into engaging in prostitution.

In formulating its recommendations for revisions to the District's criminal laws, the CCRC has drafted definitions for four distinct culpable mental states,² which could be used to resolve this ambiguity under the bill. For example, to act "knowingly" requires that a person was practically certain that a circumstance exists. As applied to the conditions in the draft language, using this culpable mental state would clarify that the defendant must have been practically certain that one of the conditions was not satisfied. If a "knowing" mental state were used, the exemption in the draft bill would apply if a defendant genuinely, but mistakenly, believed that the arrangement did not involve force, fraud, or coercion. Alternatively, to act "negligently" is a less demanding standard and requires that a person should have been aware of a substantial risk that a circumstance exists. If a "negligent" mental state is used, the exemption would not apply if the defendant should have been aware of a substantial risk that a condition was not met. For example, even if the defendant genuinely believed that a person involved was over the age of 18, if he or she should have been aware of a risk that the person was under-age, the exemption would not apply and the defendant could still be prosecuted under the revised statute.

The Council similarly could require different mental states with respect to different portions of the exemption. For example, the Council could require that the defendant knew that the agreement was free of force, fraud or coercion, but require only negligence as to the age of the other person involved. Specifying culpable mental states would better allow the Council to determine the scope of criminal liability more clearly and precisely, reducing the need for litigation over such matters.

² The CCRC's approach of specifying culpable mental state requirements for each element of an offense using standardized terms, while novel to the District, is consistent with legislative practice used in most of the United States for decades and best practices endorsed by the American Law Institute. See Paul H. Robinson & Jane A. Grall, *Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond*, 35 STAN. L. REV. 681, 683. The CCRC's approach is also responsive to concerns raised by the D.C. Court of Appeals about the need to legislatively specify culpable mental states for criminal offenses. See *Carrell v. United States*, 165 A.3d 314, 323–24 (D.C. 2017) (en banc) ("Following the lead of the Supreme Court, see supra note 16, we likewise conclude that more precise gradations of mens rea should be employed. We have previously expressed concern about the use of "general" and "specific" intent. We reiterate our endorsement of more particularized and standardized categorizations of mens rea, and, in the absence of a statutory scheme setting forth such categorizations, we, like the Supreme Court, look to the Model Penal Code terms and their definitions." (internal citations omitted)).

The bill does not define relevant terms. The exception in the bill requires that the agreement to the arrangement was “voluntary and freely-given”³ and did not involve “force,” “fraud,” or “coercion,” but does not define these terms. The lack of definitions creates significant ambiguity as to when a person could face criminal liability under the proposed amendments to D.C. Code § 22-2707. First, it is unclear what it means for agreement to be “voluntary and freely-given.” Can an agreement not be “voluntary and freely-given” even if there was no force, fraud, or coercion? For example, it is unclear if a person agrees to engage in prostitution while extremely intoxicated is “voluntary and freely given.” Second, it is unclear whether the term “force” requires a certain degree of bodily harm, or if *any* degree of unwanted physical contact suffices no matter how trivial. Third, it is unclear what type of deception or wrongdoing constitutes “fraud.” For example, if a person arranges to engage in prostitution and lies about his identity, would this constitute “fraud” as the term is used in the exception? Fourth, it is unclear what constitutes “coercion.” This term presumably encompasses a broad array of harms or threatened harms, but the scope is unclear. For example, it is unclear whether “coercion” includes a landlord threatening to evict a tenant who is behind on rent unless the tenant agrees to engage in a sexual act in exchange for the overdue rent. With these terms undefined, the scope of the exception proposed in the bill, and the scope of criminal liability under § 22-2707 is ambiguous.

In the course of revising various property offenses and offenses against persons, the CCRC has drafted definitions for the terms “deception,” and “coercive threat” that may help clarify the ambiguities. The definitions specify particular types of deceptive behavior, and certain types of threats that warrant criminalization in various contexts.⁴ Using these terms in the place of “force,” “fraud,” and “coercion” would more clearly define the scope of liability under the revised D.C. Code § 22-2707.

The Council similarly could statutorily specify a definition of “force,” “fraud,” or “coercion,” or at least provide guidance in legislative history as to the proposed scope of these terms. For example, the Council could specify whether “fraud” is meant to include deception use to induce sexual conduct (e.g. as to the identity or characteristics of the other person) or only deception as to the nature of the sexual conduct.⁵ Defining these terms would better allow the Council to determine the scope of criminal liability more clearly and precisely, reducing the need for litigation over such matters.

³ This requirement only applies when the arrangement was not for prostitution involving the defendant.

⁴ The CCRC’s latest draft of definitions of these terms, and other statutes, can be found at: <https://ccrc.dc.gov/sites/default/files/dc/sites/ccrc/publication/attachments/4-15-19-Compilation-of-RCC-Draft-Statutory-Language.pdf>.

⁵ Notably, criminalizing sexual conduct by deception is largely disfavored in current American criminal law, with the exceptions of falsely represented medical procedures and impersonation of a woman’s husband. *See, e.g.,* Jed Rubenfeld, *The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy*, 122 Yale L.J. 1372, 1397 (2013) (noting that “sex falsely represented as a medical procedure, and impersonation of a woman’s husband--have been for over a hundred years the only generally recognized situations in which Anglo-American courts convict for rape-by-deception.”) (citing Patricia J. Falk, *Rape by Fraud and Rape by Coercion*, 64 Brook. L. Rev. 39, 119 (1998)).

IV. General Background—Public Opinion on the Relative Seriousness of Prostitution.

While the CCRC takes no position at this time on the bill’s policy goals, some of its research⁶ into the opinions of District voters on the relative seriousness of various potentially-criminal conduct may be relevant to the Council’s review of the bill.

As part of its statutory mandate to develop recommendations to improve the proportionality of penalties in District criminal statutes, in 2019 the CCRC surveyed a representative panel of District voters about their views. The survey was a web-based survey administered by YouGov (as a contractor to the CCRC) and involved 400 respondents to each survey question. The survey tested short descriptions of hypothetical conduct which constitute criminal acts under the current D.C. Code. The survey design asked respondents to rate the seriousness of each hypothetical on a scale of 0 to 12, with 0 being least severe, and 12 the most severe. The survey design also asked respondents to select their rating based on a chart which provided examples of conduct for severity levels 12, 10, 8, 6, 4, 2, and 0. For example, a 12 on the chart was described as an intentional killing, while a 2 on the chart was described as non-painful physical contact, such as shoving someone around. The survey design was similar to the design of prior research conducted by University of Pennsylvania Law School professor Paul Robinson and others regarding penalties in Pennsylvania⁷ and New Jersey.⁸

Two of the survey questions concerned conduct particularly relevant to the bill.

First, question 5.05 asked respondents to rank the seriousness of: “Assisting or encouraging an adult to engage in an act of consensual prostitution with another person. No force, threats, or coercion are used, and no injury is caused.” The mean response to this hypothetical was a 5.2, the median 5, and the mode 2 (with just 11.9% selecting the mode). These mean and median responses place the conduct about half-way between the “6” example on the chart of “Moderate injury requiring immediate medical treatment (e.g. a broken bone)” and the “4” example on the chart of “Minor injury treatable at home (e.g. a black eye).” These chart examples correspond to the kinds of assault injuries current punished by 3 years and 180 days under the D.C. Code—although it should be emphasized that survey takers were not informed of this nor were they asked to provide a specific maximum penalty for conduct.

⁶ The CCRC’s complete public opinion survey findings and methodology, can be found at: <https://ccrc.dc.gov/sites/default/files/dc/sites/ccrc/publication/attachments/Advisory-Group-Memo-27-Public-Opinion-Surveys-on-Ordinal-Ranking-of-Offenses.pdf>.

⁷ Robinson, Paul H., and the University of Pennsylvania Criminal Law Research Group, *Report on Offense Grading in Pennsylvania*, December 2009; U of Penn Law School, Public Law Research Paper No. 10-01. Available at SSRN: <https://ssrn.com/abstract=1527149>. See also Robinson, Paul H. and Gaeta, Thomas and Majarian, Matthew and Schultz, Megan and Weck, Douglas M., *The Modern Irrationalities of American Criminal Codes: An Empirical Study of Offense Grading* (February 16, 2011). *Journal of Criminal Law and Criminology*, Vol. 100, Pg. 709, 2010; U of Penn Law School, Public Law Research Paper No. 10-04. Available at SSRN: <https://ssrn.com/abstract=1539083>.

⁸ Robinson, Paul H. and Levenson, Rebecca and Feltham, Nicholas and Sperl, Andrew and Brooks, Kristen-Elise and Koprowski, Agatha and Peake, Jessica and Probbler, Benjamin and Trainor, Brian, *Report on Offense Grading in New Jersey* (January 10, 2011). U of Penn Law School, Public Law Research Paper No. 11-03. Available at SSRN: <https://ssrn.com/abstract=1737825>.

Second, question 1.25 asked respondents to rank the seriousness of: “Offering to have sexual intercourse with a consenting adult for money.” The mean response to this hypothetical was a 2.2, the median 1, and the mode 0 (with 43.7% selecting the mode). The median response may be more informative giving the skewed distribution and ordinal nature of responses, placing the conduct nearly at the “2” example on the chart of “Non-painful physical contact (e.g. pushing someone around).” However, it should be noted that the modal response, selected by 43.7% of respondents, was a “0,” placing the conduct at the “0” example on the chart of “Not a crime (e.g. a speeding ticket).”⁹ These ratings were nearly the lowest of any conduct tested by the CCRC.

The meaning or significance of these public opinion survey findings may be construed in different ways, and the CCRC cautions against a reductive reading of the responses as supporting any one position on the bill or its policies. Most importantly, please bear in mind that the survey was designed to test the relative seriousness of many types of conduct, with prostitution-type conduct being only a small part of the survey and not asking directly about the imprisonment penalties that a person should face for engaging in such conduct. Also, please note that hypothetical conduct did not provide additional details or raise other policy considerations (e.g. enforcement costs, health effects, or disparate impact on various communities) that could significantly affect public responses. Nonetheless, the survey findings suggest a possible difference in current public opinion about the seriousness of procuring-type activity (even when consensual) and an individual’s own decision to solicit (consensual) prostitution. The survey findings also suggest that the public is divided nearly in half as to whether soliciting (consensual) prostitution should be criminal at all or is more akin to a civil violation like a speeding ticket.

V. Closing.

While the CCRC takes no position at this time on the bill’s policy goals, the agency’s analysis shows that the proposed amendments to D.C. Code § 22-2707 do not address a number of substantive issues which directly affect the scope criminal liability. If the Council wishes to resolve these issues, the bill should specify culpable mental states and define relevant terms. The CCRC also notes that, as a matter of general background, its survey of District voters’ opinion shows a difference between individual solicitation and procuring-type activity (even when consensual), and shows a public divided on whether individual solicitation should be criminal at all.

⁹ The full set of responses with corresponding ratings to question 1.25 were as follows:

Responses	Rating
164	0
61	1
61	2
14	3
17	4
15	5
13	6
14	7
10	8
6	9
11	10
2	11
12	12

Thank you for your consideration. For questions about this testimony or the CCRC's work more generally, please contact our office or visit the agency website at www.ccrdc.dc.gov.

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D.C. Criminal Code Reform Commission