D.C. Criminal Code Reform Commission
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Advisory Group Memorandum No. 4

To: Code Revision Advisory Group
From: Criminal Code Reform Commission (CCRC)
Date: January 25, 2017
Re: Changes for Second Draft of Report #1 (Recommendations for Enactment of D.C. Code Title 22 and Other Changes to Criminal Statutes).

This memorandum summarizes the changes the Criminal Code Reform Commission (CCRC) made in response to timely received written comments from the Code Revision Advisory Group (CRAG) on "First Draft of Report #1: Recommendations for Enactment of D.C. Code Title 22 and Other Changes to Criminal Statutes," and the accompanying appendices.[1] The changes summarized in this memorandum[2] are reflected in the "Second Draft of Report #1: Recommendations for Enactment of D.C. Code Title 22 and Other Changes to Criminal Statutes" and the accompanying appendices, which have been distributed with this memorandum.

The CCRC timely received written comments from the Office of the Attorney General for the District of Columbia (OAG), the U.S. Attorney's Office for the District of Columbia (USAO), and the Public Defender Service for the District of Columbia. Copies of the written comments received are in Appendix VIII of the Second Draft of Report #1.

While all comments and changes warrant review by the Advisory Group, the CCRC would particularly appreciate Advisory Group feedback on a comment by OAG (#10 below). Per OAG comment #10, a new statutory section would be codified at the beginning of enacted Title 22A explaining that enactment is not intended to make substantive changes in law except as described in the legislative history and is not intended to approve or disapprove any court interpretations of Title 22. In the First Draft of Report #1 this point about the limited effect of enactment was made, but it was made in the Report and prefatory section of the bill rather than in enacted text of Title 22. OAG's comment appears to be concerned that specifying these points in legislative history may not prevent contrary interpretations by courts, and codification of relevant language is preferable. The Second Draft of Report #1 does not take action on this OAG comment. Instead, this Memorandum provides some discussion and alternative drafting options for the Advisory Group's consideration.

[1] The first drafts were discussed at the November 10, 2016, Code Revision Advisory Group meeting. The deadline for written comments on the first drafts was January 13, 2017.
[2] Due to difficulties with Redline formatting, it was not possible to provide citations to page numbers in the Second Draft of the Report.

Office of the Attorney General for the District of Columbia (OAG)

1. **Member Comment:** On page 1 of its comments, OAG stated with respect to footnote 8 of the Report (formatted as footnote 9 in the Second Draft due to redline edits) that "we do not agree that just because an offense had not been charged in adult court in the past 7 years means that the offense is necessarily archaic or unused."
   CCRC Response: Footnote 8 of the Report (formatted as footnote 9 in the Second Draft due to redline edits) did not intend to suggest that an offense is necessarily archaic or unused if not charged in adult court in the past 7 years. The fact that an offense was not recently charged in adult court was a necessary, but not sufficient, condition for being deemed "unused." Hundreds of additional District offenses were not recently charged in adult court but were not deemed "archaic and unused" for purposes of this Report.
   CCRC Change(s) in Second Draft: For clarification, text was added in the body of the report highlighting that only adult data, not juvenile data, was examined. Previously this was only mentioned in footnote 8 of the Report (formatted as footnote 9 in the Second Draft due to redline edits).

2. **Member Comment:** On page 2 of its comments, OAG said that, with respect to footnote 13 of the Report (formatted as footnote 14 in the Second Draft due to redline edits), it "recommend[s] that the text of the bill be amended to explicitly state that conduct that had previously been prohibited by these provisions are covered by the remaining provision." Footnote 13 (formatted as footnote 14 in the Second Draft due to redline edits) explains that several archaic and unused property offenses recommended for repeal "appear[] to be criminalized by other District property offenses." OAG said that making this "observation in the legislative history may carry little weight."
   CCRC Response: The CCRC recommendation on this point in the First Draft of Report #1 followed the approach taken in the Sentencing Commission's recommendation to the Council and Mayor in September 2016. There was discussion at the Sentencing Commission by PDS and OAG on this matter and at that time it was decided that legislative history was the apt way to note that the conduct covered by the five repealed property offenses[3] "appears to be" also covered by property offenses remaining in effect.

   After receipt of OAG's comment on the First Draft of Report #1, the CCRC discussed this matter further with OAG, then with PDS, and concluded that there is likely disagreement on whether OAG's recommended change should be made part of this Report. However, there appeared to be no objection from either OAG or PDS to leaving repeal of the five relevant property offenses out of the current Report and considering how to reform these five archaic and unused statutes at a later date. The

[3] The five offenses recommended for repeal as archaic and unused are: (1) Destroying or defacing public records (D.C. Code § 22-3307); (2) Destroying boundary markers (D.C. Code § 22-3309); (3) Destroying or defacing building material for streets (D.C. Code § 22-3313); (4) Destroying cemetery railing or tomb (D.C. Code § 22-3314); and (5) Placing obstructions on or displacement of railway tracks (D.C. Code § 22-3319).

CCRC therefore withdraws its recommendation that these five offenses be repealed as part of Report #1.

CCRC Change(s) in Second Draft: The text of the Report, draft bill, and appendices has been altered to no longer recommend repeal of (1) Destroying or defacing public records (D.C. Code § 22-3307); (2) Destroying boundary markers (D.C. Code § 22-3309); (3) Destroying or defacing building material for streets (D.C. Code § 22-3313); (4) Destroying cemetery railing or tomb (D.C. Code § 22-3314); or (5) Placing obstructions on or displacement of railway tracks (D.C. Code § 22-3319).

3. **Member Comment:** On page 2 of its comments, OAG "objects to the mere striking of the phrase [Women's Bureau of the Police] and instead suggests that the phrase be replaced with a reference to the Metropolitan Police Department (MPD).

   CCRC Response: Staff agrees that the Women's Bureau of Police has been succeeded by MPD and substitution of MPD into the statute is appropriate.[4]

   CCRC Change(s) in Second Draft: The text of the Report, draft bill, and appendices has been altered to replace "Women's Bureau of Police" with "Metropolitan Police Department" in D.C. Official Code § 22-2703.

4. **Member Comment:** On page 3 of its comments, OAG asks, with respect to a technical amendment clarifying prosecutorial authority for the delinquency of a minor statute, "that the Commission remove this recommendation."

   CCRC Response: Staff was not previously aware that this was a contested matter and does not seek to clarify prosecutorial authority on a contested matter in this Report. The CCRC withdraws its recommendation to clarify prosecutorial authority for the delinquency of a minor statute.

   CCRC Change(s) in Second Draft: The text of the Report, draft bill, and appendices has been altered to retain existing subsection (e) of the delinquency of a minor statute, D.C. Official Code § 22-811, regarding prosecutorial authority.

5. **Member Comment:** On page 3 of its comments, OAG states with respect to the common law offense of disturbing public worship, that "the Report should note that D.C. Official Code § 22-1314 initially codified this offense, and upon its repeal, was replaced with D.C. Official Code § 22-1321(b)."

   CCRC Response: Staff has not been able to locate legislative history to cite to for OAG's analysis, to date. Without clear legislative history to the contrary, it is not clear that the disorderly conduct statute's current language regarding disturbance of people engaged in any religious service or in worship necessarily is the same as the common law offense of disturbing public worship.

   CCRC Change(s) in Second Draft: Footnote 36 of the Report (still footnote 36 in the Second Draft) on the common law offense of disturbing public worship was altered to clarify that D.C. Official Code § 22-1314, Disturbing Religious Congregation, was repealed and replaced with D.C. Official Code § 22-1321(b). The text of the Report was altered to include a statement that, "Amending the District's reception statute, as proposed in title 4 of the bill in Appendix IX, would not affect

[4] https://mpdc.dc.gov/page/brief-history-mpdc.

the validity of the District's codified criminal statutes, including D.C. Official Code § 22-1321."

6. **Member Comment:** On page 3 of its comments, OAG said, with respect to relocation of D.C. Official Code § 22-4331 which penalizes fish and game violations, that "we also believe that D.C. Official Code § 22-4329 [refusing to permit an inspection] also should not be removed" and a conforming amendment should be made to the statute.
   CCRC Response Staff agrees that this additional technical amendment should be made; it was omitted in error.
   CCRC Change(s) in Second Draft: The text of the Report, draft bill, and appendices has been altered to retain D.C. Official Code § 22-4329 in Title 22 and reflect that a conforming amendment is necessary. However, the materials leave the wording of the conforming amendment to the discretion of the Council's General Counsel.

7. **Member Comment:** On page 4 of its comments, OAG said, with respect to a reference to whether the Council has authority to enact titles of the D.C. Official Code, that "it may be beneficial to accompany that statutory and case cite with a brief citation to the Council's legislative power."
   CCRC Response: Multiple titles of the D.C. Official Code have been enacted into law in recent decades, and the District's power in this respect is uncontested.
   CCRC Change(s) in Second Draft: The Report includes a citation to the Council's general legislative authority under D.C. Official Code § 1-203.02. There is no specific citation for the authority to enact titles of the D.C. Code.

8. **Member Comment:** On page 4 of its comments, OAG said that Page 18 of the Report, quotes section 102 of the draft bill as saying, "Title 22 of the District of Columbia Official Code is enacted into law to read as follows, *with no substantive change to law intended except as otherwise noted in the "Statement of Legislative Intent for Enactment of Title 22" included in this bill,*" but that the draft bill does not actually contain the italicized language.
   CCRC Response: Staff does not recommend that Section 102 of the draft bill provide a statement of legislative intent about the effect of enactment. The passage in the First Draft referring to a statement of legislative intent to accompany the "enacted into law" language of Section 102 was in error. As discussed in the CCRC Response to OAG Comment #10, below, the current prefatory Statement of Legislative Intent for the Enactment of Title 22 adequately describes the legislative intent about the effect of enactment for purposes of legislative history.
   CCRC Change(s) in Second Draft: Section 102 of the bill has not been changed; the Report's reference to a statement of legislative intent in Section 102 has been deleted.

9. **Member Comment:** On page 4 of its comments, OAG said that Page 18 of the Report incorrectly states that the bill's provisions would "'explicitly reject any argument that prior court rulings construing the language of unenacted Title 22 statutes are being given tacit or explicit legislative approval through enactment."

CCRC Response: Staff did not intend to suggest that enactment would somehow strip controlling judicial interpretations of a provision. The CCRC's intent is to clarify in legislative history and, as appropriate, in the bill itself, that no legislative approval or disapproval of past court interpretations of the unenacted statutes that comprised Title 22 are intended. Staff believes this comment may be best addressed in conjunction with the bill's statement that no substantive change is intended by enactment except as noted in the Statement of Legislative Intent. (See OAG comment #8, immediately above and USAO comment #2, below.)

CCRC Change(s) in Second Draft: A sentence was added to the first paragraph of the Statement of Legislative Intent at the beginning of the bill to state:

> The Council of the District of Columbia finds it necessary to enact Title 22. The Council does not intend enactment of Title 22 to substantively change the laws therein, except for the specific changes noted in this Statement of Legislative Intent. *Nor does the Council intend enactment of Title 22 to indicate legislative approval or disapproval of any court decisions construing the laws therein.*

10. Member Comment: On page 4 of its comments, OAG said that, in order to be part of the bill's legislative history, the Statement of Legislative Intent "should be given a section number, formatted according to the 'Council of the District of Columbia Legislative Drafting Manual', and placed after the "Be It Enacted" portion.

CCRC Response: After receipt of this comment, the CCRC discussed this matter further with OAG. If understood correctly, OAG recommends that a short statement of legislative intent (not the current long statement on pages 2-5 of the bill) be codified as a new statutory section in enacted Title 22 (not merely as part of the bill or legislative history). The new statutory section would go after the "be it enacted" language in Section 102 of the bill and after the codified Table of Contents of Title 22, but before codified substantive offenses.

The CCRC agrees that, at a minimum, a statement of legislative intent describing substantive changes that are intended by the bill should be part of the legislative history. The CCRC believes the current prefatory Statement of Legislative Intent at the beginning of the bill would be part of the legislative history (as would references to the Statement of Legislative Intent in the Report and other Appendices) and reflects the content desired by OAG Comments #8 and #9 above (regarding the extent of substantive change and the approval or disapproval of prior judicial rulings). However, the current Statement of Legislative Intent precedes the clause "enacted into law to read as follows" in Section 102 and would not be codified.

If the OAG's recommendation were followed, a statement such as the following would be inserted into the enacted text of Title 22, perhaps as Section 22-100[5]:

> "The enactment into law of Title 22 by the Enactment of Title 22 and Other Criminal Code Revisions Act of 2017 shall not constitute legislative approval or disapproval of past court

[5] D.C. Official Code § 22-101 is a repealed section concerning abortion. It follows the Table of Contents of Title 22 and is the first offense listed in Subtitle I. Criminal Offenses. To meet the OAG recommendation, it appears that either this repealed abortion statute would need to be replaced, or a new § 22-100 created prior to Subtitle I (though this numerical designation would be unique in the D.C. Code).

> interpretations of the unenacted statutes, and shall not effect substantive changes to law except as evident in that law's legislative history."

The current, longer Statement of Legislative Intent would remain in the prefatory part of the bill, providing detail on which substantive changes are intended by the bill.

The CCRC did not insert a new statutory section into the Second Draft of Report #1 as recommended by OAG, but instead requests Advisory Group comment on this matter. Staff notes that while codifying the legislative intent (as opposed to leaving it as a matter of legislative history) may help prevent litigation,[6] such codification would be highly unusual, may be questioned by the Council's Office of General Counsel that will be responsible for final preparation of the bill, and may be confusing to lay readers.

Staff could find no precedent of such a statement of legislative intent, findings, or purpose being codified during enactment of a Title in the D.C. Code. The "Council of the District of Columbia Legislative Drafting Manual" says that statements of "findings" and "purposes" are "strongly discouraged" because they may "create confusion or ambiguity in the law" (Rule 7.1.1., page 56) and are more appropriately placed in the Committee Report (Rule 7.1.2., page 56). While the CCRC believes the current prefatory Statement of Legislative Intent in the bill and a new statutory section as recommended by OAG would not conflict with the substantive law in Title 22, it would nonetheless be confusing to any lay reader of Title 22.

The CCRC notes that resolution of this issue may not be possible or necessary prior to submission to the Council and Mayor and a full review of the bill and supporting materials by the Council's Office of General Council.

CCRC Change(s) in Second Draft: No changes were made, pending further discussion with the Advisory Group.

11. **Member Comment:** On page 4 of its comments, OAG said that, with respect to replacing references to "him" with references to "him or her" in D.C. Official Code § 50-1401, the phrase "such instructor shall display to him such certificate" in that section should also be amended to refer to "to him or her."

    CCRC Response: Staff agrees that this additional technical amendment should be made; it was omitted in error.

    CCRC Change(s) in Second Draft: The text of the Report, draft bill, and appendices has been altered to reflect this change.

12. **Member Comment:** On pages 4-5 of its comments, OAG said that, with respect to D.C. Official Code § 36-154, it "recommend[s] that the Title of this offense be

[6] The CCRC does not take a position on the effect of codification of a statement of legislative intent on enactment of a title of the D.C. Code (as opposed to inclusion of a statement of legislative intent in legislative history) at this time. Canons of statutory construction (see USAO Comment #1 below) often rely solely on a plain meaning analysis of statutory text to discern legislative intent, which would seem to favor codification as recommended by OAG. However, under current law there are several exceptions to reliance on plain meaning analysis that entail courts looking to legislative history to discern legislative intent, and enactment of a title is an extremely rare legislative event, unique in operation. There is no controlling precedent concerning the effect of enactment of a title on the interpretation of the laws contained therein. Consequently, it is unclear to the CCRC what canons of statutory construction District courts would use to discern the legislative intent of enacted Title 22 text.

shortened and renamed, 'Use or possession of vessel without purchase'" to reflect that the statute establishes an offense.

CCRC Response: Staff agrees that such a renaming is appropriate, however Title 36 is an unenacted title of the Code and the titles of sections are provided by the Council's General Counsel and are not matters for Council legislation.

CCRC Change(s) in Second Draft: Footnote 16 in the draft bill (formatted as footnote 17 in the Second Draft due to redline edits) and the Report now recommend that the Council's Office of the General Counsel amend the title of D.C. Official Code § 36-154 to "Use or possession of vessel without purchase".

U.S. Attorney's Office for the District of Columbia (USAO)

1. **Member Comment:** On page 1 of its comments, USAO commented that "[t]he current trend is to rely exclusively on the plain meaning of the text, if it is clear" and "[i]t is only if there is some resulting ambiguity or absurdity that the court looks to legislative history", regarding the case law on appellate canons of statutory construction discussed in the final paragraph on page 17 of the Report that began "[Enactment of Title 22] . . ." and in footnote 50 (formatted as footnote 53 in the Second Draft due to redline edits).

   CCRC Response: Staff agrees that several recent D.C. Court of Appeals panel rulings have relied heavily on the plain meaning analysis of statutory text, although the Court of Appeals ruling in *Peoples Drugs Stores, Inc. v. District of Columbia*, 470 A.2d 751, 753 (D.C. 1983) (en banc) remains good law and explicitly recognizes other exceptions to plain meaning analysis where legislative history is relevant besides ambiguity or absurdity.

   CCRC Change(s) in Second Draft: Text was added highlighting that in the older cases cited, the DCCA recognized that the text of a statute was the starting place for any statutory interpretation, but legislative history could be used in several situations, even if the meaning of the text appeared clear. Text was also added referencing the case USAO cited in its comments, *In re Smith*, 138 A.3d 1181 (D.C. 2016).

2. **Member Comment:** On pages 1-2 of its comments, USAO commented, regarding the final paragraph before Section VII of the Report and footnote 51 (formatted as footnote 54 in the Second Draft due to redline edits), that a "court still could construe reenactment as approval [of prior court rulings], by interpreting the 'intends no substantive change' language as meaning 'no substantive change' to the statute as it has been interpreted by the Court at the time of enactment."

   CCRC Response: Staff believes this comment may be best addressed through a clarification of the prefatory Statement of Legislative Intent for the Enactment of Title 22. See OAG comments #9, above.

   CCRC Change(s) in Second Draft: A sentence was added to the first paragraph of the Statement of Legislative Intent at the beginning of the bill to state (in italics):

   > The Council of the District of Columbia finds it necessary to enact Title 22. The Council does not intend enactment of Title 22 to substantively change the laws therein, except for the specific changes noted in this Statement of Legislative Intent for the Enactment of Title 22. *Nor does*

the Council intend enactment of Title 22 to indicate legislative approval or disapproval of any court decisions construing the laws therein.

Also, the last sentence in footnote 51 (formatted as footnote 54 in the Second Draft due to redline edits) was modified by adding "and that the legislature does not intended for enactment to indicate legislative approval or disapproval of court decisions" so that it is clear that there is no controlling District case law that involves an enactment bill that affirmatively states legislative approval or disapproval of court decisions.

3. **Member Comment:** On page 2 of its comments, USAO states, with respect to Appendix IV, that "[t]he Advisory Group should agree and recommend to the Commission that any such elementizing be based, as an initial matter, on the relevant jury instruction crafted by the 'Redbook Committee.'"
   CCRC Response: Staff welcomes all member recommendations on the revision of all specific offenses.
   CCRC Change(s) in Second Draft: No changes were made.

4. **Member Comment:** On page 2 of its comments, USAO states, with respect to Appendix V, that "the Commission should exercise great care when reorganizing evidentiary provisions (in particular) so as to avoid important provisions getting 'lost'" and that cross-references within Title 22 should be employed.
   CCRC Response: The CCRC agrees with these comments but notes that the Council's Office of General Counsel will be responsible for decisions about placement of relocated provisions.
   CCRC Change(s) in Second Draft: No changes were made.

Public Defender Service for the District of Columbia

1. **Member Comment:** On page 2 of it comments, PDS suggested, with respect to the first sentence of footnote 16 of the Report (formatted as footnote 17 in the Second Draft due to redline edits), that the Commission "insert a space between 'to' and the section symbol, '§" for statute 36-153.
   CCRC Response: Staff agrees that this edit should be made.
   CCRC Change(s) in Second Draft: This correction was made to the Report.

2. **Member Comment:** On page 2 of its comments, PDS suggested, with respect to the first paragraph of Part A., "Findings", of Section II of the Report, changing the word "discussed" to "stated" to clarify that the parameters are outlined but not discussed in the preceding paragraph.
   CCRC Response: Staff agrees that this edit should be made.
   CCRC Change(s) in Second Draft: This correction was made to the Report.

3. **Member Comment:** On page 2 of its comments, PDS suggested, with respect to Subpart 1, D.C. Code § 7-2506.01, stating what the additional element is for the amendment of the unconstitutional statute.
   CCRC Response: Staff agrees that this edit should be made.

CCRC Change(s) in Second Draft: Text was added to the Report to clarify what the added element is.

4. **Member Comment:** On page 2 of its comments, PDS suggested, with respect to the text of the sentence containing footnote 50 in the Report (formatted as Footnote 53 in the Second Draft due to redline edits), deleting the extra word "in" from the sentence.
   CCRC Response: Staff agrees that this edit should be made.
   CCRC Change(s) in Second Draft: This correction was made to the Report.