



D.C. Criminal Code Reform Commission

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MINUTES OF PUBLIC MEETING

WEDNESDAY, APRIL 4, 2018 at 10:00 AM

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

On Wednesday, April 4, 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:

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

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

Katerina 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
Public Safety)

Don Braman (Council Appointee)

Dave Rosenthal (Designee of the Attorney
General for the District of Columbia)

I. Welcome

- a. The Executive Director introduced Patrice Sulton, a newly hired staff member, to the Advisory Group. Ms. Sulton briefly described her background.
- b. The Executive Director reminded the Advisory Group of the due date for comments on draft recommendations now in circulation and said staff are available, on request, to meet individually with members and discuss any questions or concerns they may have. He also noted that the next set of written materials will likely include reports pertaining to accomplice liability and kidnapping.

II. The Advisory Group discussed written comments to the Third Draft of Report #2: Basic Requirements of Offense Liability.

- a. The Executive Director noted that the Office of the Attorney General (OAG) comments suggested re-organizing the culpable mental state definitions to account for enhanced recklessness. OAG also recommended incorporating enhanced recklessness into the hierarchal rules applicable to culpable mental states. The Executive Director noted that this would not be a substantive change to the definition or the rules, and that staff would review drafting options for incorporating the term into the mental state hierarchy.

III. The Advisory Group discussed written comments to the First Draft of Report #13: Criminal Attempt Penalties.

- a. The Executive Director and staff noted that OAG's suggestions for clarifying language for attempt liability penalties were helpful, and would be incorporated.
- b. The Advisory Group discussed the Public Defender Service's (PDS) proposal for attempt penalties. Instead of a general rule that the maximum penalty for an attempt should be set at 50% of the maximum penalty for the completed offense, PDS recommended maintaining a 180 day maximum penalty for attempted property offenses and other non-violent offenses; a five year maximum for attempting to commit certain designated crimes of violence; and a 50% reduction for other more serious violent offenses.
 - i. The OAG representative noted that the CCRC proposal would preserve the distinctions in punishment for more and less severe grades of an offense, increasing penalty proportionality.
 - ii. The PDS representative noted that for many non-violent offenses, the CCRC proposal would significantly raise penalties for some offenses or gradations, and that the PDS proposal, by contrast, more closely accorded with current law for these offenses.
 - iii. The Executive Director asked the Advisory Group to assume that the CCRC proposal is in force for upcoming reform recommendations to specific offenses, but that the CCRC proposal and the PDS alternative scheme of penalties for attempts should be revisited when the Advisory Group considers penalties for completed offenses.

IV. The Advisory Group discussed written comments to the First Draft of Report #16: Robbery.

- a. The Advisory Group discussed comments from both OAG and the PDS that objected to drafting robbery with cross-references to criminal menacing. The Executive Director told the Advisory Group that staff would review alternate drafting options that would minimize this cross referencing.
- b. CCRC staff asked PDS to clarify its position as to eliminating the “facilitating flight” language from the RCC robbery offense. PDS clarified that it proposes limiting the scope of robbery to uses of force or threats that occur before the taking or attempted taking of property. Any force or threat of force that occurs after the taking, even immediately after the taking and to prevent the owner from re-obtaining the property, should not sustain a robbery conviction. Any force or threats that occur after the taking or attempted taking must be charged as an assault, criminal menace, or other offense.
- c. The Advisory Group also discussed OAG’s comments relating to the minimum degree of force required for robbery. The Executive Director noted that the revised robbery offense, which includes using “physical force that overpowers,” was intended to exclude pickpocketing and stealthy seizures where physical force is applied only to property, but to include taking property by means of shoves or bear hugs. However, neither the statute nor commentary more specifically defines what would constitute a use of physical force that overpowers a person. The Executive Director noted that this issue also implicates assault, which uses identical language concerning physical force that overpowers another person. The Executive Director suggested that perhaps any physical force on a property owner that overcomes resistance of that property owner may be a clearer demarcation as to what constitutes physical force that overpowers. The Executive Director noted that while other jurisdictions’ statutes generally do not clarify what type or degree of force is required for robbery, staff would do further case law research to look for any examples of statutory language that would more clearly demarcate the degree of force required for robbery.

V. The Advisory Group discussed Written Comments to First Draft of Report #15: Assault and Offensive Physical Contact Offenses.

- a. The Executive Director noted that the minimum degree of force required for “physical force that overpowers” also determines the bounds of the fifth degree assault offense. However, the Executive Director said that concerns about distinguishing liability for the use of low-level physical force in the assault or offensive physical context could be dealt with by other means. The Executive Director specifically noted that Judge Schwelb of the D.C. Court of Appeals once suggested in an opinion on a simple assault case that the D.C. Council adopt a general *de minimis* provision that would allow District courts to bar convictions when the conduct is too trivial to warrant criminal sanction.
- b. The Advisory Group discussed PDS’s comments relating to the definition of “bodily injury.” PDS suggested that “bodily injury” should require “moderate” physical pain, not any degree of physical pain.
 - i. CCRC staff noted that a few jurisdictions do define bodily injury as requiring moderate (or similar) physical pain.
 - ii. The OAG representative noted his opposition to this change on grounds that it was unclear and would reduce assault liability.

- c. The Advisory Group discussed whether the grading factors based on the victim's status as a protected person require that the victim actually be a protected person. Staff noted it was unaware of any case law deciding this issue, but that many of the current statutes authorizing sentencing enhancements based on the victim's status appear to require that the victim actually be a member of the protected group.
- d. The Advisory Group discussed whether instead of requiring recklessness as to the victim being a protected person, strict liability should apply when the victim is a protected person due to age. The Executive Director explained that requiring recklessness as to the protected characteristics was intended to clarify and standardize current District law, which often doesn't address culpable mental states in these penalty enhancements and, in the elderly and minor enhancements, have affirmative defenses to liability where the defendant reasonably believed the complainant was not 65 or older or a minor. In the RCC offenses, such affirmative defenses are eliminated, but the reckless culpable mental state similarly serves to limit liability.
- e. The Executive Director noted that staff will consider and review PDS's recommendations pertaining to merger of assault and robbery offenses as part of a more comprehensive review of merger once first drafts of offenses against persons are completed and comments received.
- f. The Advisory Group discussed PDS's suggestion that negligence should be required as to whether the object used in an assault was a dangerous weapon. PDS raised a hypothetical in which a defendant causes bodily injury by swinging a bag that contains a per se dangerous weapon, but without knowing that the weapon was inside the bag.
 - i. The Executive Director noted that these types of unusual cases could be resolved by clarifying via Commentary whether the bag itself, containing a hard object, is a dangerous weapon.
 - ii. The PDS representative said that such an alternative approach (as compared to a negligence culpable mental state) may be acceptable.

VI. Adjournment.

- a. The meeting was adjourned at 12:00 PM. Audio recording of the meeting will be made available online for the public.