



First Draft of Report #61 –  
Abuse of Government Power  
General Enhancement

SUBMITTED FOR ADVISORY GROUP REVIEW  
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This Draft Report contains recommended reforms to District of Columbia criminal statutes for review by the D.C. Criminal Code Reform Commission's statutorily designated Advisory Group. A copy of this document and a list of the current Advisory Group members may be viewed on the website of the D.C. Criminal Code Reform Commission at [www.ccrdc.dc.gov](http://www.ccrdc.dc.gov).

This Draft Report has two parts: (1) draft statutory text for a new Title 22E of the D.C. Code; and (2) commentary on the draft statutory text. The commentary explains the meaning of each provision, considers whether existing District law would be changed by the provision (and if so, why this change is being recommended), and addresses the provision's relationship to code reforms in other jurisdictions, as well as recommendations by the American Law Institute and other experts.

Any Advisory Group member may submit written comments on any aspect of this Draft Report to the D.C. Criminal Code Reform Commission. The Commission will consider all written comments that are timely received from Advisory Group members. Additional versions of this Draft Report may be issued for Advisory Group review, depending on the nature and extent of the Advisory Group's written comments. The D.C. Criminal Code Reform Commission's final recommendations to the Council and Mayor for comprehensive criminal code reform will be based on the Advisory Group's timely written comments and approved by a majority of the Advisory Group's voting members.

The deadline for the Advisory Group's written comments on this– First Draft of Report #61 – Abuse of Government Power General Enhancement is July 20, 2020. Oral comments and written comments received after this date may not be reflected in the next draft or final recommendations. All written comments received from Advisory Group members will be made publicly available and provided to the Council on an annual basis.

**RCC § 22E-610. Abuse of Government Power Penalty Enhancement.**

- (a) *Penalty enhancement.* An abuse of government power penalty enhancement applies to an offense when the actor:
  - (1) In fact, commits an offense under Subtitle II or Subtitle III of this title;
  - (2) Knowing that they are a public official; and
  - (3) Recklessly engages in the conduct under color or pretense of official right.
- (b) *Penalties.* An abuse of government power penalty enhancement increases the otherwise applicable penalty classification for any offense or gradation of an offense by one class.
- (c) *Definitions.* The terms “knowingly” and “recklessly” have the meanings specified in RCC § 22E-206; the term “in fact” has the meaning specified in RCC § 22E-207; and the term “public official” has the meaning specified in RCC § 22E-701.

**COMMENTARY**

***Explanatory Note.** This section establishes the abuse of government power penalty enhancement for the Revised Criminal Code (RCC). This general penalty provides a penalty enhancement where the defendant commits an offense against persons or property under color or pretense of official right. The RCC abuse of government power penalty enhancement is the first codification of such an enhancement in the District.*

Paragraph (a)(1) requires a person to have committed all the elements of an offense in Subtitle II or Subtitle II of the RCC, including any culpable mental states required for the predicate offense. The term “in fact” specifies that the person is strictly liable as to whether the predicate offense appears in Subtitle II or III. For example, the enhancement is applicable if a police officer is charged with the murder during a pursuit,<sup>1</sup> assault during (or after) an arrest,<sup>2</sup> criminally restraining someone without cause,<sup>3</sup> engaging in nonconsensual sexual conduct during a traffic stop,<sup>4</sup> or criminally damaging property during execution of a search warrant.<sup>5</sup>

Paragraph (a)(2) specifies that the person must be a “public official,” a defined term in RCC § 22E-701 that means a government employee, government contractor, law enforcement officer, or public official as defined in D.C. Code § 1-1161.01(47).

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<sup>1</sup> RCC § 22E-1101. *See, e.g.,* Keith L. Alexander, *Motorcyclist Terrence Sterling shot twice by police, in neck and back, lawsuit says*, WASHINGTON POST (December 15, 2016).

<sup>2</sup> RCC § 22E-1201. *See, e.g.,* Eddie Kim, *Force Questioned in Video of Metro Police Arrest*, DCIST (May 22, 2011).

<sup>3</sup> RCC § 22E-1402. *See, e.g.,* Max Kutner, *‘Jump-Outs’: D.C.’s Scariest Version of ‘Stop-and-Frisk,’* NEWSWEEK (January 16, 2015).

<sup>4</sup> RCC § 22E-1307. *See, e.g.,* Zuri Davis, *D.C.’s Police Department Is Being Sued (Again) for Sexually Violating Someone During a Search*, REASON (January 14, 2020).

<sup>5</sup> RCC § 22E-2503. *See, e.g.,* John Sullivan, Derek Hawkins, Pietro Lombardi, *Probable cause: Pursuing drugs and guns on scant evidence, D.C. police sometimes raid wrong homes — terrifying the innocent*, WASHINGTON POST (March 5, 2016).

Knowing” is defined in RCC § 22E-701 and applied here means the person that they are one of the specified types of government actors.

Paragraph (a)(3) requires state action, specifying that the person must be acting under color or pretense of official right. The phrase “under color or pretense of official right” has the same meaning as “under color of law” in 42 U.S.C. § 1983, 18 U.S.C. § 242, and elsewhere in the United States Code.<sup>6</sup> Misuse of power, possessed by virtue of state law and made possible only because wrongdoer is clothed with authority of state law, is action taken under color or pretense of official right.<sup>7</sup> It includes not only acts done within an official’s lawful authority, but also acts done beyond the bounds of lawful authority while the official is purporting or pretending to act in the performance of their official duties.<sup>8</sup> For example, the enhancement may apply to a public official who violates their department’s policy<sup>9</sup> or who is off-duty at the time of the offense.<sup>10</sup> The government is not required to prove that the government entity itself was a moving force behind the conduct.<sup>11</sup>

Subsection (b) establishes that the effect of the penalty enhancement is an increase of one class to the predicate offense’s otherwise applicable penalty classification.

Subsection (c) cross references definitions elsewhere in the revised criminal code.

***Relation to Current District Law.*** *Abuse of government power is a new general enhancement and, in that sense, all aspects of the revised statute are substantive changes to District law.*

Both current District law and the RCC authorize additional punishment where the victim of a crime is especially vulnerable. For example, the revised homicide,<sup>12</sup> robbery,<sup>13</sup> assault,<sup>14</sup> and menacing<sup>15</sup> statutes provide a penalty enhancement when a victim is targeted because they are a minor, elderly person, vulnerable adult, law enforcement officer, public safety employee, transportation worker, or District official.<sup>16</sup>

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<sup>6</sup> Unlike 42 U.S.C. § 1983 and 18 U.S.C. § 242, however, the enhancement does not apply to private persons acting under color of law, per paragraph (a)(2).

<sup>7</sup> See *United States v. Classic*, 313 U.S. 299, 326 (1941); *Williams v. United States*, 341 U.S. 97, 99 (1951).

<sup>8</sup> See *West v. Atkins*, 487 U.S. 42, 49–50 (1988) (“It is firmly established that a defendant...acts under color of state law when he abuses the position given to him by the State.”).

<sup>9</sup> For example, reportedly, Officer Brian Trainer was found to have violated department policy when he pursued motorcyclist Terrence Sterling before fatally shooting him in the neck and back. See Delia Goncalves, *Officer ‘broke policy’ in fatal shooting of Terrence Sterling*, WUSA 9 (December 5, 2017).

<sup>10</sup> For example, reportedly, Officer James Haskel was off duty and looking for his stolen minibike, when he fatally shot 14-year-old Deonte Rawlings, suspected of stealing the bike, in the back of the head. See *Timeline: The Deonte Rawlings Shooting*, WASHINGTON POST; see also *McDade v. West*, 223 F.3d 1135, 1139 (9th Cir. 2000) (holding a state employee who accesses confidential information through a government-owned computer acts under state law, even when the motives are entirely personal).

<sup>11</sup> See *Kentucky v. Graham*, 473 U.S. 159, 166 (1985) (explaining that to establish *personal* liability, it is enough to show that the official, acting under color of law, caused the deprivation of a right, but more is required in an official-capacity action).

<sup>12</sup> RCC §§ 22E-1101 and 22E-1102.

<sup>13</sup> RCC § 22E-1201.

<sup>14</sup> RCC § 22E-1202.

<sup>15</sup> RCC § 22E-1203.

<sup>16</sup> See definition of “protected person” in RCC § 22E-701.

The RCC also authorizes a hate crime penalty enhancement that punishes the targeting of a victim based on race, color, religion, national origin, sex, age, sexual orientation, gender identity or expression, homelessness, physical disability, or political affiliation.<sup>17</sup> As the D.C. Council recently recognized,<sup>18</sup> a person who is the victim of a crime committed by a law enforcement officer or other public official is in an especially an especially vulnerable position.<sup>19</sup> The revised statute punishes abuse of power more severely than civilian misconduct. This change eliminates a possible gap in liability and improves the proportionality of the revised statutes.

*Relation to National Legal Trends.* The RCC abuse of government power statute appears to be novel in its generality, based on preliminary research. However, at least one reform jurisdiction<sup>20</sup> applies a penalty enhancement where a law enforcement officer commits an assault.<sup>21</sup>

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<sup>17</sup> RCC § 22E-608.

<sup>18</sup> The D.C. Council recently acknowledged the seriousness of an abuse of power in the policing context, by unanimously approving a 10-year penalty for unlawful use of neck restraints by law enforcement officers, as compared to a 180-day penalty for a simple assault for civilians. Compare Bill 23-0775, the Comprehensive Policing and Justice Reform Amendment Temporary Act of 2020 with D.C. Code § 22-404.

<sup>19</sup> For example, on May 25, 2020, Minneapolis police officer Derek Chauvin knelt on the neck of George Floyd for eight minutes and 46 seconds, while he hopelessly pleaded for his life and died. Three armed police officers stood by watching the murder, rendering concerned onlookers unable to intervene and save him. See Brittany Shammass, Timothy Bella, Katie Mettler and Dalton Bennett, *Four Minneapolis officers are fired after video shows one kneeling on neck of black man who later died*, WASHINGTON POST (May 26, 2020).

<sup>20</sup> Twenty-nine states (“reform jurisdictions”) have comprehensively modernized their criminal laws based in part on the Model Penal Code. The 29 states are: Alabama; Alaska; Arizona; Arkansas; Colorado; Connecticut; Delaware; Hawaii; Illinois; Indiana; Kansas; Kentucky; Maine; Minnesota; Missouri; Montana; New Hampshire; New Jersey; New York; North Dakota; Ohio; Oregon; Pennsylvania; South Dakota; Tennessee; Texas; Utah; Washington; Wisconsin. See Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which—Florida, Georgia, Iowa, Nebraska, New Mexico, and Wyoming—do not have general parts analogous to the Model Penal Code General Part).

<sup>21</sup> See Tex. Penal Code Ann. § 22.02.