



First Draft of Report #40 - Self-Defense Sprays

SUBMITTED FOR ADVISORY GROUP REVIEW
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DISTRICT OF COLUMBIA CRIMINAL CODE REFORM COMMISSION
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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.

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 #40 – Self-Defense Sprays is Monday, September 30, 2019. 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.

The Commission recommends the repeal of D.C. Code §§ 7-2502.12 (Definition of self-defense sprays) and 7-2502.13 (Possession of self-defense sprays), which criminalize the possession of certain lacrimators.

COMMENTARY

Explanatory Note and Relation to Current District Law. Current D.C. Code § 7-2502.12 provides:

For the purposes of §§ 7-2502.12 through 7-2502.14, the term:

“Self-defense spray” means a mixture of a lacrimator including chloroacetophenone, alpha-chloroacetophenone, phenylchloromethylketone, ortho-chlorobenzaldehyde or oleoresin capsicum.

Current D.C. Code § 7-2502.13 provides:

- (a) Notwithstanding the provisions of § 7-2501.01(7)(C), a person may possess and use a self-defense spray in the exercise of reasonable force in defense of the person or the person’s property only if it is propelled from an aerosol container, labeled with or accompanied by clearly written instructions as to its use, and dated to indicate its anticipated useful life.
- (b) No person shall possess a self-defense spray which is of a type other than that specified in §§ 7-2502.12 to 7-2502.14.

D.C. Code § 7-2502.14 has already been repealed.

The meaning and scope of a “self-defense spray” is unclear. Specifically, it is unclear from whether § 7-2502.12 defines the permissible “self-defense spray” to include any mixture containing a lacrimator of any kind and non-lacrimators, any mixture consisting solely of lacrimators that are one of the five listed substances, or any mixture consisting solely of lacrimators of any kind.

The proportionality of criminal penalties for possession of a self-defense spray is also questionable. The District of Columbia Court of Appeals (“DCCA”) has held that lacrimators are unlikely to cause great bodily injury.¹ However, simple possession of a self-defense spray is currently punishable by up to one year in jail,² the same maximum penalty currently available for possession of a fully automatic machine gun.³

Under the revised code, harmful uses of a self-defense spray would remain criminal even without a separate offense penalizing possession of such a spray. Any object, including a self-defense spray of any kind, is treated as a dangerous weapon if the manner of its actual, attempted, or threatened use is likely to cause death or serious bodily injury.⁴ Furthermore, if an

¹ See *Jones v. United States*, 67 A.3d 547 (D.C. 2013).

² D.C. Code § 7-2507.06.

³ D.C. Code §§ 22-4514(a) and 22-4515; see also D.C. Code § 7-2501.01(10) (defining “machine gun”).

⁴ RCC § 22E-701 (defining “dangerous weapon”). Consider, for example, an actor who uses self-defense spray against a person who is operating a motor vehicle.

actor uses a self-defense spray to assault another person, the potential punishment is determined by the degree of the injury suffered. For example, if the spray causes an injury that requires immediate medical treatment beyond what a layperson can personally administer,⁵ the assault may be punished as a third or fourth degree assault, instead of as a sixth degree, simple assault.⁶ Other offenses committed by use of a self-defense spray also are penalized more severely in the RCC, including robbery,⁷ menacing,⁸ sexual assault,⁹ kidnapping,¹⁰ and criminal restraint.¹¹

However, the RCC differentiates self-defense sprays from firearms and other weapons. Weapons that are most likely to facilitate a mass casualty event, are prohibited and punished as contraband *per se*.¹² Weapons that are likely to cause a more serious bodily injury are punished if they are carried outside of the home,¹³ possessed with intent to commit a crime,¹⁴ or possessed during a crime.¹⁵

This change clarifies, logically reorganizes, and improves the consistency and proportionality of the revised offenses.

Relation to National Legal Trends.

Repealing D.C. Code §§ 7-2502.12 and 7-2502.13 has strong support in other states' statutes. Of the twenty-nine states that have comprehensively reformed their criminal codes influenced by the Model Penal Code (MPC) and have a general part,¹⁶ only three have statutes that clearly criminalize possession of self-defense spray¹⁷ and only two criminalize carrying spray with an unlawful intent.¹⁸ Four states separately criminalize assaulting a person with spray.¹⁹

⁵ See RCC § 22E-701 (defining "significant bodily injury").

⁶ RCC § 22E-1202.

⁷ RCC § 22E-1201.

⁸ RCC § 22E-1203.

⁹ RCC § 22E-1301.

¹⁰ RCC § 22E-1401.

¹¹ RCC § 22E-1402.

¹² RCC § 22E-4101.

¹³ RCC § 22E-4102.

¹⁴ RCC § 22E-4103.

¹⁵ RCC § 22E-4104.

¹⁶ 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). In addition, Tennessee reformed its criminal code after the publication of this article.

¹⁷ Tex. Penal Code Ann. § 46.05 (a)(4); see also Wash. Rev. Code Ann. § 9.91.160 (prohibiting possession by children); Wis. Stat. Ann. § 941.26.

¹⁸ Arkansas criminalizes carrying spray, unless it is carried for self-defense (Ark. Code Ann. § 5-73-124); Delaware criminalizes carrying spray, unless it is carried for a lawful purpose without intent to injure or threaten (Del. Code Ann. tit. 11, § 1443).

¹⁹ Alabama separately criminalizes using spray to assault a person (Ala. Code § 13A-6-27); Oregon separately criminalizes using spray to assault a police officer (Or. Rev. Stat. Ann. §§ 163.211-13); Maine separately criminalizes using spray to assault a person (Me. Rev. Stat. tit. 17-A, § 1002); Pennsylvania separately criminalizes using spray to assault a person in a labor dispute (18 Pa. Stat. and Cons. Stat. Ann. § 2708).