



D.C. Criminal Code Reform Commission

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(202) 442-8715 www.ccrdc.dc.gov

MINUTES OF PUBLIC MEETING

WEDNESDAY, AUGUST 1, 2018 at 10:00 AM

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

On Wednesday, August 1, 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 1114 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)

Patrice Sulton (Attorney Advisor)

Rachel Redfern (Chief Counsel for
Management & Legislation)

Michael Serota (Chief Counsel for Policy &
Planning)

Advisory Group Members and Guests in Attendance:

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

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

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

Alicia Washington (Visiting Attendee of the
Attorney General for the District of
Columbia)

Renata Kendrick Cooper (Designee of the
United States Attorney for the District of
Columbia) *by phone* for Items IV and V

I. Welcome and Announcements

- a. The Executive Director recognized the service this summer of law students Solana Gillis and Monica Murphy and thanked Advisory Group members for their time speaking to the interns.
- b. The Executive Director noted that the next advisory group meeting will be Wednesday, September 5, 2018. Future meetings through September of 2019 will also be on the first Wednesday of each month.
- c. The Executive Director noted that comments are due on September 14, 2018, for Report #23, Disorderly Conduct and Public Nuisance; Report #24, Failure to Disperse and Rioting; and Report #25, Merger.

II. The Advisory Group discussed Advisory Group Written Comments on Report No. 22: Accomplice Liability and Related Provisions.

- a. The group discussed OAG’s comment concerning whether an actor can be convicted as an accomplice for purposely assisting or encouraging a person to commit an offense, where the principal attempts, but does not complete, that offense. Staff confirmed that RCC § 210(a) envisions attempt liability for the accomplice in this situation, and highlighted that footnote 2 in the Report (and accompanying text) expressly addresses this situation. OAG responded that the phrase “commission of an offense” in RCC § 210(a) is ambiguous on this point. Staff replied that it would take this into account in preparing the second draft.
- b. The group discussed OAG’s comment concerning the basis of accomplice liability in the situation of a person who encourages another person to facilitate an offense by omission. (See OAG’s written comments at Page 3, offering a hypothetical involving a corrupt officer, AA, who persuades another corrupt officer, A, to allow P’s robbery to happen). Staff explained that, analytically, the question isn’t whether AA purposely encouraged A to engage in specific conduct constituting an offense of omission, but rather, whether AA—*by encouraging A to engage in an omission*—purposely assisted P with the planning or commission of conduct constituting an offense. Staff offered to clarify this point through commentary to the extent it would be helpful.

III. The Advisory Group discussed Advisory Group Written Comments on Report No. 21: Kidnapping and Related Offenses.

- a. The Executive Director clarified the basic structure of the chapter and the relationship between the four offenses.
- b. The Executive Director addressed PDS’ concern about relatives’ liability for Criminal Restraint under (a)(2)(A), (B), and (C) (See PDS written comments). The Executive Director agreed that the statute should make clear that a child under age 16 does not have authority to differ with his or her parent about where they need to be.
- c. The Executive Director addressed PDS’ proposed alternative definition of “legal guardian” and agreed that the definition should be limited to persons with the legal authority to take physical custody of that person. A future draft will clarify this point.
- d. OAG pointed out a distinction between a relative who has rights and a relative whose rights have been restricted or removed and offered a hypothetical about a noncustodial parent or grandparent taking a child for a weekend. PDS objected to criminalizing a

relative moving a child temporarily without intent to harm the child and suggested that Civil Protection Order court is a better forum for intrafamilial custody disputes. The Executive Director clarified that the revised criminal restraint and kidnapping offenses do not revise the Parental Kidnapping offense in Title 16.

- e. The Executive Director clarified that if a parent intends to inflict bodily injury as an exercise of reasonable parental discipline, that would not amount to kidnapping under § 22A-1402(a)(3)(D). The Council representative suggested decoupling bodily injury and sexual offenses into separate subsections to make clear that a parental discipline defense is available with respect to bodily injury.
- f. PDS reemphasized its preference for a parent and guardian exception instead of a defense. Staff will conduct further research into whether there are additional benefits to drafting it as a defense, particularly in the context of guardians of adult wards.
- g. The Executive Director addressed PDS' proposal to add a Good Samaritan defense for strangers who pull a child from danger or escort them to emergency services (See PDS written comments at Page 5). Staff anticipates the Good Samaritan scenarios referenced here and in other offenses will be appropriately covered by a general "lesser evil" justification defense for good faith efforts to avoid a worse outcome, which is already recognized in District case law. In the event the code reform project concludes before reaching general defenses, a note could be added to the commentary to these offenses to make clear that is why such a defense was not explicitly included here. The Council representative noted that, here and elsewhere, it may be prudent to include cross-references to the general defenses, if there is a method of proof that is not obvious. He offered a hypothetical in which a relative is removing a child because there are drugs in the home.
- h. OAG raised a concern about the definition of bodily injury. The Executive Director clarified that the current definition includes pain, illness, or any impairment of physical condition. However, he also noted that PDS had recommended, in prior written comments, the definition be changed to refer to "significant pain."
- i. The Executive Director addressed OAG's concern about the term "harm" being left undefined (See OAG written comments at Pages 1 and 2). The Executive Director confirmed that "harm" is broader than "bodily injury" and includes any losses personal liberty that do not involve physical or mental harm. Future drafts will clarify this point in the commentary.
- j. The group discussed liability for kidnapping where the kidnapping was incidental to commission of another crime. The group agreed that the offense should not include where the victim was moved or detained for a brief distance or a brief period of time so that another crime can be committed, but OAG raised a concern about the boundary of this limitation based on temporal and physical proximity. The Council representative suggested that "incidental to the commission of another crime" may also refer to another kind of limiting principle that includes any restraint that significantly advances the "preparation, commission, or success" of another offense. Staff responded that this type of limiting principle is recognized in other jurisdictions.
- k. The group discussed the kidnapping by deception under § 22A-1402(a)(2)(C). PDS noted that the language should not capture conduct such as a surprise party, where a person is being deceived without intent to harm or inconvenience.

- l. The group discussed OAG's concern about the difficulty of proving that someone who successfully deceived a victim *would have* resorted to violence otherwise. Staff responded that, much like in attempt cases, the government may rely on evidence of intent such as possession of a weapon or handcuffs, statements, or modus operandi. The Council representative asked staff to consider an alternative model that eliminates kidnapping by deception and relies instead on a charge of attempted kidnapping. Staff will consider this issue before the next draft.
- m. The Executive Director responded to OAG's concern about child who has been persuaded to stay with kidnapper (See OAG written comments at Page 3). This conduct would nevertheless constitute a kidnapping because it prevented the child from "moving as he or she would have desired absent the defendant's intervention." Staff will consider clarifying this point in future drafts.
- n. The Executive Director agreed with OAG's written comment about replacing the term "pecuniary value" with "value" (See OAG written comments at Pages 3 and 4).

IV. The Advisory Group discussed the First Draft of Report No. 23: Disorderly Conduct and Public Nuisance.

- a. The Executive Director noted that the current disorderly conduct draft does not include a National Trends section because there is tremendous diversity in disorderly conduct statutes.
- b. Staff clarified that the revised disorderly conduct offense replaces the Affrays and subsection (a) of the current disorderly conduct statute. The revised public nuisance offense replaces subsections (b), (c), (c-1), (d), and (e) of the current disorderly conduct statute. Subsections (f) and (g) have not been addressed.
- c. OAG noted a concern about decriminalizing public urination without providing more effective enforcement of civil sanctions against drunken partygoers who urinate in front of people's homes.
- d. PDS raised a question about interruption of the orderly conduct of business in a public building, under § 22A-4002(a)(1)(B). Staff clarified that this provision is intended to prohibit purposeful (and not incidental) interruptions of Council hearings and similar proceedings, whether they occur in City Hall or at an offsite location. Staff also confirmed that this provision intends to avoid abrogation of First Amendment protections. Future drafts will aim to better define this type of interruption.

V. The Advisory Group discussed the First Draft of Report No. 24: Failure to Disperse and Rioting.

- a. PDS raised a question about failure to disperse liability for a person who does not know that a law enforcement officer has determined that her presence is substantially impairing the officer's ability to stop a course of disorderly conduct. Staff clarified that the person is strictly liable with respect to whether her presence is interfering, an objective fact, but must know that she is being ordered to disperse. Staff further noted that the person must be in the immediate vicinity of the course of disorderly conduct and that the officer's assessment about the need for the order must be objectively accurate.
- b. OAG raised a question about whether a person who fails to disperse must also be in a location that is public, noting that the current Failure to Obey regulation is limited to

motorists and pedestrians on the street. Staff confirmed that the definition of public is broader than pedestrians on a street. Staff will give more thought to fact patterns in which the person is in a non-public location but nevertheless in the immediate vicinity of a public riot.

- c. PDS raised a question about the use of four persons in the failure to disperse offense and the use of five persons in the rioting offense. Staff explained that both offenses concern a course of disorderly conduct by five or more persons (“a riot”), but a person must be a participant in the group of five for rioting and only in the vicinity of the group of five for failure to disperse.

VI. The Advisory Group did not reach the First Draft of Report No. 23: Merger.

VII. Adjournment.

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