D.C. Criminal Code Reform Commission
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To: Councilmember Charles Allen,
Chairperson, Committee on the Judiciary and Public Safety
From: D.C. Criminal Code Reform Commission (CCRC)
Date: February 28, 2022
Re: Testimony for the February 28, 2022 Hearing on B24-0516, the "Female Genital Mutilation Prohibition Act of 2021" and B24-0560, the "Animal Care and Control Omnibus Amendment Act of 2021."

I. Introduction

Thank you for the opportunity to provide testimony to the Committee on the Judiciary and Public Safety for the record of the public hearing on the "Female Genital Mutilation Prohibition Act of 2021" and "Animal Care and Control Omnibus Amendment Act of 2021" (hereafter "bills"), held on February 28, 2022. My name is Anna Scanlon and I am a senior attorney-advisor to the District's Criminal Code Reform Commission (CCRC). I am presenting testimony today on behalf of the CCRC. The CCRC is a small, independent District agency focused on developing recommendations to reform the criminal statues in the District. Last March, the CCRC submitted comprehensive recommendations to reform the District's "substantive "criminal statutes, which have been incorporated into the "Revised Criminal Code Act of 2021," introduced last October. In my testimony, I will note both relevant provisions of current District law as well as proposed statutes in the Revised Criminal Code Act of 2021 (RCCA) that would bear on these bills.

With respect to the "Female Genital Mutilation Prohibition Act of 2021" (FGM bill), the CCRC takes no position at present on the substantive merits of whether to create a separate offense to specifically address Female Genital Mutilation (FGM) or cutting of persons under care. Similarly, the CCRC takes no position at present on the substantive merits of the provisions in the "Animal Care and Control Omnibus Amendment Act of 2021" (Animal Care bill). Instead, this testimony analyzes potential ambiguities and questions related to the language of the proposed bills and offers some possible solutions. The CCRC has not researched comparable laws in other jurisdictions at this time or fully explored constitutional questions related to the bills.

II. "Female Genital Mutilation Prohibition Act of 2021"

A. Background Considerations

The present FGM bill seeks to establish criminal liability for female genital mutilation involving "persons under care" which, under the bill's current language, includes adults under a guardianship or conservatorships. Although the CCRC found no examples of prosecutions for FGM-type conduct in District

case law, the practice of non-consensual FGM on persons under the age of 18[1] and adults under care is likely punishable under District statutes guarding against bodily injury such as the assault, aggravated assault, or cruelty to children statutes.[2] The maximum penalty ranges for those offenses range from 180 days to 15 years in prison depending on the level of bodily injury and whether the actor is charged under an assault statute or the cruelty to children statue. Similarly, the RCCA bill now before the Council would likely criminalize the practice of non-consensual forms of FGM under the RCCA's assault, criminal abuse of a minor, criminal neglect of a minor, criminal abuse of a vulnerable adult or elderly person, and criminal neglect of a vulnerable adult or elderly person statutes.[3] The maximum penalties for conduct constituting FGM under the RCCA would range from 1 year to 12 years[4] again depending on the statute, age of the victim, and level of injury.

The FGM bill proposed here would establish an additional, new offense applicable to actors: (1) who knowingly perform FGM on adults under a guardianship or conservatorship; (2) who, as guardians, knowingly consent to, permit, or otherwise facilitate FGM on an adult person under care; or (3) who knowingly remove or facilitate the removal of an adult person for the purpose of facilitating FGM of the adult person under care. Though the bill mentions children and persons under the age of 18, the relevant provisions do not extend to persons under the age of 18 or adults not under a guardianship or conservatorship. Additionally, the apparent consent or wishes of the person under care are not relevant to whether a person is liable under the FGM bill except in cases involving "sex reassignment" procedures.

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[1] While parents have a large degree of discretion in decision regarding their children, it is well-established that a State may exercise "constitutional control over parental discretion in dealing with children when their physical or mental health is jeopardized." *Parham v. J. R.*, 442 U.S. 584, 603 (1979); s*ee also New York v. Ferber*, 458 U.S. 747, 756-57 (1982) ("It is evident beyond the need for elaboration that a State's interest in 'safeguarding the physical and psychological well-being of a minor' is 'compelling.'"); *Prince v. Massachusetts*, 321 U.S. 158, 170 (1944) ("Parents may be free to become martyrs themselves. But it does not follow they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves."). The DCCA has also held that the District cruelty to children statute, which criminalizes engaging in conduct that causes or creates a grave risk of bodily injury to a child, does not require malice (acting out of a desire to inflict pain rather than out of genuine effort to correct or care for the child). *Jones v. United States*, 813 A.2d 220, 224 (D.C. 2002).

[2] *See* D.C. Code § 22-404 (assault statute punishing common law assault); D.C. Code § 22-404.01 (aggravated assault statute punishing knowingly or purposely causing "serious bodily injury" to another person); D.C. Code § 22-1101 (cruelty to children statute punishing conduct that creates a grave risk of bodily injury to a child irrespective of malice). A prior version of the federal FGM statue was also struck down in part because the court found that the prohibited practice was a criminal assault and there are at least a few examples of assault statutes being used to criminalize FGM in other states. *See United States v. Nagarwala*, 350 F. Supp. 3d 613, 628 (E.D. Mich. 2018) (striking down a prior version of federal law criminalizing FGM on the grounds that "as despicable as [FGM] may be, it is essentially a criminal assault" prosecutable only by local jurisdictions absent a nexus to Congressional power); *id*. (also stating: "The comparison of FGM to healthcare is unsuitable. FGM is a form of physical assault, not anything approaching a healthcare service.");*Adem v. State*, 300 Ga. App. 708, 708, 686 S.E.2d 339, 340 (Ga. 2009) (affirming convictions of father for first degree cruelty to children and aggravated battery for removing his daughter's clitoris); *Byrd v. State*, 251 Ga. App. 83, 84, 553 S.E.2d 380, 382 (Ga. 2001) (holding severing a portion of the victim's clitoris constituted evidence from which a jury could find serious disfigurement).

[3] *See* RCCA § 22A-1202 (assault); RCCA §§ 22A-1501, 1504 (Abuse and Neglect of Vulnerable persons).

[4] Although the RCCA penalties appear to be somewhat lower than those in the current D.C. Code, this difference may reflect the different way the RCCA and the current D.C. Code calculate "back up time" under the RCCA and current law. The RCCA penalties do not include the additional years of back up time, while the current D.C. Code penalties do include backup time. (Compare RCCA § 205(b) with D.C. Code § 24–403.01(b-1).) Functionally, the 12 year statutory maximum under the RCCA (with an additional 3 years backup time) is equivalent to a current 15 year statutory maximum under the D.C. Code (from which the 3 years backup time must be subtracted to determine the maximum a judge may impose at sentencing).

Though it should be noted that current District law explicitly limits the authority of court appointed guardians to consent to certain procedures absent court approval including to the "removal of a bodily organ" (e.g., the clitoris),[5] neither the current D.C. Code nor District case law expressly address if and when a person charged with an offense may defend against criminal charges on the grounds that they were acting lawfully as a court appointed guardian. Thus, beyond criminalizing performing, facilitating, or consenting to the performance of FGM on a person under care, this bill would clarify when a guardian could lawfully authorize or facilitate FGM on a person under care and would clearly establish that guardianship or the effective consent of a guardian is not a defense to FGM.

Notably, while current statutes and case law do not discuss guardianship in relation to assaultive conduct such as FGM, the RCCA proposes a new statute entitled, Special Responsibility for Care, Discipline, and Safety Defenses, that clarifies when a parent or guardian may use parenthood or guardianship as a defense to any offense committed against a person or any property offense.[6] Pursuant to the proposed statute, a guardian defense would *not* be available if the conduct exceeds the authority of the actor's guardianship over a complainant, *as determined under civil law*. Consequently, under the RCCA proposal, a guardian could not defend against an assault, an abuse of a vulnerable adult charge, or a neglect of a vulnerable adult charge based on FGM on the grounds that they had guardianship over the person unless their conduct was otherwise authorized by civil law. Further, the RCCA's guardian defense is not available unless: (1) the conduct is done with the intent to safeguard or promote the welfare of the complainant; (2) the conduct is reasonable under all the circumstances; *and* (3) the conduct either does not create as substantial risk or, or cause death or serious bodily injury or is the performance or authorization of a lawful cosmetic or medical procedure. These provisions would preclude a court appointed guardian from using guardianship as a defense to authorizing or performing FGM on a person under care under the circumstances this bill seeks to criminalize. Should both the RCCA and this bill be enacted into law, it would necessary to reconcile any discrepancies between the relevant provisions.

B. Specific Considerations Regarding Bill Language

1. Constitutional Considerations

The proposed bill may not adequately protect the First Amendment and Due Process rights of an adult person under care. Insofar as it provides an exception for persons under care who request a sex reassignment procedure, the proposed bill recognizes that persons deemed incapacitated under guardianship statutes have and retain substantive and procedural due process rights with respect to bodily autonomy even when placed under guardianship. District law also generally presumes that persons under a guardianship are capable of making health-care decisions absent an additional certification of incapacity.[7] The FGM bill, however, permits acts constituting FGM, which range under the bill's definition from a slight pricking that causes minimal bodily injury to acts resulting in permanent disfigurement and disability, only in instances that would protect the physical health of the adult under care and instances of a sex reassignment procedure

[5] *See e.g.*, D.C. Code § 21-2047.01 (a)(1).

[6] *See* RCCA § 22A-408. Special Responsibility for Care, Discipline, or Safety Defenses.

[7] *See* D.C. Code § 21-2203. Presumption of capacity. ("An individual shall be presumed capable of making health-care decisions unless certified otherwise under § 21-2204. Mental incapacity to make a health-care decision shall not be inferred from the fact that an individual: [] (3) Has a conservator or guardian appointed pursuant to § 21-1501 et seq. or § 21-2001 et seq.").

requested by the person under care. The FGM bill does not include any procedural or substantive due process protections for adults seeking a FGM procedure of any kind for religious or non-medical reasons.[8]

To address these constitutional concerns and still accomplish the bill's purpose of prohibiting a guardian from imposing FGM on a person under care who may be incapable of meaningful consent, the Council may wish to consider revising the civil laws related to the powers and limitations of guardians in Title 21 of the District Code.[9] By clarifying guardian authority with respect to FGM in the statutes addressing guardianship and providing persons under care an opportunity to be heard by a court, the Council would also be clarifying the applicability of a guardian-type defense to the assault and other relevant statutes absent passage of the RCCA's Special Responsibility for Care, Discipline, or Safety Defense statute while protecting the rights of persons under care. Additionally, the Council may consider broadening the exceptions contained in paragraph (d) of the FGM bill text to include procedural protections such as allowing a person under care to petition a court for permission to undergo an elective procedure.

2. Other textual considerations

First, the FGM bill uses unnecessarily gendered language in the introduction and text of the bill. The practice of FGM is not limited to women and girls as transgender men and boys as well as non-binary persons with vulvas could be subjected to the practice. While it seems likely the purpose of using the term "female" is to exclude circumcision of the penis from the proscribed conduct, the Council could avoid labeling genitalia as female or male by substituting the term "vulva" or a list of the specific parts of the genitalia that the bill aims to protect, *i.e.*, the clitoris, the prepuce, the labia minor, labia majora, vaginal orifice, mons pubis, perineum, or any other part of the vulva.

Second, the rationale for inclusion of the term "conservator" appears unclear. Pursuant to D.C. Code § 21-2401.02(2), a "conservator" is "a person appointed by the court to administer the property of an adult, including a person appointed under §§ 21-2001 to 21-2077." Because a conservator has power over property and does not have power or duties over the person or health care decisions, it is not clear that a conservator could have legal custody or control of a "person under care". Notably, the proposed language defines "conservator" but does not otherwise use the term "conservator" in the statute.

Third, Sec. 102 (a)(2) bill uses the term "parent" but applies only to acts of FGM on adults who are under a conservatorship or guardianship. The language of the bill states that the terms "guardian" and "conservator" have the same meanings as in D.C. §21-2401.02(3) which applies only to incapacitated adults. Similarly, the definition of the term "person under care" means "an individual under conservatorship or guardianship" and paragraphs (a)(1)-(a)(3) only apply to "persons under care." Although a parent can be appointed as a guardian, a parent acting as a guardian would fall under the term "guardian" in the statute.

[8] Notably, clitoral hood piercing for non-medical and non-religious purposes is not uncommon but falls within the definition of FGM in the FGM bill. Categorical prohibition and criminalization of such a piercing of a person under care, without any due process protections, may implicate the due process right to privacy in addition to the First Amendment's guarantee of freedom of religion. Similarly, a prohibition related to acts labeled FGM but not practices such as penile circumcision for non-medical reasons may constitute grounds for an equal protection challenge.

[9] *E.g.*, D.C. Code § 21-2047.01 places other limitations on guardians such as limiting the power "to consent to an abortion, sterilization, psycho-surgery, *or removal of a bodily organ* except to preserve the life or prevent the immediate serious impairment of the physical health of the incapacitated individual, unless the power to consent is expressly set forth in the order of appointment or after subsequent hearing and order of the court." D.C. Code § 21-2047.01(a)(1). Although this provision already limits the power of a guardian to consent to some of the conduct under the bill's definition of FGM, the Council could amend this statute to include further limitations on the power of a guardian, specifically with respect to conduct falling under the definition of FGM.

Consequently, the use of the term "parent" in paragraph (a)(2) does not extend the reach of this statute beyond adults in a conservatorship or guardianship and can be deleted.

Fourth, the meaning and scope of "consents to, permits, or otherwise facilitates" is unclear, especially in light of the lack of nexus between the guardian and person under care. Although "consent" and "otherwise facilitate" appear to require some affirmative action on the part of the guardian or parent, "permits" appears to punish a failure to block the actions of another without limitation. Additionally, as written, the text applies to a guardian who consents to, permits or otherwise facilitates female genital mutilation of a person under care but does not specify that the person under care be under the guardianship of that particular guardian. In other words, a parent or guardian of person X would seemingly be liable for consenting, permitting, or otherwise facilitating FGM of person Y even though their guardianship powers were irrelevant to person Y and their consent would carry no legal significance. To clarify the action required, the Council may consider striking the term "permit" and clarifying that person be under the care of the guardian who consents or otherwise facilitates the FGM of the person under care.

Fifth, the proposed statue may benefit from grading to distinguish different levels of harm. The proposed statute covers multiple types of conduct, all defined as FGM, which could result in drastically different levels of harm. For example, the removal of the clitoris would result in permanent disfigurement and bodily disfunction,[10] whereas a ritual pricking[11] could be extremely mild and not cause any lasting or serious bodily injury. Should FGM conduct be prosecuted as assault or cruelty to children, the potential punishment would vary depending on the severity of the conduct in order to provide a more proportionate penalty. For example, forms of FGM such as removal of the clitoris or labia that cause "serious bodily injury"[12] would fall under the aggravated assault statute and be punishable by up to 10 years imprisonment while conduct such as ritual pricking which did not cause "significant bodily injury"[13] or "serious bodily injury" would fall under the simple assault statute and be punishable by 180 days imprisonment. The Council may consider similarly grading this new offense based on the level of bodily injury rather than treating a ritual pricking the same as permanent removal of the bodily organ. Treating a person who knowingly engages in conduct designed to avoid serious bodily injury as less culpable than a person who

[10] The removal of the clitoris would constitute "serious bodily injury" and create liability under the current aggravated assault statute. *See* D.C. Code § 22-404.01. Similarly, the removal of the clitoris would constitute destroying, amputating, or permanently disabling a member or organ of a person's body and qualify as first degree assault in the RCCA. *See* RCCA § 22A-1202.

[11] *See* L. Amede Obiora, *Bridges and Barricades: Rethinking Polemics and Intransigence in the Campaign Against Female Circumcision*, 47 CASE W. RES. L. REV. 275, 288 (1997) (stating: "The ritualized marking of female genitalia begins with the mildest forms of the procedures, where the clitoris is barely nicked or pricked to shed a few drops of blood. This procedure is innocuous and has a strictly symbolic connotation."). Some scholars have also noted that permitting "symbolic nicking of the clitoral tissue . . . so that the children can be part of the tradition which practices FC without undergoing a full genital surgery" may be more effective in persuading persons to abandon the practice of FGM than criminal laws. Holly Maguigan, *Will Prosecutions for "Female Genital Mutilation" Stop the Practice in the U.S.?*, 8 TEMP. POL. & CIV. RTS. L. REV. 391, 408–09 (1999) (stating; "The countries which have achieved greatest success with education and outreach are those in which there has been a tradition of female genital surgeries and which do not criminalize all forms of female genital surgeries.").

[12] "Serious bodily injury" means an "injury that involves a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, or loss or impairment of a bodily member or function." *Jackson v. United States*, 970 A.2d 277, 279 (D.C. 2009).

[13] "Significant bodily injury" means an injury that requires hospitalization or immediate medical attention. D.C. Code. § 22-404(a)(2). Assaultive conduct that causes "significant bodily injury" is punishable as felony assault which is a 3-year felony. *Id.*

knowingly causes serious bodily injury is consistent with the goal of ensuring proportionality in the criminal code.

Sixth, the expansive definition of "female genital mutilation" prohibits most cosmetic and other elective procedures that may have a psychological rather than "medical" benefit and may be desired by the person under care done. For example, a person may have a mild abnormality that they want removed for cosmetic reasons. Removal of the abnormality would constitute FGM under paragraph (2)(F) and would not fall under the exception that it be necessary to preserve or protect the physical health of the individual even if the act would have a psychological benefit to the person under care. Similarly, the exclusion for sex "reassignment" may be too narrow to cover procedures related to gender identity but not considered "reassignment" procedures desired by a person under care.

Seventh, the CCRC recommends deleting section 102(e) and section 201 of the FGM bill. The FGM bill does not apply to victims under the age of 18. Assuming the Council does not alter the bill to apply the statute to persons under the age of 18 undergoing FGM, the Council can delete section 102(e) which tolls the statute of limitations until the victim of the offense reaches 18 years of age and section 201 of the bill which alters the definition of a "neglected child" in D.C. Code § 16-2301(9)(A). The tolling provision and the definition of "neglected child" are inapplicable as the bill is now drafted.

III. "Animal Care and Control Omnibus Amendment Act of 2021"

A. Background Considerations

As with the FGM bill, CCRC analysis here is restricted to specific legal, policy, and drafting considerations. The CCRC has not fully researched other jurisdictions' comparable laws at this time. The CCRC takes no position on the overall bill.

While the CCRC to date has not made recommendations to revise cruelty to animal offenses in the D.C. Code, the agency does intend to undertake a comprehensive examination of these statues and make recommendations in the upcoming year that will be consistent with other revisions contained in the RCCA. The CCRC will examine each provision of the chapter on animal cruelty to ensure clarity and consistency in language as well as proportionality in sentencing in relation to each animal cruelty offense and other offenses in the D.C. Code. Should the criminal provisions in this bill and the RCCA both be enacted, the bills may need to be reconciled for consistency in terminology and to determine whether any conforming amendments are necessary.

B. Specific Considerations Regarding Bill Language

1. Possession of an implement of dogfighting

First, the CCRC notes that the criminal offense proposed here is specific to dogfighting. The proposed bill seeks to codify a new possession of an implement of dogfighting offense. Current District law on cruelty to animals criminalizes the offense of "animal fighting" which includes all animals rather than just dogs.[14] The Council may wish to consider whether the proposed new offense should be specific to dogs or inclusive of other animals encompassed by current District law prohibiting animal fighting.

Second, the CCRC recommends clarifying the definition of the term "possess," either in the statute or legislative history. The RCCA defines "possess" and other parts of speech, including "possesses," "possessing," and "possession," to mean either "[t]o hold or carry on one's person" or "to have the ability

[14] *See* D.C. Code § 22-1006.01 (penalty for engaging in animal fighting).

and desire to exercise control over."[15] This definition is consistent with DCCA case law establishing constructive and actual possession in other statutes. However, court interpretations of the term "possess" have varied over time and clarifying the definition would be useful.

Third, the CCRC recommends clarifying that the culpable mental state for possession of an implement of dogfighting is "knowingly" or "purposely". Under the proposed language, it is not clear whether the actor must know or desire that they possess an implement of dogfighting. The CCRC recommends clarifying that an actor must either purposely (consciously desire to) possess an implement of dogfighting or know (be aware or practically certain) that the object they are possessing is an implement of dogfighting.[16] This can be accomplished by changing the language from "possess, with intent to unlawfully use, an implement of dogfighting" to "knowingly possess an implement of dogfighting with intent…" or "purposely possess an implement of dogfighting with intent…." Clarifying culpable mental state requirements in criminal statutes, and doing so in a manner consistent with the Model Penal Code, has been endorsed by the Supreme Court and the D.C. Court of Appeals.[17]

Fourth, the CCRC recommends clarifying the meaning of "unlawfully use" to specify unlawful use as an implement of dog fighting. As written, the possession of an implement of dog fighting statute applies to possession of objects that an actor intends to use unlawfully regardless of whether the actor intends to use the implements of dog fighting in relation to animals. For example, an actor could possess a break stick and intend to use it to break the window of a car or as a weapon against a person. The CCRC recommends clarifying that the unlawful use required as an element be related to dog fighting. This clarification can be accomplished by changing the phrase "with intent to unlawfully use" to either "with intent to commit a crime described in this chapter" or "with intent to use in relation to unlawful dogfighting."

Fifth, the CCRC recommends clarifying the meaning of the phrase "with the intent". Current District case law has not consistently defined the term "intent" across statutes, suggesting that intent requires a purposeful mental state for some statutes and a knowingly mental state for others. The RCCA specifies that "intent" requires at least a "knowingly" culpable mental state.[18] Should the Council pass this bill before or without the enactment of the RCCA, the CCRC recommends clarifying the meaning of "intent" in this statute.

Fifth, the CCRC recommends (b)(2) be amended to say "as a condition of probation," "upon conviction," or "the court may order a person convicted", rather than "as a condition of sentencing" to avoid confusion. Typically, the term "condition" in sentencing refers to a condition of probation. If the provisions in (b)(2) are a separate part of the sentence rather than a condition of probation, the term "condition" may be deleted to avoid confusion. Current D.C. Code § 22-1001(2) uses the language "The court may order a person convicted of cruelty to animals…".

2. Prohibiting sexual contact between a person and an animal.

First, the CCRC notes that sexual contact with an animal already may be prohibited under the provision in D.C. Code § 22-1001(a)(1) criminalizing the knowing infliction of "unnecessary cruelty" on an animal or D.C. Code § 22-1002 which prohibits "knowingly and wilfully authoriz[ing] or

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[15] *See* RCCA § 22A-101 (definition of "possess").
[16] *See* RCCA § 22A-206 (definitions and hierarchy of culpable mental states).
[17] *See Carrell v. United States*, 165 A.3d 314, 324 (D.C. 2017) ("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.").
[18] *See* RCCA §§ 22A-205(b), 206(b).

permit[ing][an animal] to be subjected to unnecessary torture, suffering, or cruelty of any kind." The animal control bill seeks to codify a new offense proscribing sexual contact between an animal and person. The CCRC found no case law holding whether the unnecessary cruelty provision in D.C. Code § 22-1001 or the unnecessary suffering prohibition in D.C. Code § 22-1002 would apply to sexual contacts. However, it seems evident that suffering caused by a sexual act between a human and an animal would be "unnecessary." At least one appellate court in Michigan has upheld an animal cruelty conviction for bestiality finding that the sexual act caused unnecessary pain to an animal.[19] Thus, while current law is not clear on the matter, it seems reasonable to believe that the DCCA would find sexual contacts to constitute infliction of unnecessary suffering if there was evidence of any injury or pain.

Additionally, although the CCRC has not yet recommended revisions to the animal cruelty statutes in Chapter 10 of D.C. Code Title 22, the RCCA does revise the definitions of a "sexual act" and "sexual contact" to include certain sexual conduct between an animal and person. As a result of these definition changes, the RCCA sexual assault offenses and obscenity offenses would cover some of the conduct criminalized in the provision of this bill. For example, inducing a child or vulnerable adult to engage in a sexual contact with an animal under subsection (a)(5) would create liability under the RCCA's sexual assault, sexual abuse of a minor, arranging for sexual conduct of a minor or person incapable of consenting statutes, and, possibly, other sexual assault statutes. Similarly, forcing another person to engage in sexual contact with an animal would constitute sexual assault or sexual abuse under the RCCA.[20]

Second, the application of the phrase "lawful and accepted" and the scope of exceptions contained in subsection (e) is unclear and may benefit from amendment. It is not clear whether the phrase "lawful and accepted" in the crime applies only to "practices that relate to veterinary medicine . . ." or modifies the remaining practices in the list. Further the scope of the exception is unclear. E.g., would the phrase in subsection (e), "any other practice that provides care for animals," apply to ordinary grooming or home-care provided by a pet owner? The CCRC recommends separately listing in subsections within section (e) the applicable exceptions and further clarifying in the statutory exception what types of animal care practices are included.

Third, the breadth of the term "sexual contact" is unclear because the definition does not specify a nexus between the conduct and a desire to sexually abuse, humiliate, harass, degrade, arouse, or gratify any person or animal, or at the direction of someone with such a desire. The proposed definition of "sexual contact" includes conduct done with no sexual purpose. For example, taking the temperature of a dog with an anal thermometer or even allowing a dog to sit on one's lap would qualify because the definition includes an insertion of any object into an anal opening and a touching of sex organs through clothing. In contrast, the definition of a "sexual contact" in the District's sexual abuse statutes[21] specifies that a "sexual contact" be done "with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person." Similar language in RCCA 22A-101(118) requires a sexual act to be "with the desire to sexually abuse, humiliate, harass, degrade, arouse, or gratify…". The Council may ensure that only intended sexual contacts are included in the animal control bill's definition by modifying the definition to include a similar intent requirement.

Fourth, the requirement in subsections (c) and (d) that a judge shall impose certain conditions on a person convicted of the offense may better be left for judicial determination. The animal control bill makes the provisions in sections (c) and (d)(2) mandatory after conviction, without exception. The provisions

[19] *See People v. Antonio Ratcliff*, No. 326588, 2016 WL 4062878, at *3 (Mich. Ct. App. July 26, 2016).
[20] *See* RCCA §§ 22A-1301, 1302.
[21] D.C. Code § 22–3001(9).

include forfeiture of any animal and five-year bans on residing in a household where pets are present or working or volunteering in any establishment where pets may be present. Some persons convicted may be reliant on relatives for housing or work in places that have animals present even though the person has no contact with the animal. The Council may consider modifying the provisions to permit rather than require a judge to impose the specified restrictions so that a judge can modify such conditions as may be appropriate based on the circumstances.

Fifth, the Council may consider grading the offense based on the severity of the conduct. The animal control bill does not specify a penalty for this crime but establishes that the offense is a felony and provides no gradations. Yet, the prohibited conduct covered by the offense varies widely in degree and injury. For example, disseminating photographs is very different from actually engaging in sexual contact with an animal or forcing another person to engage in sexual contact with an animal. The Council may consider grading the offense in accordance with the seriousness of different ways that the offense can be committed and the harm to the animal.

Sixth, the CCRC recommends clarifying several undefined terms and phrases. The bill language, as currently drafted, contains several undefined terms, including: "developmental or intellectual disability" in paragraph (a)(5); "force" in paragraph (a)(6); "permit" in paragraph (a)(4); "intent" in paragraph (a)(1); and "accepted" in subsection (e). The Council may consider defining, deleting, and/or clarifying some of these terms. For example, the bill could use term "vulnerable adult" and define the term as done in the RCCA.[22] Similarly, the term "force" could be clarified to state whether it refers to physical force or also includes coercion.

Seventh, the use of the terms "cause, aid, and abet" appears to be unnecessary because current law already establishes liability as a principal for a person who causes, aids, or abets. Pursuant to D.C. Code § 22-1805, Persons advising, inciting, or conniving at criminal offense to be charged as principals, "[i]n prosecutions for any criminal offense all persons advising, inciting, or conniving at the offense, or aiding or abetting the principal offender, shall be charged as principals and not as accessories, the intent of this section being that as to all accessories before the fact the law heretofore applicable in cases of misdemeanor only shall apply to all crimes, whatever the punishment may be." The RCCA similarly establishes accomplice liability[23] and criminal liability for conduct by an innocent or irresponsible person.[24]

Thank you for the opportunity to testify regarding these bills. I will do my best to answer any questions you may have regarding the agency's analysis. In addition, the CCRC would be happy to provide further analysis to the Council on these bills or others, upon request.

[22] RCCA § 22A-101 (defining "vulnerable adult" as "a person who is 18 years of age or older and has one or more physical or mental limitations that substantially impairs the person's ability to independently provide for their daily needs or safeguard their person, property, or legal interests").
[23] RCCA § 22A-210.
[24] RCCA § 22A-211.