



D.C. Criminal Code Reform Commission

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MINUTES OF PUBLIC MEETING

WEDNESDAY, NOVEMBER 7, 2018 at 10:00 AM

**CITYWIDE CONFERENCE CENTER, 11th FLOOR OF 441 4th STREET NW
WASHINGTON, D.C. 20001**

On Wednesday, November 7, 2018, at 10:00 am, the D.C. Criminal Code Reform Commission (CCRC) held a meeting of its Criminal Code Reform Advisory Group (Advisory Group). The meeting was held in Room 1112 at 441 Fourth St., N.W., Washington, D.C. The meeting minutes are below. For further information, contact Richard Schmechel, Executive Director, at (202) 442-8715 or richard.schmechel@dc.gov.

Commission Staff in Attendance:

Richard Schmechel (Executive Director)

Rachel Redfern (Chief Counsel for
Management & Legislation)

Michael Serota (Chief Counsel for Policy
& Planning)

Jinwoo Park (Attorney Advisor)

Patrice Sulton (Attorney Advisor)

Advisory Group Members and Guests in Attendance:

Laura Hankins (Designee of the Director of
the Public Defender Service for the
District of Columbia)

Katarina Semyonova (Visiting Attendee of
the Public Defender Service for the
District of Columbia)

Kevin Whitfield (Representative of the D.C.
Council Committee on the Judiciary and
from Public Safety)

Dave Rosenthal (Designee of the Attorney
General for the District of Columbia) (absent
10:55am to 11:45am)

Renata Kendrick Cooper (Designee of the
United States Attorney for the District of
Columbia)

Professor Paul Butler (Council appointee)
(by phone until 11:47 am)

Welcome and Announcements

- a. The Executive Director noted that Advisory Group written comments on first drafts of reports # 26-30, which were distributed on September 26, 2018, will be due December 21, 2018.
- b. The Executive Director explained the sequence of the Commission's upcoming work. In late December or early January, there will be a small package of offense recommendations circulated for review. In late January or February, the Commission will circulate for review a comprehensive update to the materials that have already been discussed by the Advisory Group. Thereafter in FY 19, the Commission will circulate recommendations for drug offenses, weapons offenses, and penalties for offenses to-date. For FY 20 and beyond, the remaining offenses include primarily: several Title 23 offenses such as failure to appear; various Title 50 offenses; possession of an open container; prostitution; obstruction of justice, bribery, and related offenses; and the multitude of uncharged regulatory crimes.
- c. The Executive Director noted that in the comprehensive update coming in January or February the prefix to the revised offenses will be retitled from "22A" to "22E," to reflect that the recommended statutory language is for an enacted version of Title 22. The Executive Director clarified that, within 22E, any offenses that the CCRC does not review will be carried over verbatim, with an explicit provision in each that the revised general provisions do not apply to such offenses. The designee of the Attorney General for the District of Columbia (OAG) noted a preference for the Council to follow the approach envisioned earlier of first enacting the new code and then adding and deleting any remaining offenses as opposed to merging the old and new codes in one step.
- d. The Advisory Group discussed rescheduling the meeting in January 2019 from January 2, 2019, to January 9, 2019. Present members were available at the new time. The Executive Director will follow up by email with all members to confirm the date change.

I. The Advisory Group did not have any additional comments concerning the First Draft of Report No. 24: Failure to Disperse and Rioting.

II. The Advisory Group discussed the First Draft of Report No. 26: Sexual Assault and Related Provisions.

- a. OAG asked if the Commission considered including a threat of "embarrassment" in the definition of "coercion" in RCC § 22A-1301(3).
 - i. The Executive Director first explained that the revised definition of "coercion" maps onto current second degree and fourth degree sexual abuse, which broadly prohibit threats other than threats of "death, bodily injury, or kidnapping." Current first degree and third degree sexual abuse prohibit threats of "death, bodily injury, or kidnapping." However, the current definition of "force," which applies to first degree and third degree sexual abuse, also includes "a threat of harm sufficient to coerce or compel submission by the victim." This provision in the definition of "force" appears to render moot the delineation in types of threats of first degree through fourth degree sexual abuse. The revised sexual assault statute removes this overlap by limiting first degree and third degree to specified threats and including "coercion" in second and fourth degree sexual assault.

- ii. The Executive Director also noted that RCC § 22A-1301(3)(A) includes conduct constituting any offense against persons, some of which may include embarrassment.
 - iii. PDS noted that RCC § 22E-1301(3)(C) covers an assertion of a fact about another person that would “tend to subject that person to hatred, contempt, or ridicule, or to impair that person’s credit or repute.”
 - iv. The Council representative noted that the use of the word “embarrassment” may be preferable to “ridicule” because it is based on the perceived harm from the perspective of the victim and not the hatred or animus of the third party who ridicules them.
- b. Professor Butler raised a concern that including threats of embarrassment or ridicule may unduly expand sex offense liability. He offered a hypothetical in which a person threatens, “If you don’t have sex with me again, I will tell your family that you are gay,” and objected to including threats of non-physical harm in the definition of coercion in the sexual assault statutes, although such conduct may amount to blackmail.
 - i. Staff noted that even if the RCC’s “hatred, contempt, or ridicule” does not apply in a given fact pattern, any threat, including a threat of embarrassment, that successfully causes a person to submit to a sexual act constitutes “coercion” under the revised definition. Staff would review whether “embarrass” would further clarify or confuse the current drafting.
 - ii. OAG asked for clarification as to whether the word “harm” in the revised definition of “coercion” included reputational harm.
 - 1. The Executive Director responded that the word harm was not intended to be limited to bodily injury and that staff would review the commentary to see if that was stated.
 - iii. The Executive Director noted that the “knowingly” culpable mental state in the revised second degree sexual assault statute requires that the actor not only knowingly engage in a sexual act, but also that the actor knew that the complainant submitted to the sexual act because of the coercion. “Coercion” includes explicit and implicit threats.
 - iv. Professor Butler explained that threats of embarrassment and ridicule reach a broad range of behavior. He amended the earlier hypothetical to one in which a person threatens, “If you don’t have sex with me again, I will tell everyone that you had sex with me on the first date.”
 - 1. Staff responded that under this hypothetical, it is unclear whether the person committed sexual assault. The coercion definition includes threatening to assert a fact about a person that would tend to subject that person to ridicule. Staff noted however that this is not intended to include assertions of any facts that would subject a person to ridicule of any degree. This version of coercion is adapted from blackmail, and requires threats to assert facts of a particularly sensitive nature. In addition, the catch-all provision of the coercion definition requires that the harm be sufficiently serious to compel a reasonable person to comply. It is unclear whether this hypothetical threat is sufficiently harmful to compel a reasonable person to comply per the catch-all

provision. Moreover, whether or not the hypothetical threat meets the definition of “coercion,” to be convicted, the factfinder would have to find that the threat did *cause* the other person to engage in or submit to the sexual conduct.

2. Staff further explained that sexual assault by coercion as drafted in the RCC and as exists in current District law reflects a national trend towards defining sexual assault as an intrusion on sexual autonomy, as opposed to only a sexual act committed by force or violence.
 3. Professor Butler responded that this approach is not supported by a majority of states or by the American Law Institute (“ALI”), which recently rejected a proposal to require affirmative consent and instead speaks about overcoming the will of a person of ordinary resolution. He noted that there are growing concerns about over-criminalization and unequal enforcement against poor people and people of color.
 4. The Executive Director explained to Advisory Group members that, in recent years, the ALI has endeavored to revise the sex offenses in the Model Penal Code (“MPC”). The ALI is currently considering a controversial proposal to include a sexual assault by extortion offense, which is similar in scope to sexual assault by coercion in the RCC, and current District law.
 5. The Executive Director also noted that the policy concern debated here may be partially addressed by the gradation of the offenses. The RCC’s nonconsensual sexual conduct offense (RCC § 22E-1309) maps onto the District’s current misdemeanor sex abuse statute, and would provide liability for coercing sexual conduct where the actor has a lower culpable mental state of “recklessly” as opposed to “knowingly.”
 6. Professor Butler explained that the ALI’s longstanding language distinguishes between forcible compulsion and nonconsensual sex, grading forcible compulsion most severely. The RCC would include threats of non-physical harm as a type of force, bringing it into the most serious grades of sexual assault.
 7. Staff responded that, if grading is the main issue, an option would be removing coercion from the more serious offenses but leaving it in the nonconsensual sexual conduct offense.
- c. The Executive Director explained that, with respect to the collateral consequences of a sex offense conviction, current law includes both a firm and a flexible definition of which offenses qualify for mandatory sex offender registration.
 - d. The Council representative noted that, as in blackmail, the assertion of a fact in RCC § 22A-1301(3)(C), should also include the assertion of a falsehood. Staff replied that the text or commentary should reflect that intended meaning.
 - e. PDS raised a concern about the potential of subsection (F) in the revised definition of “coercion” to inadvertently criminalize consensual exchanges of sex for drugs as sexual assault.
 - i. Staff responded that the statute does not intend to criminalize a typical transaction of this type. However, a person who withholds drugs from a

complainant who, by virtue of drug addiction or confinement to a nursing home, has virtually no other option than to comply with a demand for sex has effectively coerced the person into submission.

- ii. PDS agreed that a person who is physically confined to a nursing home may be coerced when their caretaker withholds their prescription, but disagreed that an addict who could potentially shop around for another seller was being coerced.
- iii. The Advisory Group and staff discussed the how factors influence intuitions about whether a demand for sex in exchange for drugs amounts to a sex offense, including:
 - 1. The actual severity of the addiction;
 - A. Whether the buyer may suffer physical harm from withdrawal if the drug is not provided;
 - B. The voluntariness of the victim's submission to the transaction;
 - 2. The apparent severity of the addiction (from the perspective of the seller);
 - 3. The power dynamics between the parties to the transaction;
 - 4. The language used when the threat is made to withhold the drug;
 - 5. The reasonableness of the person submitting to the act, in light of the threatened non-physical harm;
 - 6. The lawfulness of the transaction;
 - 7. The legal duties of the person who is withholding the drug;
 - A. For example, where a nursing home employee withholds medication from a patient, PDS has no objection to including that conduct in the definition of coercion;
 - 8. The nature of the sex act (a single act versus forced prostitution with others).
- f. The Council representative suggested adding the reasonableness language in subsection (G) of the revised definition of "coercion" to subsections (A)-(F) of the revised definition to ensure that a relatively absurd threat, such as a threat of a \$1 economic injury, does not amount to coercion. Staff, however, clarified that, although such an absurd threat may meet the definition of "coercion," it would likely not satisfy the causation requirement in second degree and fourth degree sexual assault that the "coercion" caused the complainant to engage in or submit to the sexual conduct or the culpable mental state that the actor knew that the coercion caused the complainant to do so. Satisfying the definition of "coercion" alone is not sufficient for liability for second degree and fourth degree sexual assault.

III. Adjournment.

- a. The meeting was adjourned at 12:08pm.