

MEMORANDUM

To: The Honorable Members of the Criminal Justice Improvement Committee

From: The Delaware Coalition Against Domestic Violence
The Delaware Developmental Disabilities Council
The Delaware Disabilities Law Program
The Sexual Assault Network of Delaware

Date: March 28, 2017

RE: Victim Advocacy Comments on Proposed Changes to Delaware's Criminal Code

Acting on the invitation of Chief Justice Strine to give feedback, a small group of victim advocates have met to review proposed changes to Delaware's criminal statutes since December 2016. Service agencies from across the state have been involved with an intention to include representatives from a variety of victim populations. However, the victim service community has not been able to fully review the drafted criminal code. It would be a difficult task to undertake in any circumstance but given limited time, resources, and an awareness that the General Assembly may wish to act upon the matter this session, we endeavored to examine specific sections of the draft code. Sections reviewed included stalking, assault, strangulation, sex crimes, and crimes against vulnerable populations

It is our understanding that the General Assembly wishes to examine ways to make Delaware's criminal justice system more efficient and fair without comprising public safety. But it was also expressed to our group that this improved code will be drafted in such a way that all Delawareans can understand it so that the criminal code is more accessible and fair. As victim advocates, we too desire a criminal code that is straightforward and can be understood by the average person as often misunderstanding creates confusion, anger, and mistrust in the justice system. To that end, our group has compiled our initial comments in the attached document. They were shared with Chief Justice Strine and his working group earlier this month.

We appreciate that this is just the beginning of efforts to reform the criminal justice system by the General Assembly's Criminal Justice Improvement Committee and that further considerations and discussions will occur with a broader group of stakeholders.

Attached: Compilation of Victim Advocacy Comments, March 2017

1 COMPILATION OF VICTIM ADVOCACY COMMENTS ON
2
3 THE PRELIMINARY REPORT TO THE DELAWARE GENERAL ASSEMBLY'S
4 CRIMINAL JUSTICE IMPROVEMENT COMMITTEE
5 MARCH 9, 2017
6

7 Section 1. General Comments on the Model Criminal Code for Delaware

8 As our group began to decipher the draft code volumes, we identified some general themes or
9 remarks. Although not complete, our group has these initial comments:

10 ➤ Breadth of Proposed Change:

- 11 ○ When members of the victim advocacy community were invited to provide
12 input into the drafting process, we were advised that the effort was not intended
13 to substantively change the overarching policies of Delaware's criminal code.
14 But in reviewing the limited sections, there seems to be a preference to adhere to
15 a stricter standard of liability which in some cases is a significant policy change.
16 In our review it appears that the age of consensual sex and defenses for sexual
17 assault have been changed. Additionally, the inclusion of Voluntary Intoxication
18 as a defense would allow juries to consider the persons intoxication to reduce
19 charges from intentional to recklessness which seems like a significant policy
20 change. These changes are presented and discussed in the comments but we
21 found that one really needs to read the entire document to fully understand the
22 significant impact that changes may make. However given our limited
23 resources we have been unable to provide comment on all of the potential areas
24 affected. After our time with the draft, we found the length and breadth of the
25 document to be overwhelming. We note that it will be extraordinarily time
26 consuming for legislators and the public to fully comprehend what has been
27 drafted and proposed.

- 28 ■ Recommendation: To ensure fuller discussion of policy issues, areas
29 that the drafters diverged from the current criminal code should be
30 specially highlighted in easy to review formats such as charts or tables.

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➤ Structure:

- There are ways that the draft improves one’s experience when reading a particular set of offense. For example, having a set of definitions within a subsection is helpful and can minimize confusion and mistakes. But we also found that there were general definitions in earlier sections of the draft. So one has to read many sections of definitions still in order to really understand the nature of an offense. We found that there weren’t always references to those earlier definitions which made tracking difficult.
 - Recommendation: When using defined terms, always reference the definition. Also, we felt that having the definitions at the end rather than up front an adjustment and recommend having the definitions in the front of any section which seems more consistent with our current code structure.
- There seems to be a preference to condense a broad spectrum of crimes into a general category of crime. Within the sections, you can see how the grading level then separates the crimes back into a range of offenses. But what we have found is that condensing is often accompanied with the removal of specific language that helped distinguish certain crimes. Stalking and Strangulation are examples of this. These crimes are relatively new and were developed because existing code didn’t adequately capture the nature of the crime.
 - Recommendation: When condensing crimes like Assault or Harassment, there needs to be recognition in the code that some offenses, especially newer crimes, may need a more nuanced approach. Therefore, we urge the drafters to use current code language rather than trying to simplify it.
 - Recommendation: Tracking all of the changes will be difficult for any reader. Therefore we suggest that the final code include references to the names of prior offenses so that users can have a better understanding of what they are reading. For example “Offensive Touching” was a standalone crime, under the draft code it is now the crime of Assault. We suggest amending 1202 (a) (2) to include a line such as:
“.....person, formerly Offensive Touching.”

- 63 ➤ Language:
- 64 ○ We find the language in general to be at a very high reading level and that the
- 65 structure of sentences to be quite complex at times. Current criminal code
- 66 seems to be written in a more straightforward manner. We worry that even
- 67 college educated individuals will not be able to understand what is written. An
- 68 example of this can be found when reviewing the language related to the new
- 69 Voluntary Intoxication defense. Often in our reading, we would need to read
- 70 and reread a sentence multiple times in order to understand it. But in the end we
- 71 were left wondering whether our interpretation was that of the drafters. This not
- 72 only impacts the accused, but jurors as well.
- 73 ▪ Recommendation: Consideration should be given to taking the step to
- 74 ensure that any legislation be written so that the criminal code is at a
- 75 common person reading level.
- 76 ○ We find that the draft uses arcane language. There are two examples that are of
- 77 note from our narrow review. 1) Throughout the code, references are made to “he
- 78 or she” is used. This infers a single gender identification. Delaware lawmakers have
- 79 been progressive as has the state with regard to the understanding the complex
- 80 nature of gender and find this language to be limiting and problematic.
- 81 ▪ Recommendation: Replace references to “he or she” with more gender
- 82 neutral terms like the person or they.
- 83 2) We find the use of the word evil to be odd given current culture. Again this
- 84 may be a term legal professionals understand but as a group we were not sure
- 85 how it is defined.
- 86 ➤ Post Implementation Questions:
- 87 ○ We thank the drafting working group for giving thought on how the change in
- 88 the code would be implemented. We agree that allowing time to address all of
- 89 the areas affected is important and appreciate the attention to things like
- 90 training, changes to bench books, computer systems, jury instructions, etc. Last
- 91 spring our community raised a concern about this enormous undertaking and
- 92 think that these recommendations are important. But some questions remain.
- 93 We are still unclear what the impact would have as it relates to case law and

94 whether decisions made under the old criminal code would apply to the new
95 criminal code. Questions remain as to the judicial handling of cases post-
96 conviction also. Can those convicted raise appeal issues on older cases arguing
97 that the new code, had it been in effect, could benefit them? We remain unclear
98 about the impact that having a criminal code that is different than any other
99 jurisdiction in the nation. Currently, DE code is similar to that of many states
100 and so practitioners can use case decisions from those states to assist in their
101 arguments. Would these drafted changes eliminate that benefit? For this last
102 point, we do not have a recommendation except to ask that this be explained so
103 that the public has a better understanding of how the new code will be
104 interpreted in the future.

1 **Section 2. Comments on the Proposed Changes to Harassment/ Stalking**

2 Comments on an earlier version of the draft stalking statute were shared with the Court in
3 December, 2016. The following revision was subsequently shared with our group and our
4 comments follow.

5 Section 4103. Stalking; Harassment (revised)

6 (a) *Harassment: Offense Defined.* A person commits an offense if he or she:

7 (1) with intent to harass, annoy, or alarm another:

8 (A) makes communications repeatedly, anonymously, or in offensively
9 coarse language; or

10 (B) engages in any other alarming or distressing conduct that:

11 (i) serves no legitimate purpose, and

12 (ii) is in a manner likely to provoke a violent or disorderly
13 response, or to cause a reasonable person to suffer fear, alarm, or
14 distress. or;

15 (2) knowingly and repeatedly follows, monitors, or interferes with the activities
16 or the property of another in a manner described in Subsection (b)(1)(A)(iii).

17 (3) *Picketing: DeJelle.* It is a defense to Harassment that the defendant was
18 engaged in lawful picketing.

19 (b) *Grading.*

20 (1) *Stalking.*

21 (A) If the defendant's conduct offense under Subsection (a):

22 (i) spans three or more separate incidents,

23 (ii) is directed at a specific person, and

24 (iii) would cause a reasonable person in the victim's
25 circumstances to:

26 (aa) fear physical injury to any person; or

27 (bb) suffer other substantial mental anguish or distress,
28 regardless of whether that suffering requires medical or other
29 professional treatment or counseling;

30 (B) then the offense is:

31 (i) a Class 7 felony if:
32 (aa) the defendant is 21 years of age or older, and the
33 victim is less than 14 years of age; or
34 (bb) the defendant's conduct violates a court order
35 prohibiting contact with the victim; or
36 (ii) a Class 8 felony in all other cases.
37 (2) *Harassment*. In all other cases, the offense under Subsection (a) is a Class A
38 misdemeanor.
39 (c) *Defined Term*. "Physical injury" has the meaning given in Section 1210(b).

40 This revision addresses a previously raised concern regarding the *mens rea* or intent required.
41 In the first draft, the statute required a showing of specific intent, that is, the offender intended
42 to annoy or harass. In this revised version, the specific intent requirement remains with
43 harassment, but with stalking then general intent applies. This is an improvement.

44 It is confusing that stalking is listed a grading of harassment rather than its own criminal
45 statute. In this respect, stalking appears to be eliminated from the Delaware code as a criminal
46 statute and only arises as a grading level within the crime of harassment. This effort at
47 efficiency only serves to confuse. Stalking should be its own criminal statute.

48 The current criminal stalking statute also provides for multiple situations in which the crime of
49 stalking would have an enhanced felony status, such as when the conduct includes threats of
50 death or serious physical injury, or the conduct causes serious injury or the offender possesses
51 deadly weapon during the act. These felony delineations have been deleted and we recommend
52 that they be added back in to the code.

53 The current criminal stalking statute also provides a definition of "course of conduct" which is
54 fairly comprehensive and includes language that accounts for the use of technology to stalk.
55 Most stalking cases involve technology, from phones, to computers, to GPS tracking devices.
56 Noting this in the code would be very important for law enforcement and victims to help in
57 recognizing the crime and the tactics used.

58

59 *The current stalking statute is as follows:*

60 **11 Del. C. § 1312. Stalking; class G felony, class F felony, class C felony. (2008)**

61 (a) A person is guilty of stalking when the person knowingly engages in a course of conduct
62 directed at a specific person and that conduct would cause a reasonable person to:

63 (1) Fear physical injury to himself or herself or that of another person; or

64 (2) Suffer other significant mental anguish or distress that may, but does not necessarily,
65 require medical or other professional treatment or counseling.

66 (b) A violation of subsection (a) of this section is a class G felony.

67 (c) Stalking is a class F felony if a person is guilty of stalking and 1 or more of the following
68 exists:

69 (1) The person is age 21 or older and the victim is under the age of 14; or

70 (2) The person violated any order prohibiting contact with the victim; or

71 (3) The victim is age 62 years of age or older; or

72 (4) The course of conduct includes a threat of death or threat of serious physical injury to the
73 victim, or to another person; or

74 (5) The person causes physical injury to the victim.

75 (d) Stalking is a class C felony if the person is guilty of stalking and 1 or more of the following
76 exists:

77 (1) The person possesses a deadly weapon during any act; or

78 (2) The person causes serious physical injury to the victim.

79 (e) *Definitions.* -- The following terms shall have the following meaning as used in this section:

80 (1) "Course of conduct" means 3 or more separate incidents, including, but not limited to, acts
81 in which the person directly, indirectly, or through third parties, by any action, method, device,

82 or means, follows, monitors, observes, surveys, threatens, or communicates to or about another,
83 or interferes with, jeopardizes, damages, or disrupts another's daily activities, property,
84 employment, business, career, education, or medical care. A conviction is not required for any
85 predicate act relied upon to establish a course of conduct. A conviction for any predicate act
86 relied upon to establish a course of conduct does not preclude prosecution under this section.
87 Prosecution under this section does not preclude prosecution under any other section of the
88 Code.

89 (2) "A reasonable person" means a reasonable person in the" victim's circumstances.

90 (f) Notwithstanding any contrary provision of § 4205 of this title, any person who commits the
91 crime of stalking by engaging in a course of conduct which includes any act or acts which have
92 previously been prohibited by a then-existing court order or sentence shall receive a minimum
93 sentence of 6 months incarceration at Level V. The first 6 months of said period of
94 incarceration shall not be subject to suspension.

95 (g) Notwithstanding any contrary provision of § 4205 of this title, any person who is convicted
96 of stalking within 5 years of a prior conviction of stalking shall receive a minimum sentence of
97 1 year incarceration at Level V. The first year of said period of incarceration shall not be
98 subject to suspension.

99 (h) In any prosecution under this law, it shall not be a defense that the perpetrator was not
100 given actual notice that the course of conduct was unwanted; or that the perpetrator did not
101 intend to cause the victim fear or other emotional distress.

102 (i) In any prosecution under this section, it is an affirmative defense that the person charged
103 was engaged in lawful picketing.

104 (j) This section shall not apply to conduct which occurs in furtherance of legitimate activities of
105 law-enforcement, private investigators, security officers or private detectives as those activities
106 are defined in Chapter 13 of Title 24.

1 **Section 3, Comments Regarding Proposed Changes to Rape & Sexual Assault Offenses**

2 The proposed changes to Delaware’s criminal code include significant alterations to the
3 definitions, “grading”/degree of offenses, and possible defenses for the Rape and Sexual
4 Assault statutes. While aspects of the proposal have merit, some of the proposed changes raise
5 a great deal of concern. There are a number of inconsistencies between what is proposed for the
6 code (in Volume One) and what is explained about the changes in the comments (in Volume
7 Two). These inconsistencies create confusion which will impact investigation and prosecution
8 of these crimes and add to public confusion regarding sexual assault.

9 **Positives:**

- 10 • Revision of “unlawful sexual contact” to be named “sexual assault” is a positive
11 change. The term “sexual assault” is more widely understood, and validates the
12 seriousness of these offenses.
- 13 • The revised and condensed definition with all of the elements that make an offense
14 sexual assault incorporated is clear, makes sense.
- 15 • Removal of the requirement of victim resistance that is currently included in the
16 definition of “without consent” is an excellent change. The comments indicate
17 resistance was removed “because it is inconsistent with the clause about a reasonable
18 person: if the offender’s act would cause a reasonable person to submit, the victim’s
19 reaction in the moment is immaterial”. Victim advocates agree completely. Advocates
20 have been troubled by the requirement that the victim resist, especially given the current
21 scientific zeitgeist regarding the neurobiology of trauma. Rape victims experience a
22 biologically hard-wired “freeze” response rather than “fight” or “flight”. Resistance
23 would be the “fight” response, but science indicates that rape victims are much more
24 likely to have a “freeze” response and be rendered biologically incapable of resistance.
25 “Freeze,” also known as “tonic immobility,” is characterized by a decrease in breathing
26 and heart rate, the inability to speak or scream, some victims cannot open their eyes,
27 most victims experiencing freeze cannot move. The person is immobilized, just as a
28 deer in the headlights or an opossum playing dead. (See research of Dr. Rebecca
29 Campbell, Michigan State University, which indicates that 12-50% of rape victims

30 experience freeze. This data is a few years old – she indicated more research is needed
31 and she expects the number is actually much higher than 50% of victims.)

- 32 • There is some elegance to having the definition of a vulnerable victim written in the
33 code (806) and to having violations against vulnerable victims be one grade higher
34 (804) automatically.

35 **Concerns Regarding Definitions and Grading:**

36 The structure of the rewrite and the corresponding comments section make it very difficult to
37 follow and create confusion. The text cross-references other sections within itself, and in
38 current code, so that at times it was a wild goose chase to find all relevant portions to be sure to
39 understand all relevant components being considered.

40 It is difficult to discuss issues with the proposed “grading” system (1301) without also
41 discussing issues with the revised definitions (1307), as they are at times intertwined. There
42 are inconsistencies in the proposed “grading” system which does away with the degrees of
43 offenses. The Comments section says: “This grading scheme is complex, but rational and
44 comprehensive: every aggravation is consistently applied, and the relative blameworthiness of
45 different sexual conduct is maintained in every case.” Yet, in reading the revisions, it is
46 unclear how these can/will be consistently applied, and how each of the sexual offenses will be
47 charged in practice.

48 The proposed rewrite for sexual assault has not achieved the intended goal of clarifying. The
49 definition of sexual intercourse (as revised) includes oral, anal & vaginal penetration. The
50 explanation in Vol 2 says: “The term itself has been altered to make it more descriptive, for the
51 purpose of avoiding confusion between the meaning of “penetration” and “intercourse.”

52 *Proposed: (b) “Oral or object penetration” means:*

- 53 *(1) placing any object, substance, or body part inside the anus or vagina of another person; or*
- 54 *(2) the defendant placing an object inside another person’s mouth, intending the act to be*
55 *sexual in nature.*

- 56 • The proposal to make oral & anal penetration “one grade lower” than intercourse causes
57 advocates serious concern & objection. All 3 types of penetration can be equally

58 devastating to victims. The proposed grading suggests that oral or anal rape are not as
59 serious a violation, and may even give the impression that the legislature and courts of
60 Delaware view rape of men as less violent & severe than rape of women.

61 • The comments explain that the term “sexual device” used in the definition in current
62 law, is substituted with “any object . . . intending the act to be sexual in nature” to
63 provide a functional standard with which to judge between “sexual devices” and other
64 objects.” Why is this distinction necessary? Use of any object for penetration is still a
65 violation and is still rape.

66 (e) “*Sexual Contact*” means:

67 (1) (A) any touching of any body part of another person, whether clothed or unclothed, by any
68 body part, body fluid, or object; or [used to be anus, breast, buttocks, genitalia] (B) any
69 undressing that reveals the breast, genitalia, or buttocks of another person; and

70 (2) the touching or undressing is intended to be sexual in nature.

71 • The proposal to make “sexual contact” be three grades lower than sexual assault raises
72 similar concerns. If “Sexual contact” happens without consent, then making it three
73 grades lower seems a significant step down. Sexual contact without consent is still
74 sexual assault. We agree with the statement in the comments section that “The
75 elements of the various forms of rape and sexual assault under current law are so many,
76 and so varied, that they produce inconsistent results based on the precise nature of the
77 sexual act performed and the relative ages of the victim and offender.” By the same
78 token, this proposal swings too far in the other direction. With the existing degree
79 system, there is at least some ability to charge each offense based on the specific
80 behaviors alleged in each unique case.

81 • Under this proposal, if a defendant performs forced oral on a victim that doesn’t involve
82 penetration (clitoral only), this would not be as serious a violation. Yet this act can be
83 just as degrading and traumatizing a violation as penetration. This is highly
84 problematic.

85 *1301 (3) (e) Grade Adjustment: Sexual Abuse of a Child by a Person in a Position of Trust. The*
86 *grade of an offense under this Section shall be increased by one grade if:*

87 (A) the person occupies a position of trust, authority, or supervision over the victim, and
88 (B) the victim is less than 16 years of age.

89 1307 (c) A person occupies a “position of trust, authority, or supervision” if:

90 (1) the person has regular direct contact with one or more children because of his or her
91 familial relationship, profession, employment, vocation, avocation, or volunteer service, and
92 (2) in the course thereof assumes responsibility, whether temporary or permanent, for the care
93 or supervision of one or more children.

94 • Because this language is broad, it calls into question who would be considered in a
95 “position of trust, authority, or supervision”. It seems school teachers, day care
96 providers, summer camp instructors, and anyone who volunteers as a faith-based youth
97 group leader, religious education teacher, Scout Troop leader, etc. would all fall into
98 this category. But the requirement of 1307 (c) (2) that the person must assume
99 responsibility for the care or supervision of the child leaves room that certain school
100 staff would not be considered in a position of trust or authority, such as custodians,
101 security guards, etc. We would argue that they are in a position of trust or authority.
102 Furthermore, without some specificity, there may be subjectivity and interpretation
103 regarding how this statute would be charged in practice. It would be prudent to both
104 specify certain roles as absolutes, and to keep some clarified, but broader language that
105 can be applied in each case.

106 Some of the changes reflected in this rewrite are inconsistent with the current, updated
107 language and definitions used in the FBI’s Uniform Crime Reporting (see: <https://ucr.fbi.gov/>).
108 It is important to retain consistency with FBI language in order to have legal reciprocity with
109 other states & with federal laws.

110 **Concerns Regarding Age of Consent:**

111 The information provided regarding age of consent is convoluted and contradictory. Shifting
112 strict liability from age 16 to age 14, as suggested in the provision of “No defense for Mistake
113 as to Age under 14,” is cause for concern. The comments section indicates that “As a practical
114 matter, strict liability is appropriate where the victim is under twelve because a mistake as to
115 such a young child’s age would amount to negligence per se. But, the same cannot be said for

116 all victims less than sixteen years of age. When the victim is older, the need to demonstrate an
117 offender’s culpability as to that victim’s age is more acute, as it is more likely the offender in
118 that situation could have made an honest mistake as to whether the victim was the age of
119 consent. Culpability is an essential element for criminal liability under Delaware law; strict
120 liability is rarely used, and usually only in minor regulatory offenses. Lowering the age where
121 strict liability attaches improves consistency with that practice in Delaware.”

122 In addition, footnote 10 at the bottom of pg. 108 in Vol. 1 says:

123 “Issue: Should Section 1301 impose strict liability as to a victim being less than 16
124 years of age (as does current law) rather than 14 years of age?”

125 Pro: Persons having sex with younger persons should bear the whole risk of their own
126 mistakes. Imposing strict liability makes unavailable the often-abused argument that the
127 defendant “did not know” or “reasonably believed” the victim was of an appropriate
128 age. Sixteen is the age of sexual consent in Delaware, and the age for strict liability
129 should be set to match that cut-off.

130 Con: Strict liability in this context is sensible where a defendant is unlikely to make a
131 reasonable mistake as to age. But, reasonable mistakes are much more likely to occur at
132 age 16 than 14. Many 16-year-olds look much older than they are, having reached
133 puberty some years earlier. Few states have explicit strict liability provisions like
134 Delaware’s; and among those that do, 14 is roughly the average age at which strict
135 liability is set. Note that proposed Section 1306(a) has been added to strike a balance
136 with this change from current law. Under Section 1306(a), the prosecution need only
137 prove that a defendant was negligent as to the victim being underage for any relevant
138 age above 14.”

139 While other states may have strict liability at age 14, their baseline age of consent also tends to
140 be age 14. In Delaware the baseline age of consent is 12. So Delaware’s statute has not been
141 set or changed in the past based on variations in statutes in other states. Advocates understand
142 and agree that some flexibility in the rules regarding 16 year olds may be appropriate because
143 they are more likely to be engaging in consensual sex. But it is also important to consider that
144 there can be significant variation in physical, cognitive, moral, psychosocial, and emotional

145 development during the adolescent years. While most people go through the same process, we
146 do not all do it the same way. There are genetically-determined variations in the timing (age of
147 onset of puberty), and in the pace at which each person completes each process. And each type
148 of development does not progress in an exactly parallel way. So a teenager's body may be
149 ready for sexual activity, but without a parallel cognitive or emotional readiness. The existing
150 statute protects those 16 year olds who have not yet reached that point of their development
151 where they have the cognitive, emotional, and psychosocial maturity to deal with sexual
152 situations and consent.

153 Finally, the age of consent rules, both in the existing code and in this rewrite, are irrelevant for
154 children and teenagers with disabilities. All minors with disabilities should be protected under
155 the law.

156 **Other Questions & Concerns:**

- 157 • It is unclear how the Defense Arguments provided in 207 & 208c will be utilized with
158 Rape and Sexual Assault, and this creates concern.
- 159 • Intoxication is now a defense for any crime, which is a concern regarding a number of
160 offenses but especially rape and sexual assault. (See additional document specifically
161 regarding intoxication.)
- 162 • While the addition of the definition of a vulnerable victim (806) is an improvement, this
163 definition should include children, just as it includes people age 62 & up.
- 164 • The definition of sexual orientation (806) is limited, which is not in keeping with
165 current language used within and outside of the LGBTQ community. This definition
166 could be expanded to include persons who are Asexual, and persons who consider
167 themselves to be elsewhere on a fluid continuum of orientation (ex: Pansexual).

1 **Section 4. Comments on proposed revision to Criminal Code/ Disabilities Law Program**

2 Our comments are limited to sections that might impact a person with a disability either as a
3 perpetrator or as a victim. The comments are not comprehensive, as it is a monumental task
4 to match up the proposed code with the current code, as well as read the comments from the
5 drafters explaining the rationale for the changes. Additionally, our focus is on civil law, and
6 I do not purport to be an expert in this area.

7 **I. Proposed Section 208. Consent (corresponding to 11 Del Code §453)**

- 8 a. In Section 208(c)(1), eliminates the language that consent is valid as to a
9 legally incompetent person if the defendant believes the victim is legally
10 competent. This deletion makes some sense, as it is consistent with the
11 principle that an incompetent person is legally incapable of consent,
12 regardless of the defendant’s perception of their competence.
- 13 b. Section 208(c)(2) again uses the problematic language of “mental
14 disease or defect.” We strongly suggest using mental or cognitive
15 disability, or mental illness or mental disorder” or “mental disability.”

16 **II. Section 305. Conduct of Persons with Special Responsibility for Care,
17 Discipline, etc (corresponds to 11 De. Code §468).**

- 18 a. Our main objection to this section is the removal of the standard that
19 force be “reasonable and moderate” and inserting the standard “necessary.”
20 We disagree that “necessary” would subsume the concepts of
21 reasonableness and moderation. Moreover, we disagree conceptually with
22 the idea of removing any benchmarks or types of conduct that can never be
23 considered for justification. There should be no room for any conclusion
24 that an act of violence, at least where children are concerned, can be the basis
25 for a justification defense.

26 **III. Section 403 . Mental Illness (as a defense) (corresponds to 11 Del Code §401).**

- 27 a. The only substantial change here is the addition of language that the Guilty but
28 Mentally Ill defense can only be presented to the jury when the defendant has
29 requested it (and not the prosecution). We support this change because it will

30 allow juries to hear legitimate insanity (NGR) defenses without being tempted to
31 fall back on the GBMI option, which may be easier or more comfortable for them,
32 when in fact the NGR) verdict is appropriate.

33 **IV. Section 804. General Adjustment to Offense Grade**

34 a. 804(b) makes it generally the rule that an offense against a “vulnerable victim”
35 which is defined as a “vulnerable person” shall be increased by one grade. The
36 concept of have an aggravation of the charge if the victim is a vulnerable person
37 is found throughout the code. It makes some sense that there should be a general
38 provision for all offenses in which the victim is a vulnerable person. It is unclear
39 how this section coordinates with the many other provisions in the draft code that
40 still impose an enhanced charge if the victim is a minor, for example. See
41 proposed Sections 1202 and 1203. Moreover, it serves to remove the emphasis
42 that the code currently has on protecting individuals living in licensed facilities.

43 **V. Section 806 Definitions**

44 a. 806(e) definition of “vulnerable person” is extremely crucial because it
45 determines whether there will be an aggravation of a charge. The existing code
46 defines “vulnerable adult” in 11 Del. Code §1105. While this definition is quite
47 similar, it extends the protections to all persons (including children) and it adds
48 the state of being 62 or up as one of the qualifying characteristics of a vulnerable
49 person. A vulnerable person is therefore anyone who is easily susceptible to
50 abuse, neglect mistreatment, manipulation.... by reason of isolation, sickness,
51 debilitation, mental illness, physical, mental or cognitive disability or being over
52 62. We again wonder how this plays out in other sections of the code where the
53 person’s status is an element of a crime.

54 b. Because current §1105 will be eliminated, there is no language regarding the
55 availability (or not) of the defense of lack of knowledge or reasonable belief that
56 the victim is a vulnerable person. It will be essential that it be made clear that the
57 defendant’s belief regarding the victim’s status as a vulnerable person should not
58 be a defense. The definition at 806(a)(4) includes individuals who have been
59 appointed a guardian, but also individuals who meet the definition of disability

60 under the guardianship rules (12 Del Code 3901(a)(2) without having a guardian
61 appointed ; We are wondering about the necessity of including this definition
62 given the general definition of vulnerable adult in subsection(1).

63 **VI. Section 1209. Reckless Infliction of Severe Emotional Harm.**

64 a. This section is intended to incorporate the criminal abuse provisions in Titles 16
65 and 31; however, this section is limited to severe mental and emotional abuse.
66 The notes make it clear that all crimes of a physical nature against individuals
67 living in facilities are to be subsumed by the general crime provisions in Chapters
68 1100-1300, with the application of general enhanced grade to offenses against
69 vulnerable persons in Section 804. In looking at the revised sections, I could
70 only find one crime, Prohibited Sexual Contact by Persons in a Position of Trust
71 (§1302(a)(c), where the victim's status as a resident of a facility was an element
72 of the crime. In all other cases, such as Assault, the only impact of the victim
73 being a resident of a facility would be a one grade increase in the level of offense.
74 I could not find any equivalent crime for neglect in the revised code, except
75 perhaps reckless endangerment. This is unacceptable.

76 Our view is that physical violence and neglect against individuals living in
77 facilities should warrant specific crimes, if for no other reason than to put
78 potential offenders on special notice that abuse of a resident of a facility is a crime
79 that has been designated specifically and will be punished more severely. The
80 fact is that these individuals are particularly vulnerable, and the perpetrators owe
81 them an enhanced duty of care, so any crimes in this context are particularly
82 heinous. These changes strip people with disabilities and the elderly who rely on
83 others for care in facilities from the protections currently in the code that highlight
84 and emphasize the very serious nature of these crimes.

1 **Section 5. Comments on proposed revision to Criminal Code/ Developmental Disabilities Council**

- 2 • Advocates for disabilities are concerned that , despite the goal of using “clear, accessible
3 language and organization,” the language in many places is less than clear, and could not be
4 easily understood by the general population.
- 5
- 6 • In many sections, ages are used to delineate a special victim. In these cases, it is typically a
7 child below the age of 6 or below the age of 12. An observation is that people with
8 intellectual/cognitive disabilities at any age should be included in these sections as their
9 vulnerability puts them at the same risk as minors in many cases.

1 **Section 6. Introduction of Voluntary Intoxication Defense as an Excuse Defense**

2 Current DE Code is fairly clear that the voluntary intoxication of a person is not a defense to a
3 crime. In the State of Mind definitions, § 231 mentions this in the definition of recklessness. 11
4 Del C § 231 (e) states:

5 “ "Recklessly". — A person acts recklessly with respect to an element of an offense when
6 the person is aware of and consciously disregards a substantial and unjustifiable risk that
7 the element exists or will result from the conduct. The risk must be of such a nature and
8 degree that disregard thereof constitutes a gross deviation from the standard of conduct
9 that a reasonable person would observe in the situation. A person who creates such a risk
10 but is unaware thereof solely by reason of voluntary intoxication also acts recklessly with
11 respect thereto.”

12 The current code does allow a defense of Involuntary Intoxication as a defense:

13 “§ 423 involuntary intoxication as a defense.

14 In any prosecution for an offense it is a defense that, as a result of intoxication which is
15 not voluntary, the actor at the time of the conduct lacked substantial capacity to
16 appreciate the wrongfulness of the conduct or to perform a material element of the
17 offense, or lacked sufficient willpower to choose whether the person would do the act or
18 refrain from doing it.”

19 The code further clarifies what is meant by “involuntary intoxication” and in which situations
20 this defense may apply (see highlight) in:

21 “§ 424 Definitions relating to intoxication.

22 As used in §§ 421-423 of this title:

23 (1) "Intoxication" means the inability, resulting from the introduction of substances into
24 the body, to exercise control over one's mental faculties.

25 (2) "Voluntary intoxication" means intoxication caused by substances which the actor
26 knowingly introduces into the actor's body, the tendency of which to cause intoxication

27 the actor knows or should know, unless the actor introduces them pursuant to medical
28 advice or under such duress as would afford a defense to a prosecution for a criminal
29 offense.”

30 The draft code seeks to change current DE law and reinstates a defense of voluntary intoxication.
31 This defense was eliminated initially in case law and then codified in the Rules back in 1976.
32 The Commentary explains though that this position creates unintended problems for the accused
33 because in some cases a defendant could be charged as having intentionally or knowingly acted
34 instead of the behavior being considered “reckless”. In order to follow however this line of logic
35 in the code, the reader will need to put together at least five separate sections of the criminal
36 code to understand the definitions and intent of this new defense. The first section where this
37 defense appears is in:

38 “Section 212. Voluntary Intoxication

39 (a) *Generally*. Except as provided in Section 404 [involuntary intoxication defense], a
40 person’s intoxication at the time of committing an offense is not a defense unless it
41 negates a required culpability element of the offense.

42 (b) *Imputation of Reckless Culpability*. When recklessness is a required element of the
43 offense, if the person, due to voluntary intoxication, is unaware of a risk of which he or
44 she would have been aware had the person had been sober, such unawareness is
45 immaterial.

46 (c) *Defined Terms*.

47 (1) “Intoxication” has the meaning given in Section 214(e).

48 (2) “Voluntary intoxication” has the meaning given in Section 214(1).”

49 Proposed Section 212 provides that voluntary intoxication is a defense, but only to the extent it
50 negates a culpability requirement greater than recklessness, as did the original § 421 enacted in
51 1973 and the Delaware case law before that enactment. *Wyant v. State*, 519 A.2d 649, 655 (Del.
52 1986).

53 To further understand Section 212, the reader will also need to look at three other areas of the
54 draft code:

55 “Section 404. Involuntary Intoxication

56 (a) *Excuse Defined.* A person is excused for his or her offense if, at the time of the
57 offense:

58 (1) the person is involuntarily intoxicated, and

59 (2) as a result, the person:

60 (A) does not perceive the physical nature or foresee the physical
61 consequences of his or her conduct; or

62 (B) lacks substantial capacity to appreciate the wrongfulness of the person’s
63 conduct; or

64 (C) lacks substantial capacity to choose whether to engage in or refrain from
65 the conduct constituting the offense.

66 (b) *Causing Excusing Conditions.* Nothing in this Section shall be deemed to preclude
67 liability under Section 401(b)(2).

68 (c) *Defined Term.* “Involuntary intoxication” has the meaning given in Section 410(b).”

69 and

70 “Section 214. Definitions

71 (e) “Intoxication” means a disturbance of mental or physical capacities resulting from the
72 introduction of substances into the body.” and

73 “(l) “Voluntary intoxication” means intoxication:

74 (A) caused by substances that the person knowingly introduces into his or her own
75 body,

76 (B) the tendency of which to cause intoxication the person knows or ought to
77 know;

78 (C) unless the person introduces them:

79 (i) under medical advice; or

80 (ii) under circumstances that would afford a defense to prosecution for an
81 offense.”

82 But to understand Section 404 the reader will also need to look at two other sections of the draft
83 code”

84 “Section 401. General Provisions Governing Excuse Defenses

85 (a) *Conduct for Which a Person is Excused is Not Necessarily Justified.*

86 (1) Except as otherwise provided by law, conduct for which a person is excused
87 is not justified, and may be resisted and interfered with as justified by law.

88 (2) A person who assists conduct for which another is excused, is not excused
89 for his or her assistance solely because the principal actor is excused.

90 (b) *Causing the Excusing Conditions Not Automatic Bar to Excuse Defense.*

91 (1) The fact that a person has caused the conditions giving rise to an excuse
92 defense under this Chapter shall not prevent the person from being excused for
93 his or her offense.

94 (2) *Liability for Culpably Causing Excusing Conditions.* Nevertheless, a person
95 commits an offense if, acting with the culpability required by the offense, he or
96 she causes the conditions that excuse the person or another person for engaging
97 in the offense. “

98 (3) *Defense to Causing Conditions.* A person may have a general defense to his
99 or her conduct that gives rise to liability under Subsection (b)(2).

100 (c) *Mistake as to an Excuse is No Defense.* Except as otherwise provided by law, it is no
101 defense that a person mistakenly believes that he or she satisfies the requirements of an
102 excuse defense.

103 (d) *Burden of Persuasion.* Unless expressly provided otherwise by this Chapter, the
104 defendant carries the burden of persuasion on all excuse defenses by a preponderance of
105 the evidence.”

106 and

107 “Section 410. Definitions

108 (a) An “excuse defense” is any defense described in Chapter 400.

109 (b) “Involuntary intoxication” means any intoxication that is not voluntary intoxication.

110 “Voluntary intoxication” has the meaning given in Section 214(l).

111 (c) “Mental illness or serious mental disorder” does not include:

112 (1) an abnormality manifested only by repeated criminal or otherwise antisocial
113 conduct; or

114 (2) intoxication.”

115 Comments:

116 ➤ Throughout the last year, the public has been under the impression through news
117 reports and public comments by those involved that with the initiative that the
118 effort to redraft DE's criminal code was to simplify it, remove redundancies,
119 make it accessible to the common person, but not to change it. We believe that
120 this is a significant change from the current code. Additionally, we find this
121 subject area of the code to be quite confusing and given the multiple references
122 difficult to follow. Current DE code addresses the matter in three sections which
123 are in close proximity. This subject in the draft code requires the reader to piece
124 together the meaning of the defense in five sections.

125 ○ Recommendation: Pull out all of the areas within the draft where the
126 authors are proposing a change in the current public policy and highlight
127 them so that members of the General Assembly and the public are fully
128 aware.

129 ○ Recommendation: We do not find the draft code to have an intuitive flow
130 or to use simpler language. As a result we suggest redrafting sections like
131 this so that it meets the goal of the initiative.

132 ➤ The debate over intoxication as a defense is not a new one. DE's public policy
133 currently recognitions that addition is a disease. We believe that those with
134 additions would benefit more from rehabilitation rather than punishment. But our
135 currently public policy acknowledges the need for public safety when individuals
136 with additions create harm. Our understanding of addictions has also evolved and
137 we know that when people are intoxicated that often they are still able to form
138 intent. This defense would effectively eliminate this argument and reduce
139 offender accountability on serious offenses such as:

140 Murder

141 Manslaughter

142 Carjacking

143 Kidnapping

144 Arson

145 Assault

146 ○ Recommendation: We believe that this change would be a step back to a time
147 when the public was harmed by offenders claiming they were intoxicated during
148 the offense and therefore would not be held as responsible. The persistent manner
149 of addiction suggests that expansion of problem solving courts where individuals
150 with addictions receive rehabilitation rather than traditional punishment would be
151 a more appropriate public policy to explore.