

**GOVERNMENT OF THE DISTRICT OF COLUMBIA**  
Office of the Attorney General for the District of Columbia

Public Safety Division



**MEMORANDUM**

**TO:** Richard Schmechel  
Executive Director  
D.C. Criminal Code Reform Commission

**FROM:** Dave Rosenthal  
Senior Assistant Attorney General

**DATE:** May 11, 2018

**SUBJECT:** First Draft of Report #20. Abuse & Neglect of Children, Elderly, and Vulnerable Adults

The Office of the Attorney General for the District of Columbia (OAG) and the other members of the Code Revision Advisory Group of the D.C. Criminal Code Reform Commission (CCRC) were asked to review the First Draft of Report #20 - Abuse & Neglect of Children, Elderly, and Vulnerable Adults.

**COMMENTS ON THE DRAFT REPORT**

**RCC § 22A- Section 1501 and 1502. Child Abuse and Child Neglect.<sup>1</sup>**

The Commission should consider changing the names of these proposed offenses. The terms “child abuse” and “child neglect” have long been associated with the District’s child welfare system. See D.C. Code § 16-2301 (9). Calling the criminal offense and the civil offense by the same name will cause unnecessary confusion. We recommend renaming the RCC child abuse provision, “criminal cruelty to a child” and renaming RCC child neglect, “criminal harm to a child.”<sup>2</sup>

**RCC § 22A- Section 1501. Child Abuse.**

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<sup>1</sup> Third Degree Child Abuse includes “Recklessly ... us[ing] physical force that overpowers a child.” As noted in previous memoranda and discussions, the term “overpower” is not defined.

<sup>2</sup> There may be other names that the Commission may choose that avoids confusion with the child welfare system.

In establishing the offense degree, the Child abuse statute utilizes the terms “serious bodily injury” and “significant bodily injury” that were developed to distinguish between the various degrees of offenses against persons. While those definitions may be appropriate when distinguishing between injuries for adults, they are not sufficient to distinguish between injuries to a baby or small child. Either the definitions need to be expanded or additional degrees of child abuse need to be established. For example, it appears that the following injuries to a baby would not qualify as a first or second degree child abuse: regularly failing to feed the baby for 24 hours; causing a laceration that is .74 inches in length and less than a quarter of an inch deep; failing to provide medicine as prescribed, which causes the baby to suffer pain, problems breathing, or a serious rash; holding a baby’s hand against a stove causing a first degree burn; and choking the child, but not to the point of loss of consciousness.<sup>3</sup> As drafted, a parent who injured a child in one of the ways described in these examples would be guilty of third degree child neglect along with parents who merely “Recklessly fail[ed] to make a reasonable effort to provide food, clothing, shelter, supervision, medical services, medicine, or other items or care essential for the physical health, mental health, or safety of a child.”<sup>4</sup>

RCC § 22A- §1501 (f)(1) establishes the parental discipline defense. Subparagraph (D) limits the defense to conduct that does not include burning, biting, or cutting the child; striking the child with a closed fist; shaking, kicking, or throwing the child; or interfering with the child’s breathing. We suggest that that list be expanded to include, interfering with the child’s blood flow to the brain or extremities.

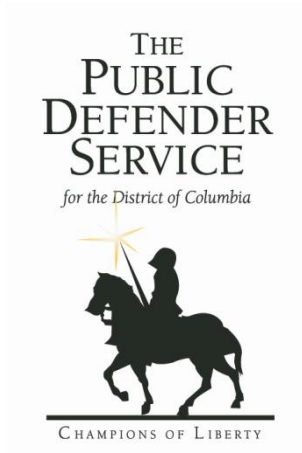
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<sup>3</sup> This is a representative list of injuries that someone may inflict on a baby that, under the current draft, appears either to be a third degree child abuse or not child abuse at all.

<sup>4</sup> Similarly, it is not clear what offense a parent would be committing if the parent intentionally blew PCP smoke into a baby’s face or fed the baby food containing drugs, which did not cause a substantial risk of death or a bodily injury.

# MEMORANDUM

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To: Richard Schmechel, Executive Director  
D.C. Criminal Code Reform Commission

From: The Public Defender Service for the District  
of Columbia

Date: May 11, 2018

Re: Comments on First Draft of Report No. 20,  
Abuse & Neglect of Children, Elderly, and  
Vulnerable Adults

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The Public Defender Service makes the following comments RCC Section 1501, Child Abuse.

1. Age Difference between the Child and the Adult

RCC § 22A-1501(a)-(c), first through third degree child abuse, prohibits abusive acts committed against children by parents, guardians, individuals acting in a parental role and by anyone, regardless of any parental role, who is more than two years older than the child. Under this definition, an 18 year old who fights with a 15 year old may be found guilty of child abuse. This would be the case although the 15 and 18 year old go to school together, take the same classes and play sports together. In this context, 15 and 18 year olds are very much peers, and physical conflicts between them should not be given the label of child abuse. The label does not make sense given the close age of the individuals involved and the comparable vulnerability of the 15 year old. A 15 year old is often as large and as strong as an 18 year old. A 15 year old often has a substantial degree of independence and the ability to seek help from members of his neighborhood or school community. A conviction for child abuse comes with significantly more stigma and probable collateral consequences than a conviction for assault. This is the case in part because the offense of child abuse connotes predatory and violent conduct towards young children who are incapable of defending themselves against adults. When the actors are 15 and 18 and the age difference is a little more than two years, the label of child abuse should not apply. PDS proposes the age difference be four years as it is with child sexual abuse at D.C. Code §§ 22-3008, 22-3009.

PDS therefore suggests the following modification to RCC§ 1501(a)-(c):

(2) In fact:

(A) that person is an adult at least ~~two~~four years older than the child; or

(B) that person is a parent, legal guardian, or other person who has assumed the obligations of a parent.

## 2. Criminalizing the Use of Physical Force that Overpowers a Child

RCC §22A-1501(c), third degree child abuse, criminalizes any use of physical force that overpowers a child. Young children who are so much smaller than adults are easy to overpower with physical force without causing any physical or emotional harm. For instance, a child who is pushing in line, or cutting in line, could be carried to the back of a line by an adult with no relationship to the child. Physically removing a 10 year old to the back of a line in a way that does not cause any injury to the child should not be criminalized as child abuse. That contact may be a fourth or fifth degree assault pursuant to RCC § 22A-1202(e) and (f) and should be charged as such. Charging it as assault will adequately address the conduct without exaggerating the harm to the child by labeling the offense as child abuse.

PDS therefore recommends that the RCC amend third degree child abuse as follows:

(c) *Third Degree Child Abuse.* A person commits the offense of third degree child abuse when that person:

(1)

(A) In fact, commits harassment per § 22A-XXXX, menacing per § 22A-1203, threats per § 22A-1204, restraint per § 22A-XXXX, or first degree offensive physical contact per § 22A-1205(a) against another person, with recklessness that the other person is a child;  
or

(B) Recklessly causes bodily injury to, ~~or uses physical force that overpowers,~~ a child; and

(2) In fact:

(A) That person is an adult at least ~~two~~four years older than the child;  
or

(B) That person is a parent, legal guardian, or other person who has assumed the obligations of a parent.

## 3. Burden of Proof for Parental Discipline Defense

PDS also recommends a change in the RCC's language for the trigger for the reasonable parental discipline defense. RCC § 22A-1501(f)(2) provides that "if evidence is present at trial of the defendant's purpose of exercising reasonable parental discipline, the government must prove the

absence of such circumstances beyond a reasonable doubt.”<sup>1</sup> The question of whether any exercise of parental discipline is reasonable is uniquely within the province of the jury. It is a fact-based inquiry that, according to the District of Columbia Jury Instructions, involves consideration of the child’s age, health, mental and emotional development, alleged misconduct on this and other occasions, the kind of punishment used, the nature and location of the injuries inflicted, and any other evidence deemed relevant.<sup>2</sup> Any judicial finding on whether the issue of reasonable parental discipline has been raised should focus on whether there has been any evidence, however weak, that the defendant’s purpose was parental discipline, not on the reasonableness of that discipline. Therefore PDS recommends removing “reasonable” from the burden of proof language.

In addition, for consistency with requests in other provisions, PDS suggests the following language:

(f)(2) Burden of Proof for Parental Discipline Defense. If some evidence, however weak, is present at trial of the defendant’s purpose of exercising ~~reasonable~~ parental discipline, the government must prove the absence of such circumstances beyond a reasonable doubt

#### 4. Merger Provision

In order to limit offense overlap and duplication, PDS recommends that the RCC include a specific merger provision to allow for the merger of offenses prohibiting the abuse and neglect of vulnerable persons and assault offenses.

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<sup>1</sup> Emphasis added.

<sup>2</sup> Criminal Jury Instructions for the District of Columbia, No. 4.100 (5th ed., rev.2017).