

Council of the District of Columbia
COMMITTEE ON THE JUDICIARY & PUBLIC SAFETY
COMMITTEE REPORT
1350 Pennsylvania Avenue, N.W., Washington, DC 20004

To: Members of the Council of the District of Columbia

From: Councilmember Charles Allen *CA*
Chairperson, Committee on the Judiciary and Public Safety

Date: November 23, 2020

Subject: Report on Bill 23-0409, the “Bella Evangelista and Tony Hunter Panic Defense Prohibition and Hate Crimes Response Amendment Act of 2020”

The Committee on the Judiciary and Public Safety, to which Bill 23-0409, the “Bella Evangelista and Tony Hunter Panic Defense Prohibition and Hate Crimes Response Amendment Act of 2020”, was referred, reports favorably thereon and recommends approval by the Council of the District of Columbia.¹

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¹ The short title of the bill as introduced was the “Sexual Orientation and Gender Identity Panic Defense Prohibition Act of 2019” and has been updated to reflect the inclusion of provisions from B23-0134, B23-0435, and B23-0513.

STATEMENT OF PURPOSE AND EFFECT

I. Purpose and Effect

a. Introduction

Bill 23-0409, the “Bella Evangelista and Tony Hunter Panic Defense Prohibition and Hate Crimes Response Amendment Act of 2020”, was introduced on September 16, 2019, by Chairman Phil Mendelson and Committee Chairperson Charles Allen. The bill was referred to the Committee on the Judiciary and Public Safety the next day, and the Committee held a public hearing on the bill on October 23, 2019. B23-0409 is an omnibus measure that includes portions of B23-0134, the “Community Harassment Prevention Amendment Act of 2019”; B23-0435, the “Tony Hunter and Bella Evangelista Panic Defense Prohibition Act of 2019”; and B23-0513, the “Hate Crime Civil Enforcement Clarification Amendment Act of 2019”. B23-0134 and B23-0513 deal with bias-motivated crimes and civil enforcement of the District’s hate crimes law, and B23-0435 is substantively similar to B23-0409. Together, the bills respond to the perpetration of hate crimes using a variety of legislative tools.

While the commission of many crimes can undermine a victim’s sense of security, bias-motivated crimes – often referred to as “hate crimes” – are especially destructive. According to the American Psychological Association, “victims of crimes that are bias-motivated are more likely to experience post-traumatic stress, safety concerns, depression, anxiety and anger than victims of crimes that are not motivated by bias.”² Additionally, bias-motivated crimes affect not only the specific person victimized, but other individuals who share the same traits or characteristics for which the victim was targeted. These crimes “send messages to members of the victim’s group that they are unwelcome and unsafe in the community, victimizing the entire group and decreasing feelings of safety and security.”³ Furthermore, in many cases, bias-motivated crimes are committed against communities that have historically faced significant discrimination.

In recognition of the unique harms posed by bias-motivated crimes, the federal government and states have enacted laws that treat these crimes differently than offenses committed without that same bias. Only a few jurisdictions have, however, addressed the continued availability of so-called “panic” defenses to defendants accused of bias-motivated crimes. “Panic” defenses are legal theories that ask the factfinder in a criminal case (i.e., the judge or jury) to find that the victim’s traits or characteristics are effectively to blame for the defendant’s conduct. Defendants asserting a panic defense generally argue that the victim made an unwanted sexual advance toward them, resulting in the defendant’s use of force – sometimes fatal – against that victim. The panic defense is not its own general defense to criminal liability. Rather, it is a legal tactic that instead relies on the traditional defenses of diminished capacity or insanity, provocation, or self-defense. In the case of self-defense, for example, “[d]efendants claim they believed that the victim, because of their

² American Psychological Association, *The Psychology of Hate Crimes* (last visited October 22, 2020), <https://www.apa.org/advocacy/interpersonal-violence/hate-crimes/>.

³ *Id.*

sexual orientation or gender identity or expression, was about to cause the defendant serious bodily harm.”⁴

Panic defenses are often differentiated based on the specific trait of the victim at issue. When the defense is invoked to justify, excuse, or mitigate a defendant’s conduct against a victim based on the victim’s sexual orientation, the defense is colloquially referred to as the “gay panic” defense; when the defense is used for cases involving a transgender victim, it is referred to as the “trans panic” defense. To capture the full range of sexual and gender identities that can be implicated in a panic defense, the National LGBT Bar Association encourages the use of the term “LGBTQ+ panic defense.”⁵

Perhaps the most well-known – though ultimately unsuccessful – use of the panic defense was in the prosecution of the two men who beat Matthew Shepard, a 21-year old college student at the University of Wyoming, to death.⁶ Since then, the panic defense has been used to acquit dozens of defendants across the country.⁷ The defense was purportedly used as recently as 2018 for the fatal stabbing of a man in Austin, Texas.⁸ In the District, the panic defense was invoked in the 2003 slaying of Bella Evangelista, a transgender woman, and the 2008 slaying of Tony Hunter, a gay man.

The continued availability of the panic defense legitimizes prejudices held against LGBTQ+ residents by allowing those prejudices to excuse, justify, or mitigate a defendant’s conduct. Panic defenses rely on long-disproved fears that LGBTQ+ persons are more dangerous or aggressive than their cisgender or straight counterparts. Panic defenses, in turn, deny LGBTQ+ persons full protection of the law, since they allow perpetrators of violence to escape criminal liability for their violent acts. The failure to hold perpetrators accountable for violence against LGBTQ+ persons is especially egregious in light of the historical and present-day discrimination these groups face. The Committee, accordingly, finds it necessary to bar the use of the defense in the District.

At the same time, the Committee does not wish to overstate what is being accomplished by elimination of the panic defense, the creation of new bias-motivated criminal offenses, and the establishment of a civil enforcement mechanism for hate crimes in the Committee Print. These legislative responses will not, alone, prevent acts of violence from being committed against LGBTQ+ persons, but they are important steps in a larger strategy. Prosecution of bias-motivated crime is, necessarily, responsive to a crime already committed. The individual victim and the community to which they belong have, therefore, already been harmed. Elimination of the panic defense will promote greater criminal accountability for acts of hate against vulnerable

⁴ THE LGBT BAR, *LGBTQ+ “Panic” Defense* (last visited October 12, 2020), <https://lgbtbar.org/programs/advocacy/gay-trans-panic-defense/>

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ Julie Compton, *Alleged ‘gay panic defense’ in Texas murder trial stuns advocates*, NBC News (May 2, 2018), <https://www.nbcnews.com/feature/nbc-out/alleged-gay-panic-defense-texas-murder-trial-stuns-advocates-n870571>. The lawyer for the defendant disputed the claim that his client asserted a “gay panic” defense. *Id.* Instead, he stated that his client “claimed to have acted purely in self-defense, though he acknowledged that there was no physical evidence to prove the victim had attacked his client.” *Id.*

communities, but ensuring the safety of LGBTQ+ persons in the District will require significant work beyond the legislation at hand, including education and restorative justice.

That said, the Committee Print includes additional statutory reforms to help combat the commission of hate crimes in the District. The bill strengthens the prohibition against defacing certain symbols or displaying certain emblems with a discriminatory or threatening intent, found in D.C. Official Code § 22–3312.02. Rather than limiting the prohibition to “private premises or property in the District of Columbia primarily used for religious, educational, residential, memorial, charitable, or cemetery purposes, or for assembly by persons of a particular race, color, creed, religion” or other protected categories, the bill expands the prohibition to all private property of another (when done without the permission of the owner or their designee), in addition to public property in the District. As explained in greater detail elsewhere in the report, this change will help overcome challenges that limit enforcement of the current statute. The bill also clarifies the requisite intent and culpable mental states required to ensure the criminal offense comports with constitutional requirements.

The Committee Print also includes the provisions of B23-0513, the “Hate Crime Civil Enforcement Clarification Amendment Act of 2019”, introduced by Attorney General Karl Racine. The Print amends the Bias-Related Crime Act of 1989, effective May 8, 1990 (D.C. Law 8-121; D.C. Official Code § 22-3701 *et seq.*), to provide the Office of the Attorney General (“OAG”) with civil enforcement authority under the act against a person who (1) commits a bias-related crime, or (2) through any act of violence, force, fraud, intimidation, or discrimination, interferes with, or attempts to interfere with, an individual’s exercise of any right secured by the Constitution or District law, or deprives an individual of equal protection under the Constitution or District law.

The District’s bias-related crime statute operates as a sentencing enhancement for criminal acts “that demonstrat[e] an accused’s prejudice based on the actual or perceived race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, gender identity or expression, family responsibility, homelessness, physical disability, matriculation, or political affiliation of a victim.”⁹ The act currently allows for criminal prosecution and civil enforcement, but the latter only by private parties.¹⁰ The Committee Print provides subpoena power for OAG, as well as the ability to seek a range of civil relief, including injunctive relief, actual or nominal damages, including for emotional distress, punitive damages, and civil penalties of up to \$10,000 per act. Further, the Print broadly defines a “person” subject to the act to include corporate and organizational defendants, and it expands the definition of “bias-related crime” to explicitly (1) include prejudice based on non-physical disabilities, and (2) provide that a designated act demonstrating an accused’s prejudice based on a protected trait of the victim need not *solely* be *based on* or *because of* that prejudice.

Lastly, the Committee Print includes a small, but important, change to the District’s Human Rights Act. The bill clarifies that the definition of “place of public accommodation” in the act (which prohibits discrimination based on eighteen traits) includes entities that provide goods or services to District residents, even if those entities do not maintain a physical location in the District or charge for those goods or services. This section of the bill is intended to overrule the

⁹ D.C. Official Code § 22–3701.

¹⁰ D.C. Official Code § 22-3704.

portion of the D.C. Circuit Court of Appeals’ decision in *Freedom Watch, Inc. v. Google Inc.*, 816 F. App’x 497 (D.C. Cir. 2020), related to the Human Rights Act. In *Freedom Watch*, the D.C. Circuit concluded that to qualify as “place of public accommodation,” an entity must “operate[] out of a particular place in D.C.” *Id.* at 500.¹¹ The court’s decision is contrary to the Council’s intent to provide broad protections against discrimination for District residents and visitors that extend far beyond mere access to physical spaces. The goal of the Human Rights Act is to ensure “full and equal enjoyment” of “goods, services, . . . privileges, advantages, and accommodations.”¹² In other words, under the Human Rights Act, it is not enough for a brick-and-mortar bank, for example, to allow people of color to come inside the building; it must allow them to open checking accounts, obtain credit cards, take out loans, and access the rest of the bank’s services. Under the D.C. Circuit’s logic, however, if a bank decides to close its physical branches and operates solely through a website, it could discriminate against District residents with respect to any or all of its services. This section of the bill clarifies the law to prevent that outcome.

This change recognizes that increasingly District residents purchase goods and services through internet-based retailers and providers, rather than from brick-and-mortar establishments. As a result, threats to fundamental civil rights, including being shut out of the economy, increasingly occur online. The Committee Print clarifies that the District’s longstanding commitment to civil rights and inclusion extend equally to digital space as physical space. Moreover, even entities with physical locations may locate their brick-and-mortar facilities outside the District but nevertheless deliver goods or provide services to District residents. These entities must also comply with the Human Rights Act when operating in the District. Discrimination has no place in the District, regardless of whether that discrimination occurs at brick-and-mortar facilities, by out-of-state entities that operate in the District, or on the internet. The Committee Print brings District law in line with the laws of California, Colorado, New Mexico, New York, and Oregon—all of which have extended public-accommodations antidiscrimination provisions beyond entities with a physical location within their jurisdiction to online entities and other entities that lack such a brick-and-mortar location.

b. *Overview of the Measures Included in the Committee Print, As Introduced*

B23-0409, the “Sexual Orientation and Gender Identity Panic Defense Prohibition Act of 2019”, and B23-043, the “Tony Hunter and Bella Evangelista Panic Defense Prohibition Act of 2019”

As introduced, B23-0409, the “Sexual Orientation and Gender Identity Panic Defense Prohibition Act of 2019”, would preclude the use of adequate provocation, reduced mental capacity, and justification as defenses in prosecutions for crimes of violence if those defenses are based on the “discovery of, knowledge about, or potential disclosure of the victim’s actual or perceived gender identity or expression, or sexual orientation, including under circumstances in which the victim made an unwanted, non-forcible romantic or sexual advance toward the defendant, or if the defendant and victim dated or had a romantic relationship.” The bill would

¹¹ Section 2 is also intended to overrule *U. S. Jaycees v. Bloomfield*, 434 A.2d 1379 (D.C. 1981), to the extent that the Court there concluded that to qualify as a place of public accommodation, an entity must “operate from [a] particular place within the District of Columbia.”

¹² D.C. Code § 2-1402.31(a)(1).

also require that judges, in criminal trials or proceedings, issue the following jury instruction upon request by either party:

Do not let bias, sympathy, prejudice, or public opinion influence your decision. Bias includes bias against the victim or victims, witnesses, or defendant based upon his or her disability, gender, nationality, race or ethnicity, religion, gender identity or expression, or sexual orientation.

B23-0435, the “Tony Hunter and Bella Evangelista Panic Defense Prohibition Act of 2019”, is substantially similar to B23-0409. As introduced, B23-0435 would eliminate the defense of adequate provocation when the defense is based on “the discovery of, knowledge about, or the potential disclosure of” a wide range of actual or perceived characteristics of the victim, including:

[D]isability, gender identity or expression, national origin, race, color, religion, sex, or sexual orientation, regardless of whether the characteristic belongs to the victim or the defendant, even if the defendant and victim dated or participated in sexual relations, or if the defendant or victim romantically pursued the other.

B23-0409’s proposed prohibition is broader in that it applies to two other defenses beyond adequate provocation: “reduced mental capacity” and “justification.” The prohibition in B23-0435, on the other hand, applies to traits beyond sexual orientation and gender but is limited to the defense of adequate provocation.

B23-0134, the “Community Harassment Prevention Amendment Act of 2019”

As introduced, B23-0134 would amend the Anti-Intimidation and Defacing of Public or Private Property Criminal Penalty Act of 1982 to broaden the prohibition on burning, desecrating, marring, defacing, or damaging religious or secular symbols (“defacing symbols”) and placing or displaying signs, marks, symbols, emblems, or other physical impressions (“displaying emblems”). Currently, the prohibition is limited to “private premises or property in the District of Columbia primarily used for religious, educational, residential, memorial, charitable, or cemetery purposes, or for assembly by persons of a particular race, color, creed, religion, or any other category listed in [D.C. Official Code] § 2-1401.01.”¹³ The bill, as introduced, would extend the prohibition to “any private property of another without the permission of the owner or the owner’s designee.”

The bill, as introduced, would also clarify that the prohibition against placing certain signs, marks, symbols, emblems or other physical impressions applies to cases where it is probable that a reasonable person would perceive that the intent is to threaten another person’s property. Currently, that prohibition only applies to situations where it is probable that a reasonable person would perceive the intent is to threaten another person and does not contemplate threats to a person’s property.

Finally, the bill would establish a new offense of harassing an entity. It defines an entity as “a group organized by association for any established common purpose, including, but not limited

¹³ D.C. Official Code § 22–3312.02(a).

to a religious, social, educational, or recreational purpose.” The bill would make it unlawful to purposefully engage in a course of conduct if the person intended, knew, or should have known that the course of conduct would cause members, participants, or employees of an entity to: fear for their safety; feel alarmed, disturbed, or frightened; or suffer emotional distress. Generally, the offense of harassing an entity would be punishable by up to 12 months’ imprisonment, a \$2,500 fine, or both. The maximum penalty increases to up to 4 years’ imprisonment, a \$12,500 fine, or both, if the person: (1) was subject to a court order or condition of release (either parole or supervised release) that prohibited contact with the entity’s members, participants, or employees, (2) has been convicted of harassing an entity within the previous 10 years, or (3) caused more than \$2,500 in financial injury.

B23-0513, the “Hate Crime Civil Enforcement Clarification Amendment Act of 2019”

B23-0513, as introduced, would grant OAG the ability to initiate civil actions against those who interfere with the exercise of another’s rights or commit bias-related crimes against another person. Under current law, a private civil action is available to anyone who “incurs injury to his or her person or property as a result of an intentional act that demonstrates an accused’s prejudice based on the actual or perceived” traits of the victim. This bill, as introduced, would expand the criteria for pursuing civil actions, including by the OAG acting on behalf of the District, in response to cases where:

[A]ny person, whether or not acting under color of law, interferes or attempts to interfere by threats, intimidation, or coercion with the exercise or enjoyment by any other person or persons of rights secured by District or federal law, or commits a bias-related crime against the other person or persons.

The victim of the interference would have the ability to pursue a civil cause of action. The bill would also allow the OAG to “bring, in the name of the District of Columbia, a civil action for appropriate relief.” In addition to the relief available under current law, the bill would also provide, for civil actions brought by the OAG, “a civil penalty of up to \$10,000 per violation.” Parents of minors would be liable for damages the minor is required to pay if their act or omission contributed to the minor’s actions.

The Committee’s amendments in the Print to the three bills as introduced are described elsewhere in this report.

II. Background and Committee Reasoning

a. *The LGBTQ+ Panic Defense*

Bella Evangelista, Tony Hunter, and “Bias-Motivated” Crimes

On September 7, 2008, Tony Randolph Hunter was found “lying supine on the ground” with a “laceration on the back of his head” in the District’s Shaw neighborhood.¹⁴ Police initially

¹⁴ Amanda Hess, *The Death of Tony Hunter*, WASH. CITY PAPER (October 22, 2008), <https://www.washingtoncitypaper.com/columns/the-sexist/blog/13117153/the-death-of-tony-hunter>.

classified the attack as a potential hate crime based on the fact “that Hunter was gay and headed to a gay bar.”¹⁵ Lacking explicit evidence that the attack was motivated by bias – such as the use of an anti-gay slur or membership in an anti-gay group – police declassified the incident as a hate crime and “began referring to the beating as an apparent robbery, citing car keys and cash that appeared to be missing from Hunter’s body.”¹⁶ Ten days after the attack, Hunter died from his injuries.¹⁷ The following month, police arrested Robert Hannah, and prosecutors charged him with voluntary manslaughter for killing Hunter.¹⁸

Hannah and one other witness at the attack claimed that the “altercation” was incited when Hunter sexually assaulted Hannah.¹⁹ Hannah and the other witness’s account, taken together with the specific charge of voluntary manslaughter, drew criticism from members of the LGBTQ+ community that prosecutors were taking Hannah’s “gay panic” defense seriously.²⁰ As noted above, the LGBTQ+ panic defense is a “legal strategy that asks a jury to find that a victim’s sexual orientation or gender identity or expression is to blame for a defendant’s violent reaction, including murder.”²¹ While the exact contours of the defense vary by jurisdiction, the defense can be used “to mitigate a case of murder to manslaughter or justified homicide.”²² Hannah was ultimately sentenced to 180 days in jail after pleading guilty to misdemeanor assault.²³

Five years before the killing of Tony Hunter, the murder of Bella Evangelista – a transgender woman and local entertainer – rocked the transgender community in the District.²⁴ On August 16, 2003, Antoine Jacobs shot and killed Evangelista “after first paying her for oral sex, then later learning she [had male genitalia].”²⁵ Lisa Mottet, a member of the National Gay and Lesbian Task Force’s Transgender Civil Rights Project, characterized the homicide as a “discovery crime,” in which the motivation is the perpetrator’s discovery of the victim’s sexual orientation, gender identity, or biological sex.²⁶ In December of that year, it was reported that Jacobs was “reportedly considering a ‘panic defense’ when he goes to court.”²⁷ Local transgender activist Earline Budd dismissed the idea that failing to disclose one’s identity to a sexual partner excuses or justifies the use of violence.²⁸ Jacobs was ultimately sentenced to a term of imprisonment of 16

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.* Todd Metrokin, a co-founder of D.C.’s then-named organization Gays and Lesbians Opposing Violence (“GLOV”), stated “It looks like they’re going with manslaughter because of something we call the ‘gay panic’ defense.” *Id.* Chris Farris, another GLOV co-founder, said he found the defense “familiar” and “repugnant”, and noted that “[t]he fact that the suspect is pointing to gayness as an excuse shows the requisite bias.” *Id.*

²¹ THE LGBT BAR, *LGBTQ+ “Panic” Defense* (last visited October 12, 2020), <https://lgbtbar.org/programs/advocacy/gay-trans-panic-defense/>.

²² *Id.*

²³ Sommer Mathis, *Hannah Sentenced to Six Months in Beating Death*, DCIST (October 15, 2009), <https://dcist.com/story/09/10/15/hannah-sentenced-to-six-months-in-j/>.

²⁴ Bob Moser, *Violence Engulfs Transgender Population in D.C.*, SOUTHERN POVERTY LAW CENTER (December 31, 2003), <https://www.splcenter.org/fighting-hate/intelligence-report/2003/violence-engulfs-transgender-population-dc>.

²⁵ Will O’Brian, *Killer Sentenced in Transgender Murder Case*, METRO WEEKLY (December 21, 2005), <https://www.metroweekly.com/2005/12/killer-sentenced-in-transgende/>.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

years and 8 months, followed by five years of supervised release, after pleading guilty to second degree murder.²⁹

While the cases of Bella Evangelista and Tony Hunter garnered particular attention, there have been dozens of verbal and physical attacks against members of the LGBTQ+ community in the District annually. There were 203 reported “bias-related crimes” – the term employed by MPD for bias-motivated or hate crimes – just last year, and 78 year-to-date through August 31, 2020 (the most recently available data).³⁰ Of those crimes, 60 were “motivated” by the victim’s sexual orientation, and 27 by the victim’s gender identity or expression.³¹ Taken together, crimes motivated by individuals’ responses to or perceptions of the victim’s sexual orientation and gender identity or expression comprised nearly half of all bias-related crimes in the District.³² This local data is consistent with national trends regarding bias-related crimes. A 2018 study of national crime data revealed that there were 7,120 reported hate crimes – 7,036 of which were single-bias incidents, and 84 of which were multiple bias incidents.³³ Of the 7,036 single-bias incidents, 17% were based on sexual orientation bias, and 2.4% were based on gender identity bias.

Table 1: Bias-Related Crimes in the District

Type of Bias	2011	2012	2013	2014	2015	2016	2017	2018	2019	YTD thru 8/31/2019	YTD thru 8/31/2020
Ethnicity/National Origin	7	5	3	3	3	13	40	49	61	42	17
Race	28	13	17	13	19	13	47	39	46	33	18
Religion	2	5	5	8	5	17	11	12	5	4	1
Sexual Orientation	43	46	31	27	27	40	55	60	60	42	24
Gender Identity/Expression	11	9	12	15	10	19	13	34	27	17	17
Disability	0	1	0	1	0	1	1	0	1	1	0
Political Affiliation	0	1	0	1	2	2	10	10	1	1	1
Homelessness	1	0	0	2	0	1	0	1	0	0	0
Sex/Gender	0	0	0	0	0	0	0	0	2	2	0
Total	92	80	68	70	66	106	177	205	203	142	78

Source: Metropolitan Police Department³⁴

²⁹ *Id.*

³⁰ Metropolitan Police Department, *Bias-Related Crimes (Hate Crimes) Data* (last visited October 12, 2020), <https://mpdc.dc.gov/hatecrimes>.

³¹ *Id.*

³² *Id.*

³³ FBI, *2018 Hate Crime Statistics* (last visited April 22, 2020), <https://ucr.fbi.gov/hate-crime/2018/topic-pages/incidents-and-offenses>. “A single-bias incident is defined as an incident in which one or more offense types are motivated by the same bias. As of 2013, a multiple-bias incident is defined as an incident in which one or more offense types are motivated by two or more biases.” *Id.*

³⁴ *Supra* note 30.

The District’s bias-related crime statute is a sentencing enhancement for criminal acts “that demonstrate an accused’s prejudice based on the actual or perceived race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, gender identity or expression, family responsibility, homelessness, physical disability, matriculation, or political affiliation of a victim of the subject designated act.”³⁵ Anyone convicted of a bias-related crime “shall be fined not more than 1 ½ times the maximum fine authorized for the designated act and imprisoned for not more than 1 ½ times the maximum term authorized for the designated act.”³⁶

In recent years, the United States Attorney’s Office for the District of Columbia (“USAO-DC”) has failed to prosecute bias-related crimes, a problem several witnesses spoke to at the public hearing on the bill. Joseph Vardner, speaking on behalf of the National LGBT Bar Association, noted that:

There has been a significant increase in bias-related crimes in the District of Columbia. In 2018, there were 205 bias-related crimes reported in our city – almost double from two years prior and triple from three years prior. This year there is also a wave of bias-related crime prejudiced on gender identity/expression and sexual orientation with already more reports to date than in six of the last eight years. As the committee noted, in its public hearing announcement, almost none of these crimes were prosecuted under the bias-related crime statute.

Specifically, of the 205 bias-related crimes reported in 2018, “police made arrests in a record 59 hate-crime cases involving adults.”³⁷ USAO-DC “prosecuted only three as hate crimes, and one was quickly dropped.”³⁸ Of the 178 reported hate crimes in 2017, “police closed 54 cases involving adults by arrest”, but USAO-DC only “charged two cases as hate crimes, and both were later dropped as part of plea deals.”³⁹ In 2019, after reviewing more than 200,000 cases, the *Washington Post* determined that “hate-crime prosecutions and convictions [were] at their lowest point in at least a decade.”⁴⁰ Responding to criticism about the dearth of prosecutions for hate crimes, earlier this year, USAO-DC “announced that it prosecuted 11 incidents from last year as hate crimes, doubling the number of such prosecutions from the previous two years combined.”⁴¹

Representatives for USAO-DC declined the Committee’s invitation to participate in the hearing. Instead, USAO-DC submitted written testimony to the Committee.⁴² The letter, among other things, explained the difference in the number of bias-related crimes reported to law enforcement and those prosecuted by the office:

³⁵ D.C. Official Code § 22–3701.

³⁶ D.C. Official Code § 22–3703.

³⁷ Michael E. Miller and Steven Rich, *Hate crime reports have soared in D.C. Prosecutions have plummeted*, WASH. POST (August 21, 2019), <https://www.washingtonpost.com/graphics/2019/local/dc-hate-prosecutions-drop/>.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ Natalie Delgadillo, *Following Criticism, The U.S. Attorney For D.C. Announces Increase In Hate Crime Prosecutions*, DCIST (January 24, 2020), <https://dcist.com/story/20/01/24/following-criticism-the-u-s-attorney-for-d-c-announces-increase-in-hate-crime-prosecutions/>.

⁴² On file with the Committee.

As you know, the D.C. Code does not have a stand-alone ‘bias-related crime’ provision. Rather, it creates an enhanced offense when an underlying crime is bias-related, which allows, but does not require, a judge to impose a higher sentence upon conviction for the enhancement. In the vast majority of the alleged bias-related arrests in 2017 and 2018 presented to USAO-DC for prosecution, the Office charged the underlying crime, often D.C. Code offenses such as assault or threats. Specifically, of the 59 alleged bias-related crimes in 2018 presented for prosecution, we charged the underlying offense in 52 cases; of the 55 alleged bias-related crimes in 2017 presented for prosecution, we charged the underlying offense in 49 cases.

In addition to its charging practices, the letter also discussed the different legal standards governing arrests and convictions:

Police make arrests based on probable cause, the same standard used, for example, in obtaining a search warrant. But prosecutors must prove each charged offense beyond a reasonable doubt, the highest threshold in the legal system. In some cases, the facts may create probable cause, but fall short of proof beyond a reasonable doubt. Not surprisingly, in some cases, the evidence will give rise to reason to believe that the crime was motivated by bias, but will not meet the exceptionally stringent beyond-a-reasonable-doubt standard. Moreover, to obtain a conviction on the bias enhancement, it is not enough that the victim identifies with, or is perceived to identify with, a protected status. It is also not enough that the perpetrator may be prejudiced against individuals identifying with such a status. Rather, prosecutors must prove, beyond a reasonable doubt, a causal nexus between the underlying crime and the perpetrator's prejudice or bias.

Whatever the reasons may be for the decline in prosecutions for bias-motivated offenses, several witnesses agreed that it undermined feelings of security within the LGBTQ+ community. Mr. Vardner stated that the “lack of prosecutions combined with the confusion as to the outcome of these cases has created a sense of fear and uncertainty within the LGBT community of the city.” Similarly, President Bobbi Strang of the Gay and Lesbian Activists Alliance testified that the failure to prosecute bias-motivated offenses “sends a message that if a person hurts members of the LGBTQ community in the District, they will be allowed to get away with it.” The Committee agrees that failure to prosecute bias-motivated offenses as such erodes the dignity and security of sexual and gender minorities. While Committee recognizes that the criminal law cannot by itself change a culture where violence against sexual and gender minorities is normalized, all victims – including members of the LGBTQ+ community – should receive full benefit of the law’s protection. This protection can also encompass non-prosecution options, in appropriate cases, like restorative practices.

The Local Origins of “Gay Panic”

While the concept of “panic” in response to unwanted sexual advances by LGBTQ+ individuals has existed for nearly a century, its modern understanding differs significantly from its

original meaning. Edward J. Kempf, a psychiatrist at St. Elizabeths Hospital, coined the term “acute homosexual panic” in 1920.⁴³ He defined “acute homosexual panic” as a “a psychosis ‘due to the pressure of uncontrollable perverse sexual cravings.’” The modern meaning began to emerge when “several prominent psychiatrists at state-run hospitals and prisons in the 1940s and 1950s advanced new definitions of gay and trans panic consistent with how the concept is largely understood in criminal cases today – namely, as violent situations triggered by the unwanted sexual advances of LGBTQ people.”⁴⁴ This conception of “gay and trans panic fell in line with a then-growing consensus in the United States psychiatric profession that homosexuality (which was then generally understood to include gender nonconformity) was a mental illness.”⁴⁵ As the medical and psychiatric communities formalized stigmatization against sexual minorities, such as listing homosexuality “as a mental disorder in the APA’s Diagnostic and Statistical Manual of Mental Disorders,”⁴⁶ so too did government and the law.⁴⁷ In the 1940s and 1950s, “every state criminalized same-sex sex, and many localities prohibited certain gender nonconforming expression, such as cross-dressing.”⁴⁸ “Between 1946 and 1959, twenty-nine states enacted sexual psychopath laws,” which “were most heavily enforced against gay men.”⁴⁹ During the Lavender Scare of the 1950s, “there was an organized effort in the federal government and the military to remove and persecute lesbian and gay employees and active service members.”⁵⁰

In 1943, Dr. Benjamin Karpman – who also worked at St. Elizabeths Hospital – offered a new understanding of gay and trans panic. He used unwanted sexual advances as evidence that a patient suffered from “gay panic” diverged from Kempf’s original conception.⁵¹ Nevertheless, Karpman’s treatment of gay panic is “different from how unwanted sexual advances are used to support gay and trans panic defenses today,” as Karpman “used the sexual advance as evidence of the patient’s mental condition as opposed to the mental state of the person who reacted violently.”⁵² Eight years after publication of Karpman’s article originating this theory, “Russell Dinerstein and Bernard Glueck, Jr. – forensic psychiatrists who worked at the psychiatric clinic at Sing Sing Prison operated by the State of New York – published an article that characterized ‘homosexual panic’ as a male inmate’s violent mental state triggered by the unwanted sexual advance of a gay man.”⁵³

⁴³ Jordan Blair Woods, *Framing Legislation Banning the “Gay and Trans Panic” Defenses*, 54 U. RICH. L. REV. 833, 842-844 (2020).

⁴⁴ *Id.* at 846.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.* at 847.

⁴⁹ *Id.* at 847–48. “These laws generally took two forms. First, any person who was charged with a crime and found by a jury to be a ‘sexual psychopath’ could be handed over to a state’s department of public health, perhaps indefinitely, until that person was ‘cured.’ Second, a civil variation allowed for the ‘psychiatric commitment of sexual psychopaths, perhaps indefinitely, regardless of whether they were charged with a crime.’” *Id.* at 848.

⁵⁰ *Id.* at 850. “As a result of heightened investigations and screens, more than 1000 federal employees either resigned or were terminated, and over 2000 active service members were discharged from the military during the early 1950s for allegations relating to homosexuality.” *Id.*

⁵¹ *Id.* at 853.

⁵² *Id.*

⁵³ *Id.* at 853–54.

This historical development of the notion of “homosexual panic” – the terminological precursor for the concept of gay or trans panic and the related legal defense – provides important background to the Committee Print. First, it illustrates the extremely problematic origins of the LGBTQ+ panic defense and the institutionally constructed, justified, and reinforced stigmatization of LGBTQ+ individuals. But it also demonstrates the unique role local governments played in the proliferation of the concept. Kempf, Karpman, Dinerstein, and Glueck were all employed at state-run hospitals – one of which was St. Elizabeths hospital here in the District.

The LGBTQ+ Panic Defense and Relevant Current Law in the District

The LGBT Bar Association describes LGBTQ+ panic defense as:

[A] legal strategy that asks a jury to find that a victim’s sexual orientation or gender identity/expression is to blame for a defendant’s violent reaction, including murder. It is not a free-standing defense to criminal liability, but rather a legal tactic used to bolster other defenses. When a perpetrator uses an LGBTQ+ “panic” defense, they are claiming that a victim’s sexual orientation or gender identity not only explains—but excuses—a loss of self-control and the subsequent assault. By fully or partially acquitting the perpetrators of crimes against LGBTQ+ victims, this defense implies that LGBTQ+ lives are worth less than others.⁵⁴

The LGBTQ+ panic defense is “not [a] freestanding legal defense[.]”⁵⁵ Rather, it is employed when a defendant invokes “gay and trans panic concepts to support one of three well-established legal defenses: (1) provocation, (2) insanity (or diminished capacity), and (3) self-defense (or imperfect self-defense).⁵⁶ In each case, the defendant would assert that the fact that the victim made an unwanted sexual advance towards the defendant justifies (in the case of self-defense) or excuses (in the cases of provocation, insanity, and diminished capacity) the defendant’s conduct. For defenses of insanity or diminished capacity, “[t]he defendant alleges that a sexual proposition by the victim – due to their sexual orientation or gender identity – triggered a nervous breakdown in the defendant, causing an LGBTQ+ ‘panic.’”⁵⁷ For the defense of provocation, the defendant specifically argues “that the victim’s proposition, sometimes termed a ‘non-violent sexual advance,’ was sufficiently ‘provocative’ to induce the defendant to kill the victim.”⁵⁸ Finally, in the case of self-defense, the defendant claims that “they believed that the victim, because of their sexual orientation or gender identity/expression, was about to cause the defendant serious bodily harm.”⁵⁹

⁵⁴ *Supra* note 4.

⁵⁵ *Comber*, 584 A.2d at 833.

⁵⁶ *Comber*, 584 A.2d at 834.

⁵⁷ *Supra* note 4.

⁵⁸ *Id.*

⁵⁹ *Id.*

i. *Murder*

In the District, there are three statutes defining murder. D.C. Official Code §§ 22–2101 and 22–2101 define first degree murder, while § 22–2103 defines second degree murder. D.C. Official Code § 22–2101 states that a person commits first degree murder when that person:

[B]eing of sound memory and discretion, kills another purposely, either of deliberate and premeditated malice or by means of poison, or in perpetrating or attempting to perpetrate an offense punishable by imprisonment in the penitentiary, or without purpose to do so kills another in perpetrating or in attempting to perpetrate any arson, . . . first degree sexual abuse, first degree child sexual abuse, first degree cruelty to children, mayhem, robbery, or kidnaping, or in perpetrating or attempting to perpetrate any housebreaking while armed with or using a dangerous weapon, or in perpetrating or attempting to perpetrate a felony involving a controlled substance.⁶⁰

D.C. Code § 22–2102 states that a person also commits first degree murder when that person “maliciously places an obstruction upon a railroad or street railroad, or displaces or injures anything appertaining thereto, or does any other act with intent to endanger the passage of any locomotive or car, and thereby occasions the death of another.”⁶¹ Finally, D.C. Code § 22–2103 states that an individual is guilty of second degree murder if that person “with malice aforethought, except as provided in [D.C. Code §§ 22-2101, 22-2102], kills another.”

All three statutes define murder by the presence of – *inter alia* – malice on the part of the defendant. In the District, malice “denotes four types of murder, each accompanied by distinct mental states.”⁶²

First, a killing is malicious where the perpetrator acts with the specific intent to kill. Second, a killing is malicious where the perpetrator has the specific intent to inflict serious bodily harm. Third, ‘an act may involve such a wanton and willful disregard of an unreasonable human risk as to constitute malice aforethought even if there is not actual intent to kill or injure.’ In *Byrd v. United States* . . . we referred to this kind of malicious killing as ‘depraved heart’ murder.

[. . .]

Historically, a fourth kind of malice existed when a killing occurred in the course of the intentional commission of a felony. Under this ‘felony-murder’ rule, ‘malice . . . is implied from the intentional commission of the underlying felony even though the actual killing might be accidental.’⁶³

⁶⁰ D.C. Official Code § 22–2101.

⁶¹ D.C. Official Code § 22–2102.

⁶² *Comber*, 548 A.2d at 38 (quoting *Byrd v. United States*, 500 A.2d 1376, 1385 (D.C. 1986).

⁶³ *Comber*, 584 A.2d at 38–41.

But even when an individual does act with one of the four mental states described above, a homicide “is not malicious if it is justified, excused, or committed under recognized circumstances of mitigation.”⁶⁴ This is because “[i]mplicit in the notion of malice aforethought is ‘the absence of every sort of justification, excuse or mitigation.’”⁶⁵ Therefore, “a defendant is not guilty of any crime at all if [they kill] with justification or excuse.”⁶⁶

ii. *Manslaughter*

English courts categorized homicides committed with malice as murder, and those committed without malice as manslaughter. In *United States v. Bradford*, the D.C. Court of Appeals defined voluntary manslaughter as:

[A]n unlawful killing, intentionally committed, the requisite intent being the general intent to do the act which caused the death rather than a specific intent to cause death. That is to say, that even though the accused did not intend to kill, he did intend to use such force against the decedent as would endanger him. Consequently, the requisite intent in voluntary manslaughter approximates express malice, both as that term has recently been defined — a wanton disregard for human life — and as it has previously been described at common law — an evil design, purposiveness or willfulness. Killings classified as voluntary manslaughter would in fact be second degree murder but for the existence of circumstances that in some way mitigate malice. The purpose to kill is in legal contemplation dampened where the killer has been provoked or is acting in the heat of passion, with the latter including fear, resentment and terror, as well as rage and anger. A killing committed in the mistaken belief that one may be in mortal danger is classified as voluntary manslaughter.⁶⁷

Or, put more simply, voluntary manslaughter can “accurately be said to be (1) an unlawful killing of a human being (2) with malice which has been mitigated by the presence of circumstances judicially recognized as reducing the degree of criminality.”⁶⁸ The D.C. Code still does not define manslaughter.⁶⁹ Instead, “[m]anslaughter is defined . . . by reference to the common law.”⁷⁰ Under

⁶⁴ *Comber*, 584 A.2d at 41.

⁶⁵ *Comber*, 584 A.2d at 41. “The absence of justification, excuse, or mitigation is thus an essential component of malice, and in turn of second-degree murder, on which the government bears the ultimate burden of persuasion.” *Id.*

⁶⁶ *Swann v. United States*, 648 A.2d 928 (D.C. 1994)

⁶⁷ *Bradford*, 344 A.2d at 215. In contrast, the Bradford court defined involuntary manslaughter as: “[A]n unlawful killing which is unintentionally committed. By unintentionally it is meant that there is no intent to kill or to do bodily injury. The crime may occur as the result of an unlawful act which is a misdemeanor involving danger of injury; as the result of a lawful act performed in an unlawful way; or as the result of the omission to perform a legal duty. The requisite intent in involuntary manslaughter is supplied by the intent to commit the misdemeanor, or by gross or criminal negligence, a term recently defined as lack of awareness or failure to perceive the risk of injury from a course of conduct under circumstances in which the actor should have been aware of the risk. When a person engages in conduct which results in extreme danger to life or serious bodily injury and that person should be aware of the danger but is not, a resultant death will be involuntary manslaughter.” *Bradford*, 344 A.2d 208 at 215.

⁶⁸ *Id.*

⁶⁹ *Comber v. United States*, 584 A.2d 26, 35 (1990) (quoting *United States v. Bradford*, 344 A.2d 208, 213 (D.C. 1975)).

⁷⁰ *Id.* (quoting *Williams v. United States*, 569 A.2d 97, 98 (D.C. 1989)).

current case law, “a homicide constitutes voluntary manslaughter where the perpetrator kills with a state of mind which, but for the presence of legally recognized mitigating circumstances, would render the killing murder.”⁷¹

The D.C. Code does not define voluntary nor involuntary manslaughter, but it does specify that anyone found guilty of manslaughter “shall be sentenced to a period of imprisonment not exceeding 30 years”⁷² and fined \$75,000.⁷³ While the *Bradford* court speculated that that “while the statutory punishment for voluntary and involuntary manslaughter is ostensibly the same, it is most likely that a sentencing court would impose a more lenient sentence for an unintentional homicide than for an intentional one and also that prospects of parole would be greater for the former.”⁷⁴

iii. *Defenses*

Currently, the D.C. Code does not define any general defenses to criminal liability such as self-defense, duress, necessity, provocation, mistake of fact, or intoxication.⁷⁵ Instead, in the District, these defenses have been developed through case law. General defenses can fall into one of three categories: justification, excuse, or mitigation. Bills prohibiting the use of the panic defense have generally done so by limiting the application of three defenses when related to discovery or knowledge of the victim’s sexual orientation or gender identity: the justification of self-defense, the excuse of insanity, and mitigating circumstance of provocation.

Self-Defense

In the homicide context, justification refers to killings that are “commanded or authorized by law.”⁷⁶ Examples of justifiable homicides include “the killing of an enemy on the field of battle as an act of war within the rules of war, the execution of a sentence of death pronounced by a competent tribunal, or the slaying of an outlaw who resists capture.”⁷⁷ But perhaps the most well-known defense of justification is self-defense. The elements of self-defense are that “(1) there was an actual or apparent threat; (2) the threat was unlawful and immediate; (3) the defendant honestly and reasonably believed that [they were] in imminent danger of death or serious bodily harm; and (4) the defendant’s response was necessary to save [themselves] from the danger.”⁷⁸ To assert a so-called “perfect” self-defense claim, the defendant’s belief “that lethal force was required to prevent imminent death or serious bodily harm must be objectively reasonable.”⁷⁹ A successful

⁷¹ *Id.* at 42.

⁷² D.C. Official Code § 22–2105.

⁷³ *Id.* See also D.C. Official Code § 22–3571.01.

⁷⁴ *Bradford*, 344 A.2d 208 at 211.

⁷⁵ CRIMINAL CODE REFORM COMMISSION, 2016 ANNUAL REPORT 5 (2017) (“Moreover, unlike most jurisdictions that have modernized their criminal codes in recent decades, the District’s criminal code does not include general defenses (e.g. self-defense).”

⁷⁶ *Comber*, 584 A.2d at 41 n. 16.

⁷⁷ *Id.* at 42 (internal citations omitted).

⁷⁸ *Brown v. United States*, 619 A.2d 1180, 1182 (D.C. 1992).

⁷⁹ *Richardson v. United States*, 98 A.3d 178, 187 n. 11 (D.C. 2014).

perfect self-defense claim entitles the defendant to an acquittal.⁸⁰ One of the pattern jury instructions for self-defense instructs the following:

Every person has the right to use a reasonable amount of force in self-defense if (1) s/he actually believes s/he is in imminent danger of [death or serious] bodily harm and if (2) s/he has reasonable grounds for that belief. The question is not whether looking back on the incident you believe that the use of force was necessary. The question is whether [name of defendant], under the circumstances as they appeared to him/her at the time of the incident, actually believed s/he was in imminent danger of [death or serious] bodily harm and could reasonably hold that belief.

[. . .]

[If you find that [name of defendant] actually and reasonably believed that s/he was in imminent danger of [death or serious] bodily harm and that [name of defendant] had reasonable grounds for that belief, then [name of defendant] has a right to self-defense even if [name of defendant] also had other possible motives, such as feelings of anger toward the [complainant] [decedent] or a desire for revenge. A defendant's other possible motives do not defeat an otherwise valid claim of self-defense but can be considered in evaluating whether the [name of defendant] actually and reasonably believed that s/he was in imminent danger of [death or serious] bodily harm.]

Self-defense is a defense to the charges of [insert all charges to which self-defense applies]. [Name of defendant] is not required to prove that s/he acted in self-defense. Where evidence of self-defense is present, the government must prove beyond a reasonable doubt that [name of defendant] did not act in self-defense. If the government has failed to do so, you must find [name of defendant] not guilty.⁸¹

If, however, the defendant's belief that lethal force was required to prevent imminent death or serious bodily harm is not objectively reasonable, the defendant's claim of self-defense is "imperfect."⁸² A defendant's claim of self-defense is also imperfect if they used excessive force in what would have otherwise been a justified case of self-defense.⁸³ As discussed below, imperfect self-defense claims function as a mitigating circumstance.

Insanity and Diminished Capacity

It is a longstanding legal tradition that "an individual may be excused from the standards of conduct demanded by society of its members by reason of psychiatric abnormality."⁸⁴ The underlying rationale is that "[a]bsent circumstances which in the aggregate satisfy the concept of

⁸⁰ *Id.*

⁸¹ 1 Criminal Jury Instructions for DC Instruction § 9.500.

⁸² *Supra* note 81.

⁸³ *Swann v. United States*, 648 A.2d 928, 932 (D.C. App. 1994) ("[M]itigation to reduce second-degree murder to voluntary manslaughter may arise 'when excessive force is used in self-defense or in defense of another.'").

⁸⁴ *Bethea v. United States*, 365 A.2d 64, 72 (D.C. App. 1976).

‘free will’, an individual transgressor is dealt with in a manner which is significantly different from the response accorded the ordinary offender.”⁸⁵ Originally, the insanity defense “turned on the existence of one or more of three interrelated capacities: cognition, volition, and control over one’s own acts.”⁸⁶ Juries were asked to consider “whether at the time of the act the accused lacked the particular attributes deemed to constitute the essential aspect of free will.”⁸⁷

In *Bethea v. United States*, the D.C. Court of Appeals adopted the following standard for the insanity defense:

(1) A person is not responsible for criminal conduct if at the time of such conduct as a result of a mental disease or defect he lacked substantial capacity either to recognize the wrongfulness of his conduct or to conform his conduct to the requirements of law.

(2) As used in this standard, the terms “mental disease or defect” do not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct.⁸⁸

The current state of the insanity defense is, however, more most clearly presented in the pattern jury instruction for the defense, which reads in relevant part:

A defendant is not guilty by reason of insanity if, at the time of his/her criminal conduct, and as a result of mental disease or defect, s/he either lacked substantial capacity to conform his/her conduct to the requirements of the law or lacked substantial capacity to recognize the wrongfulness of his/her conduct.

Mental disease or defect includes any abnormal condition of the mind, regardless of its medical label, which affects mental or emotional processes and substantially impairs a person’s ability to regulate and control his/her conduct. A “mental disease” is a condition which is capable of either improving or deteriorating; a “mental defect” is a condition not capable of improving or deteriorating. An abnormal condition of the mind evidenced only by repeated criminal or otherwise antisocial conduct is not sufficient to establish that [name of defendant] had a mental disease or defect.

In considering whether [name of defendant] had a mental disease or defect at the time of the alleged offense, you may consider any evidence about the development, adaptation and functioning of [name of defendant’s] mental and emotional processes and ability to regulate and control his or her conduct. [Name of defendant] need not show that s/he was disoriented as to time or place.

⁸⁵ *Bethea v. United States*, 365 A.2d at 64.

⁸⁶ *Bethea v. United States*, 365 A.2d 64, 72 (D.C. App. 1976).

⁸⁷ *Bethea v. United States*, 365 A.2d 64, 72–73 (D.C. App. 1976).

⁸⁸ *Bethea v. United States*, 365 A.2d 64, 79 (D.C. App. 1976).

[Name of defendant] must prove not only that s/he had a mental disease or defect, but also that there was a causal relationship between the disease or defect and the unlawful act. To meet this burden, [name of defendant] must prove that, at the time of the alleged offense and as a result of mental disease or defect, s/he lacked substantial capacity either to conform his/her unlawful act[s] to the requirements of the law or to recognize the wrongfulness of his/her unlawful act[s]. You may consider any evidence of mental disease or defect you deem relevant in deciding whether the defendant has met this burden.⁸⁹

Provocation

“Unlike circumstances of justification or excuse,” discussed above, “legally recognized mitigating factors do not constitute a total defense to a murder charge.”⁹⁰ While mitigating circumstances are not a total bar to conviction, they serve to “dampen the otherwise malicious nature of the perpetrator’s mental state.”⁹¹ The presence of mitigating circumstances may, therefore, “justify a reduction from second-degree murder to voluntary manslaughter.”⁹² The most common case of mitigation arises when “the killer has been provoked or is acting in the heat of passion.”⁹³ Mitigation may also be found “when excessive force is used in self-defense” and “a killing is committed in the mistaken belief that one may be in mortal danger.” The pattern jury instructions for the District define mitigating circumstances in the following manner:

Mitigating circumstances can exist in two situations. They exist where a person acts in the heat of passion caused by adequate provocation. Heat of passion includes such emotions as rage, resentment, anger, terror and fear. Adequate provocation is conduct on the part of another that would cause an ordinary, reasonable person in the heat of the moment to lose his/her self-control and act on impulse and without reflection. For a provocation to be considered “adequate,” the person’s response must not be entirely out of proportion to the seriousness of the provocation. An act of violence or an immediate threat of violence may be adequate provocation, but mere words, no matter how offensive, are never adequate provocation. [The provocation must be such as would provoke a reasonable sober person. Therefore, if a person was provoked simply because s/he was intoxicated, and a sober person would not have been provoked, the provocation would not be considered as “adequate.”]

[Mitigating circumstances also exist when a person actually believes that s/he is in danger of serious bodily injury, and actually believes that the use of force that was likely to cause serious bodily harm was necessary to defend against that danger, but one or both of those beliefs are not reasonable.]⁹⁴

⁸⁹ 1 Criminal Jury Instructions for DC Instruction § 9.400.

⁹⁰ *Comber*, 584 A.2d at 41.

⁹¹ *Comber*, 584 A.2d at 41.

⁹² *Comber*, 584 A.2d at 41.

⁹³ *Comber*, 584 A.2d at 41.

⁹⁴ 1 Criminal Jury Instructions for DC Instruction § 4.202.

Other Jurisdictions' Approaches to Banning the LGBTQ+ Panic Defense

Eleven states – California, Colorado, Connecticut, Hawaii, Illinois, Maine, Nevada, New Jersey, New York, Rhode Island, and Washington – have enacted legislation prohibiting the LGBTQ+ panic defense. While the exact language in each state's prohibition varies, they generally operate by (1) identifying a particular defense or defenses (e.g., provocation, lack of capacity, self-defense, or defense of others); (2) specifying, when necessary, the particular offenses to which that defense applies (e.g., murder); and (3) limiting the defendant's ability to rely on "discovery of, knowledge about or potential disclosure of the victim's actual or perceived gender, gender identity, gender expression or sexual orientation."

The statutes in California, Hawaii, Illinois, New Jersey, and New York are the narrowest in scope. California, New Jersey, and New York's statutes only prohibit the use of the LGBTQ+ panic defense in a single context: mitigating a murder charge to voluntary manslaughter on the basis of adequate provocation. Similarly, Hawaii prohibits the use of the panic defense to mitigate first and second degree murder (and attempted murder) to voluntary manslaughter on account of "extreme mental or emotional disturbance." The Illinois statute is slightly broader, as it additionally bans the use of the panic defense as mitigation in capital cases. As introduced, B23-0435 is most comparable to these five measures, as it only prohibits the use of panic defenses when asserting adequate provocation in prosecutions for crimes of violence. B23-0435 does, however, enumerate traits beyond sexual orientation or gender identity, the discovery or disclosure of which could not be used in a claim of adequate provocation. Nevada and Washington prohibit the use of the panic defense in two contexts. Nevada has eliminated the use of the panic defense in the context of adequate provocation or self-defense. Washington, on the other hand, has banned the use of the panic defense for assertions of diminished capacity or self-defense. The Colorado, Connecticut, Maine, and Rhode Island statutes are the most complete bans of the panic defense. Each prohibits use of the panic defense for cases of adequate provocation, diminished capacity, or self-defense.

One final difference worth noting between statutes prohibiting the panic defense is whether discovery of, knowledge about, or disclosure of the trait of a victim has to be the *sole basis* for the defense. The statutes in California, Hawaii, Illinois, Nevada, New York, and Washington bar the use of panic defenses when commission of the crime "resulted from", was "based on", or was "because of" discovery of, knowledge about, or disclosure of the trait. In contrast, Connecticut, Maine, and Rhode Island bar the use of the panic defense when the crime "resulted solely from" or was "based solely on" discovery of, knowledge about, or disclosure of the trait. Colorado's ban on the panic defense is a hybrid, using "based on" in the context of self-defense, "results solely from" in the context of heat of passion, and, for mental defects, Colorado's ban states that "knowledge or awareness of the victim's actual or perceived gender, gender identity, gender expression, or sexual orientation shall not constitute inability to distinguish right from wrong." New Jersey's ban simply states "discovery of, knowledge about, or potential disclosure of the homicide victim's actual or perceived gender identity or expression, or affectional or sexual orientation. . . shall not be reasonable provocation."

Table 2: State LGBTQ+ Panic Defense Bans

<i>State</i>	<i>Statute</i>	<i>Offenses & Defenses Affected</i>	<i>Relevant Text</i>
California	Cal. Pen. Code § 192	Provocation (murder)	<p>“Manslaughter is the unlawful killing of a human being without malice. It is of three kinds:</p> <p>(a) Voluntary—upon a sudden quarrel or heat of passion.</p> <p>[. . .]</p> <p>(f)</p> <p>(1) For purposes of determining <i>sudden quarrel</i> or <i>heat of passion</i> pursuant to subdivision (a), the provocation was not objectively reasonable if it resulted from the discovery of, knowledge about, or potential disclosure of the victim’s actual or perceived gender, gender identity, gender expression, or sexual orientation, including under circumstances in which the victim made an unwanted nonforcible romantic or sexual advance towards the defendant, or if the defendant and victim dated or had a romantic or sexual relationship. Nothing in this section shall preclude the jury from considering all relevant facts to determine whether the defendant was in fact provoked for purposes of establishing subjective provocation.</p> <p>(2) For purposes of this subdivision, “gender” includes a person’s gender identity and gender-related appearance and behavior regardless of whether that appearance or behavior is associated with the person’s gender as determined at birth.”</p>
Colorado	Colo. Rev. Stat 16-8-101.5	Lack of capacity due to mental disease or defect (<i>any offense</i>)	<p>“(a) ‘Diseased or defective in mind’ does not refer to an abnormality manifested only by repeated criminal or otherwise antisocial conduct. Evidence of knowledge or awareness of the victim’s actual or perceived gender, gender identity, gender expression, or sexual orientation shall not constitute inability to distinguish right from wrong.”</p>
Connecticut	Conn. Gen. Stat. § 53a-13	Lack of capacity due to mental disease or defect (<i>any offense</i>)	<p>“(a) In any prosecution for an offense, it shall be an affirmative defense that the defendant, at the time the defendant committed the proscribed act or acts, lacked substantial capacity, as a result of mental disease or defect, either to appreciate the wrongfulness of his conduct or to control his conduct within the requirements of the law.</p> <p>(b)</p> <p>[. . .]</p> <p>(2) No defendant may claim as a defense under this section that such mental disease or defect was based solely on the discovery of, knowledge about or potential disclosure of the victim’s actual or perceived sex, sexual orientation or gender identity or expression, including under circumstances in which the victim made an unwanted, nonforcible, romantic or sexual advance toward the defendant, or if the defendant and victim dated or had a romantic relationship.”</p>
	Conn. Gen. Stat. § 53a-16	Provocation (<i>any offense</i>)	<p>“In any prosecution for an offense, justification, as defined in sections 53a-17 to 53a-23, inclusive, shall be a defense. Justification as a defense does not include provocation that resulted solely from the discovery of, knowledge about or potential disclosure of the victim’s actual or perceived sex, sexual orientation or gender identity or expression, including under circumstances in which the victim made an unwanted, nonforcible, romantic or sexual</p>

<i>State</i>	<i>Statute</i>	<i>Offenses & Defenses Affected</i>	<i>Relevant Text</i>
			advance toward the defendant, or if the defendant and victim dated or had a romantic relationship. As used in this section, ‘gender identity or expression’ means gender identity or expression, as defined in section 53a-181i.”
	Conn. Gen. Stat. § 53a-18	Self-defense and defense of others; defense of premises or property (<i>any offense</i>)	“(a) The use of physical force upon another person which would otherwise constitute an offense is justifiable and not criminal under any of the following circumstances: [. . .] (b) No person is justified in using force upon another person which would otherwise constitute an offense based solely on the discovery of, knowledge about or potential disclosure of the victim’s actual or perceived sex, sexual orientation or gender identity or expression, including under circumstances in which the victim made an unwanted, nonforcible, romantic or sexual advance toward the defendant, or if the defendant and victim dated or had a romantic relationship.”
Hawaii	H.R.S. § 707-702(2)	Extreme mental or emotional disturbance (<i>murder and attempted murder</i>)	“(2) In a prosecution for murder or attempted murder in the first and second degrees it is an affirmative defense, which reduces the offense to manslaughter or attempted manslaughter, that the defendant was, at the time the defendant caused the death of the other person, under the influence of extreme mental or emotional disturbance for which there is a reasonable explanation. The reasonableness of the explanation shall be determined from the viewpoint of a reasonable person in the circumstances as the defendant believed them to be; provided that an explanation that is not otherwise reasonable shall not be determined to be reasonable because of the defendant’s discovery, defendant’s knowledge, or the disclosure of the other person’s actual or perceived gender, gender identity, gender expression, or sexual orientation, including under circumstances in which the other person made an unwanted nonforcible romantic or sexual advance toward the defendant, or in which the defendant and the other person dated or had a romantic relationship. If the defendant’s explanation includes the discovery, knowledge, or disclosure of the other person’s actual or perceived gender, gender identity, gender expression, or sexual orientation, the court shall instruct the jury to disregard biases or prejudices regarding the other person’s actual or perceived gender, gender identity, gender expression, or sexual orientation in reaching a verdict.”
Illinois	720 ILCS 5/9-1(c)	Death penalty mitigation (<i>first degree murder</i>)	“(c) Consideration of factors in Aggravation and Mitigation. The court shall consider, or shall instruct the jury to consider any aggravating and any mitigating factors which are relevant to the imposition of the death penalty. Aggravating factors may include but need not be limited to those factors set forth in subsection (b). Mitigating factors may include but need not be limited to the following: Provided, however, that an action that does not otherwise mitigate first degree murder cannot qualify as a mitigating factor for first degree murder because of the discovery, knowledge, or disclosure of the victim’s sexual orientation as defined in Section 1-103 of the Illinois Human Rights Act [775 ILCS 5/1-103].”

<i>State</i>	<i>Statute</i>	<i>Offenses & Defenses Affected</i>	<i>Relevant Text</i>
	720 ILCS 5/9-2	Heat of passion / provocation (<i>second degree murder</i>)	<p>“(a) A person commits the offense of second degree murder when he or she commits the offense of first degree murder. . . and either of the following mitigating factors are present:</p> <p>(1) at the time of the killing he or she is acting under a sudden and intense passion resulting from serious provocation by the individual killed or another whom the offender endeavors to kill, but he or she negligently or accidentally causes the death of the individual killed; or</p> <p>[. . .]</p> <p>(b) Serious provocation is conduct sufficient to excite an intense passion in a reasonable person provided, however, that an action that does not otherwise constitute serious provocation cannot qualify as serious provocation because of the discovery, knowledge, or disclosure of the victim’s sexual orientation as defined in Section 1-103 of the Illinois Human Rights Act [775 ILCS 5/1-103].</p>
Maine	17-A M.R.S. § 38	Mental abnormality	<p>“An actor does not suffer from an abnormal condition of the mind based solely on the discovery of, knowledge about or potential disclosure of the victim’s actual or perceived gender, gender identity, gender expression or sexual orientation, including under circumstances in which the victim made an unwanted nonforcible romantic or sexual advance toward the actor or in which the actor and victim dated or had a romantic or sexual relationship.”</p>
	17-A M.R.S. § 108(3)	Self-defense and defense of others; defense of premises.	<p>“3. A person is not justified in using force against another based solely on the discovery of, knowledge about or potential disclosure of the victim’s actual or perceived gender, gender identity, gender expression or sexual orientation, including under circumstances in which the victim made an unwanted nonforcible romantic or sexual advance toward the person or in which the person and victim dated or had a romantic or sexual relationship.”</p>
	17-A M.R.S. § 201	Heat of passion/ provocation (<i>murder</i>)	<p>“1. A person is guilty of murder if the person:</p> <p>A. Intentionally or knowingly causes the death of another human being;</p> <p>[. . .]</p> <p>3. It is an affirmative defense to a prosecution under subsection 1, paragraph A, that the person causes the death while under the influence of extreme anger or extreme fear brought about by adequate provocation.</p> <p>4. For purposes of subsection 3, provocation is adequate if:</p> <p>A. It is not induced by the person; and</p> <p>B. It is reasonable for the person to react to the provocation with extreme anger or extreme fear, provided that evidence demonstrating only that the person has a tendency towards extreme anger or extreme fear is not sufficient, in and of itself, to establish the reasonableness of the person’s reaction.</p> <p>For purposes of determining whether extreme anger or extreme fear was brought about by adequate provocation, the provocation was not adequate if it resulted solely from the discovery of, knowledge about or potential disclosure of the victim’s actual or perceived gender, gender identity, gender expression or sexual orientation, including under circumstances in which the victim made an unwanted nonforcible romantic</p>

<i>State</i>	<i>Statute</i>	<i>Offenses & Defenses Affected</i>	<i>Relevant Text</i>
			or sexual advance toward the person or in which the person and victim dated or had a romantic or sexual relationship.”
Nevada	Nev. Rev. Stat. Ann. § 193.225(1)	Heat of passion / provocation (<i>any offense</i>)	“1. For the purpose of determining the existence of an alleged state of passion in a defendant or the alleged provocation of a defendant by a victim, the alleged state of passion or provocation shall be deemed not to be objectively reasonable if it resulted from the discovery of, knowledge about or potential disclosure of the actual or perceived sexual orientation or gender identity or expression of the victim, including, without limitation, under circumstances in which the victim made an unwanted nonforcible romantic or sexual advance towards the defendant, or if the defendant and victim dated or had a romantic or sexual relationship.”
	Nev. Rev. Stat. Ann. § 193.225(2)	Self-defense and defense of others	“2. A person is not justified in using force against another person based on the discovery of, knowledge about or potential disclosure of the actual or perceived sexual orientation or gender identity or expression of the victim, including, without limitation, under circumstances in which the victim made an unwanted nonforcible romantic or sexual advance towards the defendant, or if the defendant and victim dated or had a romantic or sexual relationship.”
New Jersey	§ 2C:11-4	Heat of passion / provocation (<i>murder</i>)	“b. Criminal homicide constitutes manslaughter when: (1) It is committed recklessly; or (2) A homicide which would otherwise be murder . . . is committed in the heat of passion resulting from a reasonable provocation. The discovery of, knowledge about, or potential disclosure of the homicide victim’s actual or perceived gender identity or expression, or affectional or sexual orientation, which occurred under any circumstances, including but not limited to circumstances in which the victim made an unwanted, non-forcible romantic or sexual advance toward the actor, or if the victim and actor dated or had a romantic or sexual relationship, shall not be reasonable provocation pursuant to this paragraph. As used herein, the terms “gender identity or expression” and “affectional or sexual orientation” shall have the same meaning as in section 5 of P.L.1945, c.169 (C.10:5-5).”
New York	NY CLS Penal § 125.25, Part 1 of 2	Heat of passion / provocation (<i>second degree murder</i>)	“A person is guilty of murder in the second degree when: 1. With intent to cause the death of another person, he causes the death of such person or of a third person; except that in any prosecution under this subdivision, it is an affirmative defense that: (a) (i) The defendant acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant’s situation under the circumstances as the defendant believed them to be. Nothing contained in this paragraph shall constitute a defense to a prosecution for, or preclude a conviction of, manslaughter in the first degree or any other crime. (ii) It shall not be a “reasonable explanation or excuse” pursuant to subparagraph (i) of this paragraph when the defendant’s conduct resulted from the discovery, knowledge or disclosure of the victim’s sexual orientation, sex, gender, gender identity, gender expression or sex assigned at birth;”

<i>State</i>	<i>Statute</i>	<i>Offenses & Defenses Affected</i>	<i>Relevant Text</i>
	NY CLS Penal § 125.26	Heat of passion / provocation (<i>aggravated murder; murder in the second degree</i>)	<p>“3. In any prosecution [for aggravated murder], it is an affirmative defense that:</p> <p>(a)</p> <p>(i) The defendant acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant’s situation under the circumstances as the defendant believed them to be. Nothing contained in this paragraph shall constitute a defense to a prosecution for, or preclude a conviction of, aggravated manslaughter in the first degree, manslaughter in the first degree or any other crime except murder in the second degree.</p> <p>(ii) It shall not be a “reasonable explanation or excuse” pursuant to subparagraph (i) of this paragraph when the defendant’s conduct resulted from the discovery, knowledge or disclosure of the victim’s sexual orientation, sex, gender, gender identity, gender expression or sex assigned at birth; or”</p>
	NY CLS Penal § 125.27	Heat of passion / provocation (<i>first degree murder; second degree murder</i>)	<p>“2. In any prosecution [for first degree murder], it is an affirmative defense that:</p> <p>(a)</p> <p>(i) The defendant acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant’s situation under the circumstances as the defendant believed them to be. Nothing contained in this paragraph shall constitute a defense to a prosecution for, or preclude a conviction of, manslaughter in the first degree or any other crime except murder in the second degree.</p> <p>(ii) It shall not be a “reasonable explanation or excuse” pursuant to subparagraph (i) of this paragraph when the defendant’s conduct resulted from the discovery, knowledge or disclosure of the victim’s sexual orientation, sex, gender, gender identity, gender expression or sex assigned at birth; or</p> <p>(b) The defendant’s conduct consisted of causing or aiding, without the use of duress or deception, another person to commit suicide. Nothing contained in this paragraph shall constitute a defense to a prosecution for, or preclude a conviction of, manslaughter in the second degree or any other crime except murder in the second degree.”</p>
Rhode Island	R.I. Gen. Laws Section 12-17-17	Heat of passion / provocation (<i>any offense</i>)	“For purposes of determining sudden quarrel or heat of passion, the provocation was not objectively reasonable if it resulted solely from the discovery of, knowledge about, or potential disclosure of the victim's actual or perceived gender, gender identity, gender expression, or sexual orientation, including under circumstances in which the victim made an unwanted, non-forcible romantic or sexual advance toward the defendant, or if the defendant and victim dated or had a romantic relationship.”
	R.I. Gen. Laws	Diminished capacity (<i>any offense</i>)	“A defendant does not suffer from reduced mental capacity based solely on the discovery of, knowledge about, or potential disclosure of the victim's actual or perceived gender, gender identity, gender expression, or sexual

<i>State</i>	<i>Statute</i>	<i>Offenses & Defenses Affected</i>	<i>Relevant Text</i>
	Section 12-17-18		orientation, including under circumstances in which the victim made an unwanted, non-forcible romantic or sexual advance toward the defendant, or if the defendant and victim dated or had a romantic or sexual relationship.”
	R.I. Gen. Laws Section 12-17-19	Self-defense	“A person is not justified in using force against another based solely on the discovery of, knowledge about, or potential disclosure of the victim's actual or perceived gender, gender identity, gender expression, or sexual orientation, including under circumstances in which the victim made an unwanted, non-forcible romantic or sexual advance toward the defendant, or if the defendant and victim dated or had a romantic or sexual relationship.”
Washington	Rev. Code Wash. (ARCW) § 9A.08.- --	Diminished capacity	“A defendant does not suffer from diminished capacity based on the discovery of, knowledge about, or potential disclosure of the victim’s actual or perceived gender, gender identity, gender expression, or sexual orientation, including under circumstances in which the victim made an unwanted nonforcible romantic or sexual advance towards the defendant, or in which the defendant and victim dated or had a romantic or sexual relationship.”
	Rev. Code Wash. (ARCW) § 9A.16.- --	Self-defense (<i>any offense</i>)	“A person is not justified in using force against another based on the discovery of, knowledge about, or potential disclosure of the victim’s actual or perceived gender, gender identity, gender expression, or sexual orientation, including under circumstances in which the victim made an unwanted nonforcible romantic or sexual advance towards the defendant, or in which the defendant and victim dated or had a romantic or sexual relationship.”

The Committee is persuaded of the need to eliminate the use of the LGBTQ+ panic defense in the District. The Committee recognizes the harm bias-motivated crimes inflict on the specific individual targeted and the larger community to which that victim belongs. The Committee Print, therefore, bans the use of three specific defenses when that defense is based on the discovery of, knowledge about, or the potential disclosure of the victim’s actual or perceived gender identity, gender expression, or sexual orientation: (1) heat of passion caused by adequate provocation; (2) insanity; and (3) self-defense, defense of others, or defense of property. The Committee Print limits the enumerated traits covered by the prohibition to gender identity, gender expression, and sexual orientation – the three traits mentioned in the bill as introduced. The Committee declines to extend the prohibition to defenses based on discovery of, knowledge about, or the potential disclosure of traits beyond gender identity, gender expression, and sexual orientation at this time. No other jurisdiction has limited certain defenses to based on discovery of traits beyond the three enumerated.

The “based on” standard that is used in the Committee Print appears in the bill as introduced and is consistent with a majority of jurisdiction that prohibit the use of panic defenses. This “based on” standard strikes a balance between the less prohibitive “based solely on” standard used in a minority of jurisdictions and the more expansive “related to” standard that appears in Bill 23-0409. The Committee declined to use the “based solely on” standard out of concerns it created to a high a threshold for determining whether or not certain defenses ran afoul of the prohibition on panic defenses. In using the “based on” standard, the Committee also rejected the “related to” standard

proposed in B23-0409. First, the “related to” standard is not used by any of the jurisdictions that have addressed the use of the panic defense. As Naida Henao of the Network for Victim Recovery of the DC testified at the Committee’s hearing, “eight other jurisdictions that have employed similar legislation use stronger and more specific language when it comes to the factual nexus between the defendant’s action and the discovery of, knowledge about, or potential disclosure of the enumerated victim characteristics.” Furthermore, she noted that the phrase “related to” “lacks the specificity and causality of the other terms, and thus prompts NVRDC to wonder if it may have any unintended effects or barriers to prosecution.”

At the same time, the Committee understands the need to allow defendants to present a complete defense. At the request of the Public Defender Service for the District of Columbia, the Committee Print includes a specific provision that allows a defendant to present evidence of past trauma. Specifically, the Committee Print states that “the defense may present evidence of prior trauma to the defendant for the purposes of excusing or justifying the defendant’s conduct or mitigating the severity of the offense.” As Ms. Semyonova testified, this “language ensures that the defendant will not be prevented from providing relevant evidence about the defendant’s past traumatic experience. Evidence of traumatic experiences that could be presented under this provision may include, for example, a prior sexual assault committed against the defendant, that a factfinder could conclude excuses, justifies, or mitigates the defendant’s violent conduct.”

Finally, the Committee did not include the requirement that judges issue the specific anti-bias jury instruction contained in the bill as introduced. During the hearing on the bill, Richard Gilbert, speaking on behalf of the District of Columbia Association of Criminal Defense Attorneys, urged “the Committee to defer to the process by which standard jury instructions in the District of Columbia are developed.” At the time, the current anti-bias jury instruction stated that:

You should determine the facts without prejudice, fear, sympathy, or favoritism.
You should not be improperly influenced by anyone’s race, ethnic origin, or gender.
Decide the case solely from a fair consideration of the evidence.

Since that hearing, the standard jury instruction has been amended to discourage bias against a broader range of characteristics. The body responsible for amending jury instructions includes judges from D.C. Superior Court and practitioners from U.S. Attorney’s Office, the Office of Attorney General, the Public Defender Service for the District of Columbia, and the private defense bar. Specifically, the jury instruction now states that:

As human beings, we all have personal likes and dislikes, opinions, prejudices, and biases. Generally, we are aware of these things, but you also should consider the possibility that you have implicit biases, that is, biases of which you may not be consciously aware. Personal prejudices, preferences, or biases have no place in a courtroom, where our goal is to arrive at a just and impartial verdict. All people deserve fair treatment in our system of justice regardless of any personal characteristic, such as race, national or ethnic origin, religion, age, disability, sex, gender identity or expression, sexual orientation, education, or income level. You should determine the facts solely from a fair consideration of the evidence. You

should decide the case without prejudice, fear, sympathy, favoritism or consideration of public opinion.⁹⁵

The Committee finds that this more expansive anti-bias instruction addresses the concerns witnesses testified about during the hearing.

b. ***Civil Hate Crimes and Human Rights Act Clarification***

The District’s current hate crimes civil enforcement regime is found at D.C. Official Code § 22–3704(a), which states that:

Irrespective of any criminal prosecution or the result of a criminal prosecution, any person who incurs injury to his or her person or property as a result of an intentional act that demonstrates an accused’s prejudice based on the actual or perceived race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, gender identity or expression, family responsibilities, homelessness, physical disability, matriculation, or political affiliation of a victim of the subject designated act shall have a civil cause of action in a court of competent jurisdiction for appropriate relief.

The actual scope of this subsection is not immediately apparent given the use of several terms of art. The subsection’s initial reference to “intentional acts” – a seemingly broad definition – is limited in scope by the subsection’s subsequent reference to “designated acts.” D.C. Official Code § 22–3701(2) defines a “designated act” as:

[A] criminal act, including arson, assault, burglary, injury to property, kidnapping, manslaughter, murder, rape, robbery, theft, or unlawful entry, and attempting, aiding, abetting, advising, inciting, conniving, or conspiring to commit arson, assault, burglary, injury to property, kidnapping, manslaughter, murder, rape, robbery, theft, or unlawful entry.⁹⁶

This term “bias-related crime” relies on the definition of “designated acts”:

Bias-related crime” means a designated act that demonstrates an accused’s prejudice based on the actual or perceived race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, gender identity or expression, family responsibility, homelessness, physical disability, matriculation, or political affiliation of a victim of the subject designated act.⁹⁷

Taken together, D.C. Official Code § 22–3704(a) can be summarized as allowing victims of bias-related crimes to pursue civil action.⁹⁸

⁹⁵ 1 Criminal Jury Instructions for DC Instruction § 2.102.

⁹⁶ D.C. Official Code § 22–3701(1).

⁹⁷ *Id.*

⁹⁸ *Uzoukwu v. Metro. Wash. Council of Gov’ts*, 983 F. Supp. 2d 67, 91 (D.D.C. 2013) (“This provision does not appear to apply to the instant set of facts because it appears to solely allow civil actions for conduct that would

Under current law, appropriate relief includes an injunction, actual or nominal damages for economic and non-economic loss, punitive damages, and attorney's fees.

The Committee Print strengthens existing law's civil action provision by explicitly permitting OAG to bring an action against a person who (1) commits a bias-related crime, or (2) through any act of violence, force, fraud, intimidation, or discrimination, interferes with, or attempts to interfere with, an individual's exercise of any right secured by the Constitution or District law, or deprives an individual of equal protection under the Constitution or District law. Further, the Committee provides subpoena authority for OAG to effectuate the enforcement power, as well as the ability to seek a range of civil relief, including injunctive relief; actual or nominal damages for economic or non-economic loss, including for emotional distress; punitive damages, including treble damages for economic or non-economic loss; attorney's fees; civil penalties of up to \$10,000 per act; and any other relief the court deems just.

The Committee Print importantly defines a "person" subject to the act's penalties to include "any individual, firm, corporation, partnership, cooperative, association, or any other organization, legal entity, or group of individuals however organized; provided, that for the purposes of a civil action brought against an individual pursuant to [the section providing OAG with civil enforcement authority], the term "person" shall not include an individual who is 17 years of age or younger." The bill also expands the definition of "bias-related crime" to explicitly include prejudice based on non-physical disabilities and clarify that a "designated act" demonstrating the defendant's prejudice based on a protected trait "need not solely be based on or because of an accused's prejudice". Lastly, the Print adds a definition for "discrimination" to mean differential treatment based on protected traits in the Human Rights Act.

Regarding the Print's clarification of the definition of "place of public accommodation", this change is described in full on pages 4-5 of this report.

c. *Community Harassment*

Defacing or Placing Symbols

The Anti-Intimidation and Defacing of Public or Private Property Criminal Penalty Act of 1982 prohibits the defacement of religious or secular symbols, or the display of certain emblems when done with the intent to discriminate against a person or class of persons, to intimidate someone from exercising their rights, to threaten harm, or to cause another to fear for their safety.⁹⁹ Specifically, D.C. Official Code § 22–3312.02(a) states that:

It shall be unlawful for any person to burn, desecrate, mar, deface, or damage a religious or secular symbol on any private premises or property in the District of Columbia primarily used for religious, educational, residential, memorial,

constitute a bias related 'crime.' Indeed, the District of Columbia enacted the bias related crime legislation 'to provide for the collection and publication of data about bias-related crime, and to provide enhanced penalties for persons who commit a bias-related crime and appropriate civil relief for a victim of bias-related crime.'

⁹⁹ D.C. Official Code § 22–3701(1).

charitable, or cemetery purposes, or for assembly by persons of a particular race, color, creed, religion, or any other category listed in § 2-1401.01, or on any public property in the District of Columbia.¹⁰⁰

D.C. Code Official § 22–3312.02(a) also makes it unlawful:

[T]o place or to display in any of these locations a sign, mark, symbol, emblem, or other physical impression including, but not limited to, a Nazi swastika, a noose, or any manner of exhibit which includes a burning cross, real or simulated.

To be unlawful, the act of defacing or placing a symbol must be done in such a way that it is probable that a reasonable person would perceive that the intent is:

(1) To deprive any person or class of persons of equal protection of the law or of equal privileges and immunities under the law, or for the purpose of preventing or hindering the constituted authorities of the United States or the District of Columbia from giving or securing to all persons within the District of Columbia equal protection of the law;

(2) To injure, intimidate, or interfere with any person because of his or her exercise of any right secured by federal or District of Columbia laws, or to intimidate any person or any class of persons from exercising any right secured by federal or District of Columbia laws;

(3) To threaten another person whereby the threat is a serious expression of an intent to inflict harm; or

(4) To cause another person to fear for his or her personal safety, or where it is probable that reasonable persons will be put in fear for their personal safety by the defendant's actions, with reckless disregard for that probability.”¹⁰¹

In its transmittal letter to the Council, the Executive discussed its concerns regarding a gap in prohibition against defacing symbols or placing emblems:

The current “display of certain emblems” statute only covers private premises or property in the District primarily used for religious, educational, residential, memorial, charitable, or cemetery purposes, or any public property. So, while more than twenty suspected nooses and swastikas have been reported in the District in 2017 and 2018, it is not clear that someone placing them on some types of property with an intent to intimidate or frighten the community could be held accountable. By expanding the statute to apply to any public property or private property of another without permission, the bill provides additional recourse in cases of

¹⁰⁰ The original prohibition on burning, desecrating, marring, defacing, or damaging was limited to “a cross or other religious symbol on any private premises or property in the District of Columbia primarily used for religious, educational, residential, memorial, charitable, or cemetery purposes, or for assembly by persons of a particular race, color, creed, or religion, or on any public property in the District of Columbia.” In 2008, the law was amended to protect against the burning, desecrating, marring, defacing, or damaging of secular symbols. Secondly, it extended the prohibition to private premises or property primarily used for assembly by particular groups beyond race, color, creed and religious by including the list of protected traits find at D.C. Official Code § 2–1401.01.

¹⁰¹ *Id.*

displays of certain symbols of hate.¹⁰²

The Committee agrees with this concern raised by the Mayor and, accordingly, the Committee Print extends the prohibition to “the private property of another without the permission of the owner or the owner’s designee”. The Committee Print also makes several additional clarifications to § 22–3312.02. First, to better reflect the fact that prior amendments to the statute expanded its prohibition to the defacement of secular – and not just religious – symbols, the Committee Print amends the section heading to now read “Defacement of certain symbols; display of certain emblems.” Secondly, the bill separates the two prohibitions covered by the statute – the defacement of certain symbols and display of certain emblems – into two separate sections. The Committee supports the suggestion of Attorney General Racine to clarify that the prohibition on the display of certain emblems not be limited to physical impressions and, therefore, removes the word “physical” from the statute.

The bill also clarifies the culpable mental states required by the offense based upon recommendations of the Criminal Code Reform Commission. Director Schmechel testified that:

As articulated in D.C. Code § 22-3312.02, the offense proscribes conduct “. . . where it is probable that a reasonable person would perceive that the intent is . . .” to intimidate, etc. However, it is unclear what intent or other mental state, if any, the offense requires, and that may be relevant as courts have only upheld a true threats exception to the First Amendment where based on at least recklessness.

The Committee Print, accordingly, requires that the person act “[r]eckless to the fact that a reasonable person would perceive that the intent of the person acting is” one of the four enumerated purposes. Secondly, the Committee Print clarifies the language used when describing each of the four intents.

Harassing an Entity

B23-0134, as introduced, would also create a new offense of harassing an entity. In the aforementioned transmittal letter, the Executive explained why it argued the District’s current stalking statute does not clearly cover incidents where someone targets an organization with harassment:

While the rise in reported hate crimes has been disturbing, the harassing incidents that may not currently be covered by our extensive statute on bias related crimes is just as troubling. Organizations have been targeted for repeated harassing phone calls and letters, causing alarm among employees and members. However, the existing stalking statute (D.C. Code § 22-3133) protects an “individual,” and it is unclear whether that will extend to the same behavior targeting an organization. As a result, the legislation seeks to serve as a remedy for entities organized by association for any established purpose that are vulnerable to serious incidents of

¹⁰² Transmittal Letter from Mayor Muriel Bowser to Council Chairman Phil Mendelson for B23-0134, the “Community Harassment Prevention Amendment Act of 2019” (February 6, 2019), <https://lims.dccouncil.us/downloads/LIMS/41857/Introduction/B23-0134-Introduction.pdf>.

harassment and implied threats. By providing law enforcement with a tool for combatting this harassment, it ensures that individuals can safely assemble to advance their common interests.¹⁰³

The Committee is, however, persuaded by testimony from the Public Defender Service, the Criminal Code Reform Commission, and the ACLU-DC that the statute may violate First Amendment protections for the freedom of speech and suffer from overbreadth and vagueness challenges. On this point, Nassim Moshiree of the ACLU-DC testified persuasively:

Most significantly, the new offense in question raises first amendment concerns about criminalizing speech solely based on its viewpoint. A person could be arrested under this statute for standing outside a fast-food eatery with a sign saying ‘eating hamburgers kills innocent animals’ (which might make employees feel distressed), while a person would not be liable for standing outside the same business with a sign promoting its business.

The bill’s exception clause stating that the ‘harassing an entity’ section ‘does not apply to constitutionally protected activity, is insufficient to protect against concerns that the bill may criminalize speech based on its content. We would not accept a law that provided, ‘saying something to an officer that the officer doesn’t like is a crime, unless it is constitutionally protected.’ Importantly, this exception clause would not prevent arrest and prosecution of individuals engaged in the conduct proscribed by the bill, even if they are ultimately acquitted on the ground that they were exercising a constitutionally protected right. We cannot expect law enforcement officers to be constitutional scholars to know whether an individual has committed a crime, nor should we expect the individuals engaged in the conduct to be constitutional scholars. If enacted into law, this bill could have a serious chilling effect on protected speech and lead to self-censorship and would likely be subject to constitutional challenges on those grounds.

Katya Semyonova, of the Public Defender Service, elaborated on the bill’s overbreadth in her testimony:

Even if the Council could prohibit some of the conduct contained in Bill 23-134, for instance, the prohibition of a course of conduct that includes threats, given the flaws outlined above, the entire statute would be susceptible to a challenge for overbreadth. A statute will be invalidated as overbroad if ‘a substantial number of its applications are unconstitutional, judged in relation to the statute’s plainly legitimate sweep.’ In 2017, the Illinois Supreme Court considered the constitutionality, on overbreadth grounds, of a stalking statute that Bill 23-134 mirrors in substantial part. The Illinois statute addressed the stalking of individuals rather than entities, but the difference is of little import since Bill 23-134 also targets individuals, but focuses on individuals who are connected with an ‘entity.’ The Illinois Supreme Court invalidated the stalking statute as overbroad, finding that the communication language prohibited a range of speech - including attending

¹⁰³ *Id.*

a public meeting and repeatedly complaining about pollution caused by a local business - that was at the heart of the First Amendment's protections.””

For these reasons, the Committee Print does not include the offense of harassing an entity, as it declined to do in the temporary legislation on this issue currently in effect.

LEGISLATIVE HISTORY

February 6, 2019	B23-0134 is introduced by Chairman Mendelson at the request of the Mayor.
February 15, 2019	Notice of Intent to Act on B23-0134 is published in the <i>District of Columbia Register</i> .
February 19, 2019	B23-0134 is referred to the Committee on the Judiciary and Public Safety.
June 7, 2019	Notice of Public Hearing on B23-0134 is published in the <i>District of Columbia Register</i> .
June 24, 2019	Public Hearing on B23-0134 is held by the Committee on the Judiciary and Public Safety.
September 16, 2019	B23-0409 is introduced by Chairman Mendelson and Committee Chairperson Allen.
September 17, 2019	B23-0435 is introduced by Councilmembers Grosso, Committee Chairperson Allen, and Councilmembers Cheh, Nadeau, Silverman, Todd, and Robert White; B23-0409 and B23-0435 are referred to the Committee on the Judiciary and Public Safety.
September 20, 2019	Notice of Intent to Act on B23-0409 is published in the <i>District of Columbia Register</i> .
September 27, 2019	Notice of Intent to Act on B23-0435 is published in the <i>District of Columbia Register</i> ; Notice of Public Hearing on B23-0409 and B23-0435 is published in the <i>District of Columbia Register</i> .
October 22, 2019	B23-0513 is introduced by Chairman Mendelson at the request of the Attorney General.
October 23, 2019	Public Hearing on B23-0409 and B23-0435 is held by the Committee on the Judiciary and Public Safety.
November 5, 2019	B23-0513 is referred to the Committee on the Judiciary and Public Safety.

November 8, 2019	Notice of Intent to Act on B23-0513 is published in the <i>District of Columbia Register</i> .
January 10, 2020	Notice of Public Hearing on B23-0513 is published in the <i>District of Columbia Register</i> .
March 3, 2020	Public Hearing on B23-0513 is held by the Committee on the Judiciary and Public Safety.
November 23, 2020	Consideration and vote on B23-0409 by the Committee on the Judiciary and Public Safety.

POSITION OF THE EXECUTIVE

B23-0134

The Committee received testimony at its June 24, 2019 public hearing on B23-0134 from Kelly O'Meara, Executive Director, Strategic Change Division, Executive Office of the Chief of Police, Metropolitan Police Department, whose testimony is summarized below:

Kelly O'Meara – Executive Director, Strategic Change Division, Executive Office of the Chief of Police, Metropolitan Police Department

Ms. O'Meara testified on behalf of the Executive in support of B23-0134. She noted that the bill would “close gaps in the District’s law dealing with offenders trying to intimidate or cause fear in our communities.” She stated that under District law, there is not a specific “hate crime.” It is, rather, “a designation that makes an enhanced penalty available to the court” in cases where the crime is motivated by bias against the victim. She noted that in 2017, “a synagogue in the District received a series of letters that did not rise to the level of a direct threat, but were certain concerning, especially in totality.” The U.S. Attorney’s Office “agreed that it was unclear whether the current [stalking] statute would extend to the same behavior targeting an organization.” The proposed offense of harassing an entity was developed in response to this perceived gap in the law. She notes that the proposed offense “mirrors the District’s existing stalking offense, and prohibits a person from purposefully engaging in a course of conduct directed at a specific entity with the intent to cause members, participants, or employees of that entity to fear for their safety, feel alarmed, disturbed, frightened, or suffer emotional distress.” Under the bill, a course of conduct “requires three or more incidents.”

Ms. O'Meara also discussed prior bias-motivated incidents that “prompted the proposal to amend the District’s statute on burning or desecrating religious or secular symbols, or displaying certain emblems.” In 2017, “fifteen nooses were found at museums, monuments, universities, construction sites, and other locations.” Swastikas were also found in one dozen cases. The swastikas were typically graffiti and were separately punishable as destruction of property. “The nooses, however, did not involve damage to, or destruction of, property, so it was not clear that the District could hold someone accountable for hanging nooses at construction sites, or on utility wires or trees.” The current law would also likely not apply movie theaters and sports arenas, as

they are privately owned properties that are open to the public. The legislation would address this gap in the law “by prohibiting these activities or displays on any private property of another without permission of the owner or the owner’s designee, or on any public property in the District. Ms. O’Meara noted that the bill would criminalize the display of certain emblems when done with the intent to threaten property; the law is currently limited to the display of certain emblems when made with the intent to threaten a person. But a “burning cross may only demonstrate a threat to property, but it would be alarming nonetheless.”

B23-0409 and B23-0435

The Committee received testimony at its October 23, 2019 public hearing on B23-0409 and B23-0435 from then-Deputy Mayor for Public Safety and Justice Kevin Donahue, whose testimony is summarized below:

Kevin Donahue – Deputy Mayor for Public Safety and Justice

Deputy Mayor Donahue testified on behalf of the Executive in support of B23-0409 and B23-0435. He argued that “use of the defense implies that a victim’s sexual orientation or gender identity somehow justifies a defendant’s loss of self-control and subsequent attack.” He noted that the District would join several states in enacting this legislation, including California, Illinois, Rhode Island, Nevada, Connecticut, Maine, Hawaii, and New York.

B23-0513

The Committee did not receive testimony or comments from the Executive on B23-0513.

ADVISORY NEIGHBORHOOD COMMISSION COMMENTS

The Committee received the following testimony or comments from Advisory Neighborhood Commissions:

B23-0409 and B23-0435

Japer Bowles – Commissioner, IC07

Commissioner Bowles is the Chair of the ANC Rainbow Caucus, and he testified in support of B23-0409. Mr. Bowles stated that according to the LGBTQ Bar Association, juries have acquitted dozens of individuals accused of murder based on a panic defense; one case was as recent as April 2018. Mr. Bowles stated that the panic defense is not a “freestanding” legal defense, but is a legal strategy used to bolster other defenses. He argued that when a defendant uses a panic defense, “they are claiming that a victim’s sexual orientation or gender identity not only explains, but excuses, a loss of self-control and the subsequent assaults.” Mr. Bowles stated that the full or partial acquittal of a defendant’s conduct against LGBTQ+ individuals implies that their lives are worth less than others. He implored the Committee to pass the bill as an important step in making the LGBTQ+ community safer.

John Guggenmos – Commissioner, 2F02

Mr. Guggenmos reflected on the killing of Matthew Shepard in Laramie, Wyoming. Mr. Shepard was beaten to death by two men for being gay. The two defendants – Russell Henderson and Scott McKinney – unsuccessfully invoked the “homosexual panic defense” at their trial. Mr. Guggenmos believes the defense codifies homophobia into law and is disappointed by its continued availability in the District.

Mike Silverstein – Commissioner, 2B06

Commissioner Silverstein testified on behalf of B23-0409. He is a member of the ANC Rainbow Caucus, which is composed of 23 openly LGBTQ+ advisory neighborhood commissioners from across the District. Mr. Silverstein began his testimony by describing attacks against three members of the LGBTQ community. Zoe Spears, a transgender woman, was shot and killed near her home. Carl Craven and Braden Brecht were assaulted on U Street. Mr. Silverstein also summarized a recent article from the *Washington Post* where it was reported that, of the 204 hate crimes committed in the District, 59 resulted in an arrest, 3 resulted in a prosecution involving the hate crime enhancement, and no cases resulted in convictions. A *Post* article published just that morning revealed that the number of reported hate crimes in the District surpassed the previous year.

In response to crimes committed against their community, the Rainbow Caucus proposes a number of legislative changes to improve the safety of the LGBTQ community. First, Mr. Silverstein proposed banning the gay and trans panic defense. “The idea that someone might attack us or kill us because of our sexuality or gender identity, and that [the panic defense] might consider who we are a mitigating factor is insulting and dehumanizing.” He encouraged that the District join at least a dozen other states that have already enacted bans on the panic defense. Mr. Silverstein also recommended that the Council clarify the jury instructions that define a hate crime. He says that the current definition requires that the bias against the protected class must be the “sole” or “primary” factor driving the commission of the offense, which creates an impossibly high threshold for considering an offense a hate crime. Third, he recommended greater transparency with respect to enforcement and prosecution of hate crimes, including notifying the community when a hate crime has taken place, whether an arrest has been made, whether a bias-related enhancement has been sought, and the final disposition of the case. Finally, Mr. Silverstein argued the LGBTQ+ community should be notified of cases involving juveniles who committed the harm.

Kishan Putta – Commissioner, 2E01

Commissioner Putta testified in support of B23-0409. He stated that the District has one of the highest rates of hate crimes in the United States, he expressed support for the bill’s inclusion of protected traits in addition to gender identity, gender expression, or sexual orientation. He noted that many members of the Asian and Pacific Islander community have increasingly been victims of hate crimes in the years after the September 11 attacks and after the most recent presidential election. According to South Asians Leading Together, following that election, there were 302 incidents of violence, xenophobia, or harmful political rhetoric aimed at the Asian-Pacific Islander

Community – a more than 45% increase over the previous year. He also recounted ethnic and religious slurs to which he and his family have been subjected.

ANC 2B

Advisory Commission 2B submitted a resolution in support of the bill. The resolution notes that the District has one of the largest LGBTQ populations per capita, but has yet to pass legislation prohibiting the panic defense. It also states that “the most recent victims of locally reported hate crimes against the LGBT+ community are persons of color.” The resolution urges the Council to pass legislation banning the use of the panic defense.

ANC 4B

Advisory Neighborhood Commission 4B submitted a resolution in support of the bill. The resolution states that “these defenses imply that LGBTQ lives are worth less than others.” The Commission believes the “murders of Ashanti Carmon and Zoe Spears, two D.C. transgender women of color . . . and other recent acts of violence against members of the LGBTQ community clearly underscore the need for this type of legislation.” The Commission noted that “[m]ultiple transgender women have been the victims of violent crime within the boundaries of the Commission or directly adjacent to the Commission.” The resolution asks that the Council pass legislation prohibiting the use of the panic defense.

B23-0513

Salim Adofo – Commissioner, 8C07

Commissioner Adofo reflected on the historical discrimination Black people have experienced in the United States since its founding. He stated that this discrimination has continued to the present, and he discussed a recent ruling by the D.C. Superior Court regarding housing discrimination. In light of the continued discrimination District residents face, he believes “it is clear that the Attorney General needs to have the authority this bill is requesting.”

WITNESS LIST AND HEARING RECORD

B23-0134

On Monday, June 24, 2019, the Committee on the Judiciary and Public Safety held a public hearing on B23-0134. A video recording of the public hearing can be viewed at <https://entertainment.dc.gov/page/on-demand-2019>. The following witnesses testified at the hearing or submitted statements to the Committee outside of the hearing:

Public Witnesses

Nassim Moshiree – Policy Director, ACLU of the District of Columbia

Ms. Moshiree testified on behalf of the American Civil Liberties Union of the District of Columbia. She stated that the proposed offense of harassing an entity is “vague, overly broad, and could have the unintended consequence of chilling and criminalizing constitutionally protected speech.” She noted that the definition of “entity” is vague and argued that it is “unclear how someone could harass an entity without separately harassing the people belonging to that entity, which would already be covered by DC’s existing stalking statute, making this provision unnecessary.” She noted that the statute’s stated purpose of “helping to ensure individuals can safely assemble to advance their common interests” is incredibly broad. She also argued that attaching liability to conduct that causes another to “suffer emotional distress” is too broad, as “emotional distress is a normal byproduct of speech.” She also provided examples of the way the law could be viewed as promoting viewpoint-based discrimination in violation of the First Amendment. Finally, Ms. Moshiree urged the Committee to postpone taking action on the bill until the Criminal Code Reform Commission has issued its recommendations for comprehensive criminal code reform.

Government Witnesses

Karl Racine – Attorney General for the District of Columbia

Attorney General Racine testified in support of the bill. He noted the rise in bias-motivated crimes in the District and believes the bill will “offer broader and newer protections for District residents.” He proposed amending some of the language in the statute to “make it clear that the sign or mark does not have to be a ‘physical impression’ left on a structure.” With this change, “the project of a noose . . . on a building to intimidate any person or any class of person from” exercising their rights would be covered by the prohibition.

Attorney General Racine also noted that under current law, “persons associated with entities are not protected by the stalking statute.” The new crime of harassing an entity “will enable law enforcement and prosecutors to assist during instances where an entity is purposefully targeted by a criminal course of conduct” with the requisite intent. He proposed removing the phrase “but not limited to” as superfluous.

Katya Semyonova – Special Counsel to the Director for Policy, Public Defender Service for the District of Columbia

Ms. Semyonova testified on behalf of the Public Defender Service in opposition to the bill. She echoed concerns that the definition of “entity” provided in the bill is vague. She also argued that the bill would violate the First Amendment because it discriminates against speakers based on the content of their speech. The bill “would criminalize, for example, the act of standing outside of a baker that refused to bake a cake for a gay wedding and communicating to others the need to boycott the baker’s business.” This speech would be unlawful “because it would cause the baker to suffer emotional distress over the loss of business revenue.” The bill would not, however,

“criminalize the conduct of standing outside of the baker and telling employees or people who happen to pass by the baker about the amazing skills of the baker.” This content-based restriction on speech is “presumed to be invalid.”

Ms. Semyonova further argued that “[e]ven if the Council could prohibit some of the conduct contained in [the bill], for instance, the prohibition of a course of conduct that includes threats . . . the entire statute would [be] susceptible to challenge for overbreadth. She noted that an Illinois stalking statute that closely resembles the bill was struck down by Illinois’ Supreme Court as overbroad, “finding that the communication language prohibited a range of speech – including attending a public meeting and repeatedly complaining about pollution caused by a local business – that was at the heart of the First Amendment’s protections.

In closing, Ms. Semyonova explained why the statute’s exception for constitutionally protected activity does not resolve First Amendment concerns. She noted that the exception “functions only as an affirmative defense at trial,” and does not prevent the arrest and prosecution of individuals engaged in constitutionally protected speech. The Illinois Supreme Court, dealing with a similar provision on the aforementioned stalking law, noted that “the exemption cannot eliminate the chilling effect on protected speech and the resulting self-censorship.” She encouraged the Committee to wait for the Criminal Code Reform Commission’s final comprehensive criminal code reform recommendations to be issued before taking action.

Richard Schmechel – Executive Director, Criminal Code Reform Commission

Director Schmechel noted that the bill would “codify a different and much broader rationale for a harassing entity offense than addressing hate crimes – namely, ‘helping to ensure that individuals can safely assemble to advance their common interest.’” Although the Mayor’s transmittal letter cites the increase in bias-related crimes, the offense is “not limited to stalking that is based on hate or bias, nor are the bill’s changes limited to traditional ‘protected classes’ based on race, religion, national origin, sex, age, etc.” The definition of entity includes, but is not limited to, those same protected classes. The offense, consequently, captures a broader range of conduct than just hate or bias-related crimes. Mr. Schmechel also noted that “there is no requirement in the bill . . . that a person actually experienced fear for safety based on the accused’s actions.” That means that despite its stated purpose, “the harassing an entity statute criminalizes a wide array of conduct that does not necessarily cause a person to fear for their physical safety, individually or in assembly.”

Director Schmechel reiterated concerns that the bill “appears to criminalize a wide swath of ordinary, constitutionally-protected First Amendment Activity,” and cited the Illinois Supreme Court’s decision invalidating a similar stalking statute. He also cautioned that “[f]orceful, bigoted hate speech may reasonably be thought to cause a person severe emotional distress, yet even such speech is protected and cannot be specifically prohibited except where such speech constitutes a “true threat,” “solicitation of a crime,” or another recognized exception to First Amendment protection.” Moreover, the bill’s proposed prohibition “reaches speech about a person that is far less condemnable than hate speech,” such as “vilifying a business and its employees for environmental pollution, criticizing the performance of a healthcare facility, or remonstrating a government unit for ethical breaches.”

Director Schmechel also noted that the savings clause for harassing an entity “does not sufficiently shield such activity from unconstitutionally chilling speech.” He noted that the Illinois Supreme Court, in the case reviewing a similar stalking, found that the savings clause is an affirmative defense, ““which cannot eliminate the chilling effect on protected speech and resulting self-censorship.”” Furthermore, a “case-by-case discretionary decision by law enforcement officers and prosecutors does not solve the problem of the chilling effect on innocent speakers who fear prosecution based on negligently made distressing communications to or about a person.”

Finally, with respect to the offense of harassing an entity, he noted that the “statute does not require proof of a pattern of infringement against any specific individual.” Consequently, “one-time victimization of two persons in an entity . . . is sufficient.” This runs counter to the District’s current stalking statute, which requires “action on two or more occasions that is directed at the same ‘specific individual.’”

With respect to the amendments to the District’s prohibition on defacing symbols or displaying emblems, Director Schmechel cautioned that the Criminal Code Reform Commission has not “fully evaluated or developed draft recommendations regarding [the current statute].” He did, however, noted that “the bill does not specify complete culpable mental state requirements for the amended D.C. Code § 22-3312.02. It is, therefore “unclear what intent or other mental state, if any, the offense requires, and that may be relevant as courts have only upheld a true threats exception to the First Amendment where based on at least recklessness.”

B23-0409 and B23-0435

On Wednesday, October 23, 2019, the Committee on the Judiciary and Public Safety held a public hearing on B23-0409 and B23-0435. A video recording of the public hearing can be viewed at <https://entertainment.dc.gov/page/on-demand-2019>. The following witnesses testified at the hearing or submitted statements to the Committee outside of the hearing:

Public Witnesses

Mark Rodeffer – Public Witness

Mr. Rodeffer testified about his own experience of being attacked by a man who perceived his sexual orientation as gay. In January 2013, Mr. Rodeffer was assaulted in the bathroom of the Washington Sports Club by an individual who repeatedly used homophobic slurs. Mr. Rodeffer’s assailant was arrested and charged with assault, and USAO-DC pursued a sentencing enhancement for the commission of a bias-related crime. At trial, Mr. Rodeffer stated that defense counsel told the jury that someone could believe that Mr. Rodeffer was making an unwanted sexual advance on the defendant, and that it is widely known that gay men seek unwanted sexual encounters in public restrooms. Mr. Rodeffer found the experience traumatic. While these claims had no evidentiary basis, the jury ultimately acquitted the defendant in Mr. Rodeffer’s case. While he is supportive of the legislation, Mr. Rodeffer believes that it is not comprehensive enough. In addition to prohibiting the use of panic defenses, Mr. Rodeffer believes that defense counsel should be

prohibited from arguing “that people in minority groups are different, weird, or perverted.” He asks that the Council stop the use of bigotry as a legal defense.

Bobbi Strang – President, Gay and Lesbian Activists Alliance

Ms. Strang testified in support of the bill. She stated that the District has experienced a significant increase in the commission of hate crimes, and she does not believe this increase can be attributed solely to more frequent reporting. Given the increase, the failure of USAO-DC to prosecute these offenses is troubling. Mr. Strang is skeptical of USAO-DC’s claim that the jury instruction for bias-related crime enhancements makes it difficult to pursue such an enhancement at trial. Ms. Strang also discussed the use of panic defenses in the District – most notably, in the cases of Bella Evangelista and Tony Hunter. Ms. Strang opposed the use of panic defenses, stating that “our existence does not constitute incitement and should not be grounds for a legal defense.”

Ruby Corado – Executive Director, Casa Ruby

Ms. Corado testified in support of the bill. Ms. Corado is a transgender woman who founded an LGBTQ community center as a refuge for youth struggling from violence and HIV. Ms. Corado recounted the moment she was notified that Bella Evangelista had been shot and about her own experience being attacked by a former romantic partner. She also spoke about being notified about the death of Zoe Spears, and the emotional toll that losing members of her community takes. She discussed how gender identity intersects with race, and that discrimination against LGBTQ people of color reinforces the notion that their lives have little value.

Nina J. Ginsberg – President, National Association of Criminal Defense Lawyers

Ms. Ginsberg testified on behalf of the National Association of Criminal Defense Lawyers in opposition to B23-0409. Ms. Ginsberg argued that eliminating the panic defense will not help reduce violence committed against members of the LGBTQ community, nor will it aid in the prosecution of hate crimes in the District. She argued that the categorical prohibitions against certain defenses contained in the bill undermine a defendant’s constitutional right to present a complete defense. The right to present a defense encompasses the presentation of any evidence that shows that the accused person did not commit a crime, or that their actions were justified, excused, or mitigated. She also argued that the “the categorical, legislative prohibition of specific defenses wisely presumes that judges are not capable of determining that which is relevant and admissible evidence, when in fact judges, who have heard all of the evidence during a trial, are in the best position to apply long-established rules of evidence to the unique facts and circumstances of the cases which come before them.” Additionally, Ms. Ginsberg stated that the bill “denigrate[s] the ability of your constituents, the persons who are selected to serve on juries in the District to follow instructions, and presupposes that these citizens are incapable of discharging their duty to render fair verdicts due, in the case of these bills, to their own homophobia, transphobia, and bigotry.” While she understands the desire to legislate policy changes to protect vulnerable, oppressed, or marginalized populations, she believes the desire to categorically prohibit certain defenses is based on “public discourse around high profile cases which tends to stir passions and to distill complicated facts and circumstances into sensationalistic headlines and rhetorical soundbites.”

Richard Gilbert – Chair, Legislative Committee, D.C. Association of Criminal Defense Lawyers

Mr. Gilbert testified on behalf of the D.C. Association of Criminal Defense Lawyers in opposition to B23-0409. First, Mr. Gilbert criticized a provision in the legislation that mandates that a judge issue an anti-bias jury instruction upon request. He urged the Committee “to defer to the process by which standard jury instructions in the District of Columbia are developed.” He provided background information on the use of jury instructions, and also explained how jury instructions for the District – consolidated in the “Redbook” – are developed in consultation with judges, prosecutors, and defense attorneys. He proposed alternative language to be used in an anti-bias jury instruction.

Mr. Gilbert then turned to a discussion of the gay panic defense. He said the most common circumstances in which a defendant asserts a gay panic defense is “when a heterosexual male engages with a stranger whom he believes to be biologically [female] for the purposes of a sexual encounter, whether commercial or consensual, and discovers during the encounter that the stranger is biologically [] male. Or when a heterosexual male receives an unexpected, unwanted, overt sexual advance from someone he believes to be another male.” In passing a bill limiting the defense, Mr. Gilbert believes that the “Council ignores basic human psychology when it ignores the role that sexual interactions can play in human emotions.” “Sex,” he argued, “is different than our everyday encounters and “is intensely personal, profoundly implicates our self-identity and frequently evokes powerful emotions.” While some of these emotions may be positive – such as affection and desire – sex can also implicate negative emotions of revulsion, fear, and shame. He noted that this is “particularly true if the defendant himself has been the victim of sexual abuse as a child.” He also argued that “years of religious doctrine and cultural influence may unfortunately convince some heterosexual persons that homosexual conduct is an ‘abomination’ or ‘unnatural.’ If these influences “combine in an instant when confronted by unexpected and unwanted” advances, “a defendant should be permitted to” make their case to the jury. Mr. Gilbert also highlighted specific concerns related to the bill’s language, including references to “potential disclosure,” “unwanted, non-forcible sexual advances,” “reduced mental capacity,” and group association.

In closing, Mr. Gilbert emphasized that “DCACDL applauds the extension of complete civil rights to the LGBTQ community and we deplore the senseless acts of violence perpetrated on members of it and other minority communities.” But DCACDL cannot “support depriving criminal defendants of long recognized defenses simply because of the characteristics of the victim.”

Sasha Buchert – Senior Attorney, Lambda Legal

Ms. Buchert testified in support of the bill. She noted that LGBTQ people, and transgender women of color in particular, “move through the world under the constant threat of impending violence.” At least 21 transgender people had been murdered in the United States in 2019 as of the hearing. Two of those murders – those of Zoe Spears and Ashanti Carmen – took place in the D.C. Metropolitan Area. Ms. Buchert also noted that a record number of hate crimes took place in the

District in 2019, and a disproportionate number of those crimes were motivated by the offender's bias regarding the victim's actual or perceived sexual orientation.

Ms. Buchert stated that in Bella Evangelista's case, "the defendant argued that he became enraged when he discovered her gender identity." In Mr. Hunter's case, "the defendant told police that he fatally punched Tony in self-defense after Mr. Hunter supposedly made a sexual overture." Ms. Buchert also discussed notable cases from outside the District in which a panic defense was raised, including the cases of Islan Nettles and Matthew Shephard.

Ms. Buchert noted that D.C. has a hate crimes statute that applies whenever someone is targeted for their identity, and she argued that "just as no one should be targeted as a victim based on [the perpetrator's] bias against their gender identity, sexual orientation, or other protected characteristics, those biases should not be the basis for a mental state of mind reducing criminal responsibility." She argued that permitting the panic defense "inevitably sends the message that this violence is culturally understandable and even permissible."

As a final note, Ms. Buchert recommended that the defenses of diminished capacity and self-defense be addressed in the final legislation. She also encouraged that the legislative prohibition against the panic defenses be expanded to cover all protected traits, not just gender identity and sexual orientation.

Glennis McLeod – Pubic Witness

Ms. McLeod testified in opposition to the bill.

Naida Henao – Strategic Advocacy Counsel, Network for Victim Recovery of D.C. ("NVRDC")

Ms. Henao testified on behalf of NVRDC in support of the bill. She stated that while the rate at which hate crimes are committed in the District has increased, there has not been an increased effort at "holding offenders accountable". That being said, NVRDC shares a concern from PDS about the lack of more specific language "when it comes to the factual nexus between the defendant's action and the discovery of, knowledge about, or potential disclosure of the enumerated victim characteristics." Ms. Henao noted that other jurisdictions that have banned the panic defense do so when the defendant's actions are "because of," resulting from," or "resulting solely from" the victim's protected trait. Presently, the D.C. bill only requires that the defendant's action is "related to" these characteristics. She believes that the phrase "related to" lacks specificity, and urged the Committee to closely examine the language present in similar bills from other jurisdictions.

Doron F. Ezickson, Washington, D.C. Regional Director, Anti-Defamation League

Mr. Ezickson testified to the impact of hate crimes on victims and shared national and local data on incidences of such crimes. He provided several recommendations aimed at reducing hate crimes, including reexamining the District's hate crimes framework with key stakeholders, suggesting model language, speaking out against hate and extremism, taking steps to ensure

victims know how to and feel safe reporting hate crimes to law enforcement, and ensuring sufficient resources to prosecute.

Dr. Stacey Karpen Dohn – Senior Manager of Behavioral Health, Whitman Walker Health

Dr. Dohn testified on behalf of Whitman Walker Health in support of the bills. Dr. Dohn facilitated the expansion of Whitman Walker's Behavioral Health Department "to include providing mental health care to LGBTQ youth, specifically victims of violence." She noted that many of her LGBTQ and HIV-positive patients have "fears of discrimination, stigmatization and victimization [that] are ingrained in the day-to-day tasks of living." She argues that the gay and trans panic defense has "instilled fear in the lives of LGBTQ people and their loved ones" because they "allow anyone to use an immutable characteristic . . . to blame the victim for the violence perpetrated against them." Justifying or excusing violence committed against someone because of their sexual orientation, gender identity, or HIV status sends the message that they are "inherently less worthy and less human compared to those who do not identify as LGBTQ or those who are HIV negative."

She noted that in 1973, the American Psychiatric Association removed the diagnosis of homosexuality and homosexual panic disorder from the Diagnostic and Statistical Manual of Mental Disorders. She argued that members of the LGBTQ community "have for decades fought to disassociate themselves with homophobia and transphobic associations with predation, deviance and perversion." But the continued acceptance of panic defenses "legally sanctions those associations." In fact, statistics revealed that LGBTQ are far more likely to be victimized than their non-LGBTQ peers.

Joseph Vardner – President, D.C. LGBT Bar Association

Mr. Vardner testified on behalf of the LGBT Bar Association in support of the bills. He noted that there has been an increase in bias-related crimes in the District. In 2018, there were 206 reported bias-related crimes in the District, a significant increase over prior years. But "almost none of these crimes were prosecuted under the bias-related crimes statute," which "has created a sense of fear and uncertainty within the LGBT community."

Mr. Vardner also pointed out the various legal organizations that support elimination of the gay panic defense, including the American Bar Association and the National LGBT Bar Association. He explained that bills eliminating the gay and trans panic defense do so by eliminating "discovery of a person's sexual orientation or gender identity as provocation for a violent crime and it instructs the judiciary to remind jurors that bias and prejudice should not factor into their decision." Mr. Vardner also stated that "[w]hile the state requires evidence 'that demonstrates the accused's prejudice,' the actual jury instructions issued require evidence that the crime was committed 'because of prejudice.' He urged the Committee "to send a message to the publisher of the Red Book encouraging them to align their publication with the statute." Finally, Mr. Vardner also recommended that the Committee update the bias-crime statute "to reduce alleged uncertainty in its requirements."

Government Witnesses

Toni Michelle Jackson – Deputy Attorney General, Office of the Attorney General for the District of Columbia

Ms. Jackson testified in support of the bill, noting that the panic defense “provides an excuse for violent crime based on the victim’s identity.” The defense “compounds the negative effects of the increase in bias-motivated violence.” OAG does not believe “there is any valid criminal justice reason to allow a perpetrator to use a victim’s identity to justify or excuse violence.”

Katerina Semyonova – Special Counsel to the Director for Policy, Public Defender Service for the District of Columbia

Ms. Semyonova testified in opposition to B23-0409 on behalf of the Public Defender Service (“PDS”). PDS categorically opposes “any statutory changes that decrease a jury’s ability to hear any defense proffered by the defendant.” She noted that this is especially important in the District, which “has one of the highest incarceration rates in the country.” She argued that the “proposed limitations on [the] heat of passion [defense] may have the unintended consequence of preventing individuals who are targeted because of their race, gender, or sexual orientation from presenting a full defense.”

Ms. Semyonova proceeded to summarize relevant District law. She explained that “in prosecutions for mayhem, malicious disfigurement, assault with intent to commit murder, and first and second degree murder, the prosecution must prove the absence of mitigating circumstances, but only in cases where there is sufficient evidence to warrant an instruction on mitigation.” Jurors are, accordingly, “never instructed on mitigation, heat of passion, or provocation if a judge does not determine in the first instance that legally sufficient evidence of mitigation exists.” If “the prosecution fails to prove the absence of mitigating circumstances, jurors may convict the defendant of lesser included offenses such as assault or manslaughter.” She also noted that provocation “exists only when the conduct of another would cause a reasonable person to lose control, and mere words, no matter how offensive, are never adequate.”

She asked that if the Council wishes to create some limitation on a defendant’s rights to present a full defense, that we modify the language to foreclose a heat of passion defense “*only* when defense is *based solely* on the defendant’s discovery of, knowledge about, or potential disclosure of the victim’s characteristics.” Echoing comments from NVRDC, Ms. Semyonova argued that the “current language, prohibiting the defense when it is ‘related to’ the discovery of, knowledge or potential disclosure of the victim’s characteristics is vague and will lead to arbitrary and potentially overbroad application.” She noted that the eight states that have passed bills prohibiting the panic defense “required a more direct causal link between the defendant’s actions and the discovery of the complainant’s characteristics than the ‘related to’” in the present bill.

Ms. Semyonova also argued that some of the language present in B23-0409 is problematic. First, that bill “precludes a heat of passion defense ‘under circumstances in which the victim made an unwanted sexual advance toward the defendant or if the defendant and the victim dated or had

a romantic relationship.” Ms. Semyonova pointed out that “there are countless ways that non-forcible sexual advances may still be terrifying for individuals.” In these cases, “defendants should be able to explain their fears fully to a jury and should have available a heat of passion defense that can mitigate the offense.” She also pointed out that B23-0409’s limitation on the reduced mental capacity defense is unnecessary because in *Bethea v. United States*, the D.C. Court of Appeals rejected this defense. Ms. Semyonova also took issue with B23-0409’s proposed limitations on the defense of self-defense. She argued that “an individual is absolutely prohibited from using force solely based on the discovery of someone’s sexual orientation or gender.” This is because a “person may only use deadly force in self-defense if [that person] actually and reasonably believes at the time of the incident that [they] are in imminent danger of death or seriously bodily harm.” Therefore, “[e]ven if someone’s gender identity or sexual orientation is not perceived as a subjective threat, the requirement of reasonableness . . . forecloses the use of self-defense.”

Finally, Ms. Semyonova urged the Committee to adopt language present in a federal bill pending which “ensures that the defendant will not be prevented from providing relevant evidence about the defendant’s past traumatic experience.” That provision specifically reads: “PAST TRAUMA.—Notwithstanding the prohibition in subsection (a), a court may admit evidence, in accordance with the Federal Rules of Evidence, of prior trauma to the defendant for the purposes of excusing or justifying the conduct of the defendant or mitigating the severity of the offense.”

Richard Schmechel – Executive Director, Criminal Code Reform Commission

Mr. Schmechel, testifying on behalf of the Criminal Code Reform Commission (“CCRC”), took “no position at present on the substantive merits of whether to codify a categorical exception or multiple exceptions to defenses based on the defendant’s knowledge or discovery of the victim’s actual or purported gender identity, sexual orientation, or other specified attribute.” His testimony first provided important background information on the state of the law regarding general defenses. He noted that the “District is among a minority of jurisdictions nationally that have no codified general defenses.” Absent legislation, “a judicial ‘common law’ regarding the scope and meaning [of] general defenses has continued to evolve in the District.” Because the decisions rendered by courts are specific to the case presented, “court decisions establishing the District’s law regarding defenses are necessarily incomplete, may include outdated language, and may not reflect current District norms or the will of its elected representatives.” Given the limitations of case law, “[l]egal practitioners seeking a common, fixed articulation of District general defenses routinely turn to pattern jury instructions.” The District’s Criminal Jury Instructions – colloquially referred to as the “Redbook” – “include a short commentary explaining the relevant case law and often provide alternative formulations of an instruction.” These instructions, however, are “updated only periodically” and “are imperfect and incomplete.”

Mr. Schmechel then turned to commentary on specific provisions within B23-0435. First, he noted that it is unclear whether the bill’s reference to the heat of passion defense is meant to “preclude raising such conduct as a defense to any crime of violence, or *only* to murder.” There is similar ambiguity as to whether the bill’s reference to a “reduced mental capacity” is also meant to preclude an insanity defense. Second, Mr. Schmechel argued that “the causal relationship between the protected attribute and the provocation of violence is unclear,” echoing concerns about

the vagueness created by use of the phrase “related to.” He also pointed out that D.C. Code § 22-3701(1) – the bias-related crime statute for the District – uses the phrase “based on”, while 18 U.S.C. § 249 – the federal hate crime statute – uses the phrase “because of.” His recommendations were to either adopt a “based on” or a “based solely on” standard of causation.

Mr. Schmechel also flagged concerns related to the bill’s proposed anti-bias jury instruction. He argued that the instruction “appears to be a wholly separate provision that does not appear to confer a new right or remedy but may risk creating a conflict of law in some cases.” He recommended either eliminating “the bill’s references to a jury instruction, referring the matter to the drafters of the Redbook” or making “the codified jury instruction permissive, subject to judicial approval, by replacing ‘the court shall’ with ‘the court may.’” He also argued that “the rationale for limiting application of the defense exception to any ‘crime of violence’ is unclear. The offenses statutorily designated a crime of violence “do[] not coincide with the availability of the relevant defenses such as self-defense or adequate provocation.” He proposed either eliminating “the limitation on the heat of passion exception so that it would apply to any offense to which a heat of passion defense could be raised” or limiting “the exception for a heat of passion defense to murder.”

Finally, Mr. Schmechel stated that “the meaning of ‘force’ and ‘non-forcible romantic or sexual advance’ is unclear.” While “assaultive conduct would presumably be included in any definition of force, it is unclear whether the definition of force would include non-painful or sexual contact.” He believes that a “[c]lear definition of ‘force’ and ‘non-forcible romantic or sexual advance’ . . . is critical to any analysis of whether and how the bills constrain self-defense.” He proposed either eliminating the bill’s “references to an exception to a use of force defense” or defining “force” and “non-forcible romantic or sexual advance”, including whether those terms include “coercive threats, the display of weapons (alone), and non-painful physical contact.”

B23-0513

On Tuesday, March 3, 2020, the Committee on the Judiciary and Public Safety held a public hearing on B23-0513. A video recording of the public hearing can be viewed at <https://entertainment.dc.gov/page/demand-2020-a>. The following witnesses testified at the hearing or submitted statements to the Committee outside of the hearing:

Public Witness

Jade Harriell Arrindell – Founder, Victory of the People Movement

Ms. Arrindell testified in support of the bill. She noted the historical and present day discrimination Black people face in the United States and in the District. She noted significant inequities in educational, criminal justice, and healthcare systems. She also drew special attention to “rampant housing discrimination, a homelessness epidemic, and overpolicing.” She testified that the bill is a “a good start,” but encouraged expanding the legislation to provide accountability for state actors.

Government Witness

Michelle D. Thomas – Chief, Civil Rights Section, Office of the Attorney General for the District of Columbia

Ms. Thomas testified on behalf of the Office of the Attorney General in support of the bill. She noted that “bias-motivated violence is on the rise in the District.” While the “LGBTQ+ community bears the brunt of this burden,” “attacks based on ethnicity, race, and national origin are also increasing.” Ms. Thomas explained that it is the U.S. Attorney’s Office “that decides whether to enforce our statute that enhances penalties for bias-motivated violence.” She argued that, in light of the U.S. Attorney’s Office’s failure to prosecute those offenses, “the people of the District need a government that is accountable to them.” This legislation would “empower the Office of the Attorney General to hold perpetrators of bias-motivated offenses accountable with civil penalties and injunctions.” Current law gives the right to pursue civil action exclusively to victims. Pursuing a civil case is “an onerous task because victims are often focused on recovering from trauma and because the difficulty of finding a lawyer where financial recovery is uncertain.” This bill “enables OAG to seek justice for marginalized members of our community and gives them a voice even when federal prosecutors fail to act.” It also “expands the types of rights protected under the statute.” Specifically, the bill “creates a cause of action for offenses that interfere with rights protected by District and federal law” —including voting rights. Finally, the bill “clarifies that protections extend to people with all sorts of disabilities, not just physical.” Ms. Thomas noted that at least two jurisdictions – Maine and Massachusetts – have granted their Attorneys General similar authority.

IMPACT ON EXISTING LAW

B23-0409 would amend the Human Rights Act of 1977 to clarify that the term “place of public accommodation” does not require a person or place to have a physical location in the District or charge for goods or services; to amend the Anti-Intimidation and Defacing of Public or Private Property Criminal Penalty Act of 1982 to expand the offense of defacement of certain symbols or display of certain emblems; to amend the Bias-Related Crime Act of 1989 to add definitions, clarify the definition of “bias-related crime”, provide civil enforcement authority to the Attorney General against persons who commit bias-related crimes or, through certain acts, interfere or attempt to interfere with an individual’s exercise of constitutional or District rights, or deprive an individual of equal protection, to provide subpoena authority, and specify appropriate relief; and to amend Chapter 1 of Title 23 to limit the scope of the defenses of heat of passion caused by adequate provocation, insanity, self-defense, defense of others, and defense of property if certain elements of the defense are based on the victim’s actual or perceived gender identity, gender expression, or sexual orientation.

FISCAL IMPACT

The Committee adopts the fiscal impact statement of the District’s Chief Financial Officer.

SECTION-BY-SECTION ANALYSIS

- Section 1** Provides the long and short titles.
- Section 2** Amends the Human Rights Act of 1977, effective December 13, 1977 (D.C. Law 2-38; D.C. Official Code § 2-1401.02(24)), to clarify that the term “place of public accommodation” means any person or place that provides, to a person in the District, access to an accommodation, service, or good, whether or not that place or offeror maintains a physical location in the District or charges for those goods or services.
- Section 3** Amends the Anti-Intimidation and Defacing of Public or Private Property Criminal Penalty Act of 1982, effective March 10, 1983 (D.C. Law 4-203; D.C. Official Code § 22-3312.02), to expand the offense of defacement of certain symbols or display of certain emblems.
- Section 4** Amends the Bias-Related Crime Act of 1989, effective May 8, 1990 (D.C. Law 8-121; D.C. Official Code § 22-3701 *et seq.*), to:
- (a) Add definitions for “Attorney General”, “discrimination”, and “person”, and amend the definition of “bias-related crime” to provide that a designated act demonstrating an accused’s prejudice based on a protected trait of the victim need not solely be based on or because of that prejudice, and a non-physical disability constitutes a “disability”;
 - (b) Make a technical change;
 - (c) Make a conforming change; and
 - (d) Provide civil enforcement authority, subpoena power, and the ability to seek certain relief to the Office of the Attorney General.
- Section 5** Amends Chapter I of Title 23 of the District of Columbia Official Code to:
- (a) Make a conforming change; and
 - (b) Add a new subsection to ban the use of three specific defenses when that defense is based on the discovery of, knowledge about, or the potential disclosure of the victim’s actual or perceived gender identity, gender expression, or sexual orientation: (1) heat of passion caused by adequate provocation; (2) insanity; and (3) self-defense, defense of others, or defense of property.
- Section 6** Provides the applicability clause.
- Section 7** Provides the fiscal impact statement.

Section 8 Provides the effective date.

COMMITTEE ACTION

On November 23, 2020, the Committee on the Judiciary and Public Safety held an Additional Meeting to consider and markup B23-0409, the “Bella Evangelista and Tony Hunter Panic Defense Prohibition and Hate Crimes Response Amendment Act of 2020”. The meeting was called to order at 11:05 a.m. Chairperson Charles Allen recognized a quorum consisting of himself, Councilmembers Anita Bonds, Mary M. Cheh, Vincent C. Gray, Jr., Brooke Pinto, and Chairman Phil Mendelson. Chairperson Allen, without objection, moved the Committee Report and Print for B23-0409 en bloc with leave for staff to make technical, editorial, and conforming changes.

Chairperson Allen first described the bill’s provisions and the Committee’s reasoning. Councilmember Pinto spoke in support of the bill’s prohibition on use of panic defenses, which are rooted in homophobia and transphobia. She recounted statistics showing that LGBTQ+ people are disproportionately targeted by criminal acts, and noted the unique harms that result from bias-motivated crimes. After an opportunity for discussion, the Committee voted 6-0 to approve the Committee Report and Print, with the Members voting as follows:

YES: Chairperson Allen, Councilmembers Bonds, Cheh, Gray, and Pinto, and Chairman Mendelson

NO: None

PRESENT: None

ABSENT: None

LIST OF ATTACHMENTS

- (A) B23-0409, as introduced
- (B) B23-0134, as introduced
- (C) B23-0435, as introduced
- (D) B23-0513, as introduced
- (E) Notice of Public Hearing on B23-0409 and B23-0435, as published in the *District of Columbia Register*
- (F) Agenda and Witness List for Public Hearing on B23-0409 and B23-0435
- (G) Witness Testimony for B23-0409 and B23-0435
- (H) Public Hearing Record for B23-0134
- (I) Public Hearing Record for B23-0513
- (J) Fiscal Impact Statement
- (K) Legal Sufficiency Determination
- (L) Comparative Committee Print
- (M) Committee Print

ATTACHMENT A

COUNCIL OF THE DISTRICT OF COLUMBIA
1350 Pennsylvania Avenue, N.W.
Washington D.C. 20004

Memorandum

To : Members of the Council

From : 
Nyasha Smith, Secretary to the Council

Date : September 17, 2019

Subject : Referral of Proposed Legislation

Notice is given that the attached proposed legislation was introduced in the Office of the Secretary on Monday, September 16, 2019. Copies are available in Room 10, the Legislative Services Division.

TITLE: "Sexual Orientation and Gender Identity Panic Defense Prohibition Act of 2019", B23-0409

INTRODUCED BY: Chairman Mendelson and Councilmember Allen

The Chairman is referring this legislation to the Committee on Judiciary and Public Safety.

Attachment

cc: General Counsel
Budget Director
Legislative Services

1 
2 Councilmember Charles Allen


Chairman Phil Mendelson

3
4
5
6
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8
9 A BILL
10
11

12 IN THE COUNCIL OF THE DISTRICT OF COLUMBIA
13
14

15 To amend Chapter 1 of Title 23 to limit criminal defenses and authorization for the use of force
16 relating to a victim's sexual orientation or gender identity.
17

18 BE IT ENACTED BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this
19 act may be cited as the "Sexual Orientation and Gender Identity Panic Defense Prohibition Act
20 of 2019".
21

22 Sec. 2. Chapter 1 of Title 23 of the District of Columbia Official Code is amended as
23 follows:

24 (a) The table of contents is amended by adding two new section designations to read as
25 follows:

26 "23-115. Limit on defenses relating to a victim's sexual orientation and gender identity.

27 "23-116. Criminal trial anti-bias jury instruction."

28 (b) New subsections 23-115 and 23-116 are added to read as follows:

29 "§ 23-115. Limit on defenses relating to a gender identity or expression or sexual
30 orientation.

31 "(a) For a crime of violence, adequate provocation for a defense premised on "heat of
32 passion" shall not exist if the defendant's actions are related to the discovery of, knowledge
33 about, or potential disclosure of the victim's actual or perceived gender identity or expression, or

sexual orientation, including under circumstances in which the victim made an unwanted, non-forcible romantic or sexual advance toward the defendant, or if the defendant and victim dated or had a romantic relationship.

“(b) A defendant does not suffer from reduced mental capacity based solely on the discovery of, knowledge about, or potential disclosure of the victim’s actual or perceived gender identity or expression, or sexual orientation, including under circumstances in which the victim made an unwanted, non-forcible romantic or sexual advance toward the defendant, or if the defendant and victim dated or had a romantic relationship.

“(c) A person is not justified in using force against another based solely on the discovery of, knowledge about, or potential disclosure of the victim’s actual or perceived gender identity or expression, or sexual orientation, including under circumstances in which the victim made an unwanted, non-forcible romantic or sexual advance toward the defendant, or if the defendant and victim dated or had a romantic relationship.

“(d) For purposes of this section:

“(1) “Crime of violence” shall have the same meaning as provided in D.C. Official Code § 23-1331(4).

“(2) “Gender identity or expression” shall have the same meaning as provided in D.C. Official Code § 2-1401.02(12A).

“(3) “Sexual orientation” shall have the same meaning as provided in D.C. Official Code § 2-1401.02(28).

“§ 23-116. (a) In any criminal trial or proceeding, upon the request a party, the court shall instruct the jury substantially as follows: “Do not let bias, sympathy, prejudice, or public opinion influence your decision. Bias includes bias against the victim or victims, witnesses, or defendant

57 based upon his or her disability, gender, nationality, race or ethnicity, religion, gender identity or
58 expression, or sexual orientation.”.

59 Sec. 3. Fiscal impact statement

60 The Council adopts the fiscal impact statements in the committee report as the fiscal
61 impact statement required by section 4a of the General Legislative Procedures Act of 1975,
62 approved October 16, 2006 (120 Stat. 2038; D.C. Official Code § 1-301.47a).

63 Sec. 4. Effective date.

64 This act shall take effect following approval by the Mayor (or in the event of a veto by
65 the Mayor, action by the Council to override the veto), a 30-day period of congressional review
66 as provided in section 602(c)(1) of the District of Columbia Home Rule Act, approved December
67 24, 1973 (87 Stat. 813; D.C. Official Code § 1-206.02(c)(1)), and publication in the District of
68 Columbia Register.

ATTACHMENT B

COUNCIL OF THE DISTRICT OF COLUMBIA
1350 Pennsylvania Avenue, N.W.
Washington D.C. 20004

Memorandum

To : Members of the Council

From : 
Nyasha Smith, Secretary to the Council

Date : February 11, 2019

Subject : Referral of Proposed Legislation

Notice is given that the attached proposed legislation was introduced in the Office of the Secretary on Wednesday, February 6, 2019. Copies are available in Room 10, the Legislative Services Division.

TITLE: "Community Harassment Prevention Amendment Act of 2019", B23-0134

INTRODUCED BY: Chairman Mendelson at the request of the Mayor

The Chairman is referring this legislation to the Committee on Judiciary and Public Safety.

Attachment

cc: General Counsel
Budget Director
Legislative Services



2019 FEB -6 PM 4:16

OFFICE OF THE
SECRETARY

MURIEL BOWSER
MAYOR

FEB - 6 2019

The Honorable Phil Mendelson
Chairman, Council of the District of Columbia
John A. Wilson Building
1350 Pennsylvania Ave., NW, Suite 504
Washington, DC 20004

Dear Chairman Mendelson:

Enclosed for consideration and approval by the Council of the District of Columbia is the *Community Harassment Prevention Amendment Act of 2019*. The bill seeks to provide additional safeguards for protected classes against bias-related crimes in the District.

Specifically, the legislation amends the *Omnibus Public Safety and Justice Amendment Act of 2009* (D.C. Law 18-88; D.C. Official Code *passim*), to create the offense of Harassing an Entity. This offense would prohibit a person from purposefully engaging in a course of conduct directed at a specific entity with the intent to cause members, participants, or employees of that entity to fear for their safety, feel alarmed, disturbed or frightened, or suffer emotional distress. It also prohibits a person from engaging in course of conduct that the person knows or should have known would cause members, participants, or employees of the entity to fear for their safety, feel seriously alarmed, disturbed, or frightened, or suffer emotional distress. Further, the bill amends section 3(a) of the *Anti-Intimidation and Defacing of Public or Private Property Criminal Penalty Act of 1982* (D.C. Law 4-203; D.C. Official Code § 22-3312.02(a)) to expand the types of property on which it is unlawful to display certain emblems that deprive any person or class of persons of equal protection of the law or that intimidate or causes fear in a person or threatens to harm a person or damage property.

Reports of bias-related crimes and incidents have increased significantly in the District – and the country – in the past two years. As we have seen all too clearly recently, from the murder of an African American couple in a Kroger parking lot to the horrific shooting at the Tree of Life synagogue that left 11 people dead, each hate crime takes a toll not only on the victim, but also on the community. I have made it a priority of my administration to provide support to our individuals and the community that have been targeted by hate.

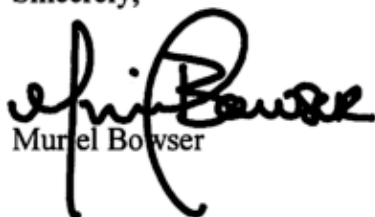
While the rise in reported hate crimes has been disturbing, the harassing incidents that may not currently be covered by our extensive statute on bias related crimes is just as troubling. Organizations have been targeted for repeated harassing phone calls and letters, causing alarm among employees and members. However, the existing stalking statute (D.C. Code § 22-3133)

protects an “individual,” and it is unclear whether that will extend to the same behavior targeting an organization. As a result, the legislation seeks to serve as a remedy for entities organized by association for any established purpose that are vulnerable to serious incidents of harassment and implied threats. By providing law enforcement with a tool for combatting this harassment, it ensures that individuals can safely assemble to advance their common interests.


Additionally, the current “display of certain emblems” statute only covers private premises or property in the District primarily used for religious, educational, residential, memorial, charitable, or cemetery purposes, or any public property. So while more than twenty suspected nooses and swastikas have been reported in the District in 2017 and 2018, it is not clear that someone placing them on some types of property with an intent to intimidate or frighten the community could be held accountable. By expanding the statute to apply to any public property or private property of another without permission, the bill provides additional recourse in cases of displays of certain symbols of hate.

Chief Peter Newsham and I are available to discuss any questions you may have.

Sincerely,



Muriel Bowser


Chairman Phil Mendelson
at the request of the Mayor

A BILL

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

To amend the Anti-Intimidation and Defacing of Public or Private Property Criminal Penalty Act of 1982 to make it unlawful to deface or burn a religious or secular symbol on any property of another without permission or to place or display on such property a physical impression that a reasonable person would perceive as a threat to physically damage the property of another; and to amend the Omnibus Public Safety and Justice Amendment Act of 2009 to make it unlawful to harass an entity.

BE IT ENACTED BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this act may be cited as the "Community Harassment Prevention Amendment Act of 2019".

Sec. 2. Section 3(a) of the Anti-Intimidation and Defacing of Public or Private Property Criminal Penalty Act of 1982, effective March 10, 1983 (D.C. Law 4-203; D.C. Official Code § 22-3312.02(a)), is amended as follows:

(a) The lead-in language is amended to read as follows:

"(a) It shall be unlawful for any person to burn, desecrate, mar, deface, or damage a religious or secular symbol on any private property of another without the permission of the owner or the owner's designee or on any public property in the District of Columbia; or to place or to display in any of these locations a sign, mark, symbol, emblem, or other physical impression including, but not limited to: a Nazi swastika, a noose, or any manner of exhibit

which includes a burning cross, real or simulated, where it is probable that a reasonable person would perceive that the intent is:"

(b) Paragraph (3) is amended by striking the word "person" and inserting the phrase "person or property" in its place.

Sec. 3. The Omnibus Public Safety and Justice Amendment Act of 2009, effective December 10, 2009 (D.C. Law 18-88; D.C. Official Code *passim*), is amended as follows:

(a) The heading of Title V is amended to read as follows:

"TITLE V
STALKING; HARASSING AN ENTITY".

(b) Section 501 (D.C. Official Code § 22-3131) is amended by adding a new subsection

(c) to read as follows:

"(c) This title also provides law enforcement with a tool for combatting harassment of an entity, thereby helping to ensure that individuals can safely assemble to advance their common interests."

(c) Section 502 (D.C. Official Code § 22-3132) is amended by adding a new paragraph

(4A) to read as follows:

"(4A) "Entity" means a group organized by association for any established common purpose, including, but not limited to a religious, social, educational, or recreational purpose.

(d) A new section 503a is added to read as follows:

"Sec. 503a. Harassing an entity.

"(a) It is unlawful for a person to purposefully engage in a course of conduct directed at a specific entity:

46 “(1) With the intent to cause members, participants, or employees of that entity to:

47 “(A) Fear for their safety;

48 “(B) Feel seriously alarmed, disturbed, or frightened; or

49 “(C) Suffer emotional distress;

50 “(2) That the person knows would cause members, participants, or employees, of

51 that entity to:

52 “(A) Fear for their safety;

53 “(B) Feel seriously alarmed, disturbed, or frightened; or

54 “(C) Suffer emotional distress; or

55 “(3) That the person should have known would cause a reasonable person who is

56 a member, participant, or employee of that entity to:

57 “(A) Fear for his or her safety;

58 “(B) Feel seriously alarmed, disturbed, or frightened; or

59 “(C) Suffer emotional distress.

60 “(b) This section does not apply to constitutionally protected activity.

61 “(c) Where a single act is of a continuing nature, each 24-hour period constitutes a

62 separate occasion.”.

63 “(d) The conduct on each of the occasions need not be the same as it is on the others.”.

64 (e) The heading of section 504 (D.C. Official Code § 22-3134) is amended to read as

65 follows:

66 “Sec. 504. Penalties for stalking.”.

67 (f) A new section 504a is added to read as follows:

68 “Sec. 504a. Penalties for harassing an entity.

69 “(a) Except as provided in subsections (b) and (c) of this section, a person who violates
70 section 503a shall be fined not more than the amount set forth in section 101 of the Criminal Fine
71 Proportionality Amendment Act of 2013, effective July 5, 2013 (D.C. Law 19-317; D.C. Official
72 Code § 22-3571.01), imprisoned for not more than 12 months, or both.

73 “(b) A person who violates section 503a shall be fined not more than the amount set forth
74 in section 101 of the Criminal Fine Proportionality Amendment Act of 2013, effective July 5,
75 2013 (D.C. Law 19-317; D.C. Official Code § 22-3571.01), imprisoned for not more than 5
76 years, or both, if the person:

77 “(1) At the time, was subject to a court, parole, or supervised release order
78 prohibiting contact with an entity’s members, participants, or employees;

79 “(2) Has one prior conviction in any jurisdiction of harassing any entity within the
80 previous 10 years; or

81 “(3) Caused more than \$2,500 in financial injury.

82 “(c) A person who violates section 503a shall be fined not more than the amount set forth
83 in section 101 of the Criminal Fine Proportionality Amendment Act of 2013, effective July 5,
84 2013 (D.C. Law 19-317; D.C. Official Code § § 22-3571.01), imprisoned for not more than 10
85 years, or both, if the person has 2 or more prior convictions in any jurisdiction for harassing an
86 entity, at least one of which was for a jury demandable offense.”.

87 Sec. 4. Fiscal impact statement.

88 The Council adopts the fiscal impact statement in the committee report as the fiscal
89 impact statement required by section 602(c)(3) of the District of Columbia Home Rule Act,
90 approved December 24, 1973 (87 Stat. 813; D.C. Official Code § 1-206.02 (c)(3)).

91 Sec. 5. Effective date.

92 This act shall take effect following approval by the Mayor (or in the event of veto by the
93 Mayor, action by the Council to override the veto), a 30-day period of Congressional review as
94 provided in section 602(c)(2) of the District of Columbia Home Rule Act, approved December
95 24, 1973 (87 Stat. 813; D.C. Official Code § 1-206.02(c)(2)), and publication in the District of
96 Columbia Register.


Government of the District of Columbia
Office of the Chief Financial Officer



Jeffrey S. DeWitt
Chief Financial Officer

MEMORANDUM

TO: The Honorable Phil Mendelson
Chairman, Council of the District of Columbia

FROM: Jeffrey S. DeWitt
Chief Financial Officer 

DATE: January 15, 2019

SUBJECT: Fiscal Impact Statement – Community Harassment Prevention
Amendment Act of 2019

REFERENCE: Draft Bill as shared with the Office of Revenue Analysis on January 10,
2019

Conclusion

Funds are sufficient in the fiscal year 2019 through fiscal year 2022 budget and financial plan to implement the bill.

Background

Current law¹ makes it illegal to burn, desecrate, mar, deface, or damage a religious or secular symbol on public property or private religious, educational, residential, memorial, charity, or cemetery properties. The bill expands the protections to include all property in the District regardless of its use.

The bill also establishes a new offense of harassment of an entity where that entity is a group that is organized based on any common purpose.² The bill makes it unlawful for any individual to make any member, participant, or employee of an entity fear for her or his safety, suffer emotional distress, or feel alarmed or frightened. An individual who harasses an entity is subject to imprisonment of not more than twelve months, a fine of \$2,500, or both. The bill increases the penalties for an offender who has multiple convictions in any jurisdiction of harassing an entity, is subject to a legal order prohibiting contact with the entity, or causes more than \$2,500 in financial

¹ Omnibus Public Safety and Justice Amendment Act of 2009, effective December 10, 2009 (D.C. Law 18-88; D.C. Official Code § 22-3131 et seq.).

² Including, but not limited to a religious, social, educational, or recreational purpose.

The Honorable Phil Mendelson

FIS: "Community Harassment Prevention Amendment Act of 2019," Draft Bill as shared with the Office of Revenue Analysis on January 10, 2019

injury.³ If an act of harassment is continuous, each 24-hour period is considered a separate harassment action.

Financial Plan Impact

Funds are sufficient in the fiscal year 2019 through fiscal year 2022 budget and financial plan to implement the bill. The bill provides law enforcement with expanded powers to protect religious and secular symbols on all District property and establishes a new offense to protect the members, employees, or participants of protected entities. There are no costs associated with the bill's implementation.

³ The penalty is imprisonment of not more than five years, a fine of \$12,500, or both under these additional conditions except that two or more offenses carries a penalty of imprisonment of not more than ten years, a fine of \$25,000, or both.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
OFFICE OF THE ATTORNEY GENERAL


ATTORNEY GENERAL
KARL A. RACINE



Legal Counsel Division

MEMORANDUM

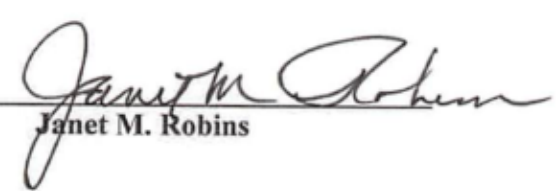
TO: Alana Intrieri
Executive Director
Office of Policy and Legislative Affairs

FROM: Janet M. Robins 
Deputy Attorney General
Legal Counsel Division

DATE: January 10, 2019

SUBJECT: Legal Sufficiency Certification of the "Community Harassment
Prevention Amendment Act of 2019," Emergency and Temporary
Versions and Emergency Declaration Resolution
(AE-17-644-E)

This is to Certify that this Office has reviewed the above-referenced legislation and has found it to be legally sufficient. If you have any questions regarding this certification, please do not hesitate to contact me at 724-5524.


Janet M. Robins

ATTACHMENT C

COUNCIL OF THE DISTRICT OF COLUMBIA
1350 Pennsylvania Avenue, N.W.
Washington D.C. 20004

Memorandum

To : Members of the Council

From : 
Nyasha Smith, Secretary to the Council

Date : September 18, 2019

Subject : Referral of Proposed Legislation

Notice is given that the attached proposed legislation was introduced in the Committee of the Whole on Tuesday, September 17, 2019. Copies are available in Room 10, the Legislative Services Division.

TITLE: "Tony Hunter and Bella Evangelista Panic Defense Prohibition Act of 2019", B23-0435

INTRODUCED BY: Councilmembers Grosso, Allen, Cheh, Silverman, Nadeau, R. White, and Todd

CO-SPONSORED BY: Councilmembers Evans, McDuffie, Bonds, and Gray

The Chairman is referring this legislation to the Committee on Judiciary and Public Safety.

Attachment

cc: General Counsel
Budget Director
Legislative Services

1 Brianne K. Nadeau
2 Councilmember Brianne K. Nadeau

3 Robert C. White, Jr.
4
5
6 Councilmember Robert C. White, Jr.

7 Brandon T. Todd
8
9
10 Councilmember Brandon T. Todd

David Grosso
Councilmember David Grosso

Charles Allen
Councilmember Charles Allen

Mary M. Cheh
Councilmember Mary M. Cheh

Elissa Silverman
Councilmember Elissa Silverman

17 A BILL

18
19
20 IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

21
22
23
24 To amend Chapter 1 of Title 23 to curtail the availability and effectiveness of defenses that seek
25 to partially or completely excuse crimes such as murder and assault on the grounds that
26 the victim's sexual orientation, gender identity, or other inherent identity, is to blame for
27 the defendant's violent action and to require an anti-bias jury instruction in criminal trials
28 if requested by the prosecutor or the defendant.

29
30 BE IT ENACTED BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this
31 act may be cited as the "Tony Hunter and Bella Evangelista Panic Defense Prohibition Act of
32 2019".

33
34 Sec. 2. Chapter 1 of Title 23 of the District of Columbia Official Code is amended as
35 follows:

36 (a) The table of contents is amended by adding two new section designations to read as
37 follows:

38 "23-115. Limit on defenses that seek to excuse violence on the basis of a victim's
39 identity.

40 "23-116. Criminal trial anti-bias jury instruction."

41 (b) New sections 23-115 and 23-116 are added to read as follows:

42 “§ 23-115. Limit on defenses that seek to excuse violence on the basis of a victim’s
43 identity.

44 “(a) For any crime of violence, sufficient or adequate provocation for a defense premised
45 on “heat of passion” shall not exist if the defendant’s actions are related to the discovery of,
46 knowledge about, or the potential disclosure of:

47 “(1) One or more of the following characteristics or perceived characteristics of
48 the victim: disability, gender identity or expression, national origin, race, color, religion, sex, or
49 sexual orientation, regardless of whether the characteristic belongs to the victim or the defendant,
50 even if the defendant and victim dated or participated in sexual relations, or if the defendant or
51 victim romantically pursued the other; or

52 “(2) The victim’s association with a person or group with one or more of the
53 characteristics, or perceived characteristics identified in paragraph (1) of this subsection.

54 “(b) For the purposes of this section, the term:

55 “(1) “Crime of violence” shall have the same meaning as D.C. Official Code § 23-
56 1331.

57 “§ 23-116. (a) In any criminal trial or proceeding, upon the request of either the
58 prosecutor or the defendant, the court shall instruct the jury substantially as follows: “Do not let
59 bias, sympathy, prejudice, or public opinion influence your decision. “Bias” includes bias against
60 the victim or victims, witnesses, or defendant based upon his or her disability, sex, national
61 origin, race, color, religion, gender identity or expression, or sexual orientation.”.

62 Sec. 3. Fiscal impact statement.

63 The Council adopts the fiscal impact statement in the committee report as the fiscal

64 impact statement required by section 4a of the General Legislative Procedures Act of 1975,
65 approved October 16, 2006 (120 Stat. 2038; D.C. Official Code § 1-301.47a).

66 Sec. 4. Effective date.

67 This act shall take effect following approval by the Mayor (or in the event of veto by the
68 Mayor, action by the Council to override the veto), a 30-day period of congressional review as
69 provided in section 602(c)(1) of the District of Columbia Home Rule Act, approved December
70 24, 1973 (87 Stat. 813; D.C. Official Code § 1-206.02(c)(1)), and publication in the District of
71 Columbia Register.

72

ATTACHMENT D

COUNCIL OF THE DISTRICT OF COLUMBIA
1350 Pennsylvania Avenue, N.W.
Washington D.C. 20004

Memorandum

To : Members of the Council

From : 
Nyasha Smith, Secretary to the Council

Date : November 04, 2019

Subject : Referral of Proposed Legislation

Notice is given that the attached proposed legislation was introduced in the Office of the Secretary on Tuesday, October 22, 2019. Copies are available in Room 10, the Legislative Services Division.

TITLE: "Hate Crime Civil Enforcement Clarification Amendment Act of 2019",
B23-0513

INTRODUCED BY: Chairman Mendelson at the request of the Attorney General

The Chairman is referring this legislation to the Committee on Judiciary and Public Safety.

Attachment

cc: General Counsel
Budget Director
Legislative Services

GOVERNMENT OF THE DISTRICT OF COLUMBIA
OFFICE OF THE ATTORNEY GENERAL



ATTORNEY GENERAL
KARL A. RACINE

2019 OCT 22 PM 4:25
OFFICE OF THE
SECRETARY

October 22, 2019

The Honorable Phil Mendelson
Chairman, Council of the District of Columbia
John A. Wilson Building
1350 Pennsylvania Avenue, N.W.
Suite 504
Washington, D.C. 20004

Dear Chairman Mendelson:

I am writing to transmit the "Hate Crime Civil Enforcement Clarification Amendment Act of 2019" (The Bill). This Bill expands civil enforcement under the *Bias-Related Crime Act of 1989* (The Act). The Act prohibits what it refers to as "bias-related crimes," i.e., any criminal offense that "demonstrates an accused's prejudice based on the actual or perceived race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, gender identity or expression, family responsibility, homelessness, physical disability, matriculation, or political affiliation." Anyone who perpetrates a bias-related crime could face criminal penalties, as well as a civil action brought by anyone who incurs injury from a bias-related crime.

The bill strengthens civil enforcement of the by clarifying that the Attorney General may bring civil actions for bias-related crimes, or when any person interferes or attempts to interfere with the exercise of federally or District-protected rights through threats, intimidation, or coercion. Civil remedies could, in addition to remedies available in a private civil action, include penalties up to \$10,000 per offense.

The Office of the Attorney General looks forward to working with the Council and other stakeholders on this important measure. If you have any questions, your staff may contact Deputy Attorney General for Legislative Affairs, James A. Pittman, at James.Pittman@DC.Gov.

Sincerely,

Karl A. Racine
Attorney General



Chairman Phil Mendelson
at the request of the Attorney General

A BILL

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

To amend the Bias-Related Crime Act of 1989 to expand available causes of action and remedies and to clarify the Attorney General's enforcement authority.

BE IT ENACTED BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this act may be cited as the "Hate Crime Civil Enforcement Clarification Amendment Act of 2019".

Sec. 2. The Bias-Related Crime Act of 1989, effective May 8, 1990 (D.C. Law 8-121; D.C. Official Code § 22-3701 et seq.), is amended as follows:

(a) Section 2 (D.C. Official Code § 22-3701) is amended as follows:

(1) Designate the existing paragraph (1) as paragraph (1A).

(2) A new paragraph (1) is added to read as follows:

"(1) "Attorney General" means the Attorney General for the District of Columbia provided for by section 435 of the District of Columbia Home Rule Act, effective May 27, 2010 (D.C. Law 18-160; D.C. Official Code § 1-204.35).".

(3) Paragraph (1A) is amended by striking the phrase "physical disability" and inserting the word "disability" in its place.

(4) New paragraphs (5) and (6) are added to read as follows:

34 “(5) “Person” means an individual, firm, corporation, partnership, cooperative,
35 association, or any other organization, legal entity, or group of individuals however organized.

36 “(6) “Rights secured by District or federal law” means rights secured by the
37 Constitution or laws of the United States, or rights secured by the laws of the District.”.

38 (b) Section 5 (D.C. Official Code § 22-3704) is amended to read as follows:

39 “Sec.5. Civil action.

40 “(a) Whenever any person, whether or not acting under color of law, interferes or
41 attempts to interfere by threats, intimidation, or coercion with the exercise or enjoyment by any
42 other person or persons of rights secured by District or federal law, or commits a bias-related
43 crime against the other person or persons:

44 “(1) The other person or persons shall, irrespective of any criminal prosecution or
45 the result of any criminal prosecution, have a civil cause of action in a court of competent
46 jurisdiction for appropriate relief; and

47 “(2) The Attorney General may, irrespective of any criminal prosecution, of the
48 result of a criminal prosecution, or of any cause of action pursued under paragraph (1) of this
49 subsection, bring, in the name of the District of Columbia, a civil action for appropriate relief.

50 “(b) The parent of a minor shall be liable for any damages that a minor is required to pay
51 under subsection (a) of this section if any action or omission of the parent or legal guardian
52 contributed to the actions of the minor.

53 “(c) In the course of an investigation to determine whether to seek relief under subsection
54 (a)(2) of this section, the Attorney General may subpoena witnesses, administer oaths, require
55 sworn written responses to written questions, examine an individual under oath, and compel
56 production of records, books, papers, contracts, and other documents, subject to the procedures

in section 110a(d) and (e) of the Office of the Attorney General for the District Columbia Clarification and Elected Term Amendment Act of 2010, effective October 22, 2015 (D.C. Law 21-36; D.C. Official Code § 1-301.88d(d) and (e)). Information obtained under this section is not admissible in a later criminal proceeding against the person who provides the evidence.

“(d) Appropriate relief under this section may include:

“(1) Injunctive relief;

“(2) Actual or nominal damages for economic or non-economic loss, including damages for emotional distress;

“(3) Punitive damages in an amount to be determined by a jury or a court sitting without a jury, which may include treble damages for any economic or non-economic loss the person suffered;

“(4) Reasonable attorneys’ fees and costs; or

“(5) In a civil action brought by the Attorney General under subsection (c) of this section, a civil penalty of up to \$10,000 per violation of this act.”.

Sec. 3. Fiscal impact statement.

The Council adopts the fiscal impact statement in the committee report as the fiscal impact statement required by section 4a of the General Legislative Procedures Act of 1975, approved October 16, 2006 (120 Stat. 2038; D.C. Official Code § 1-301.47a).

Sec. 4. Effective date.

This act shall take effect following approval by the Mayor (or in the event of veto by the Mayor, action by the Council to override the veto), a 30-day period of congressional review as provided in section 602(c)(1) of the District of Columbia Home Rule Act, approved December

79 24, 1973 (87 Stat. 813; D.C. Official Code § 1-206.02(c)(1)), and publication in the District of
80 Columbia Register.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Office of the Attorney General



ATTORNEY GENERAL
KARL A. RACINE

Legal Counsel Division

MEMORANDUM

TO: James Pittman
Deputy Attorney General
Legislative and Intergovernmental Affairs

FROM: Brian K. Flowers
Deputy Attorney General
Legal Counsel Division

DATE: October 21, 2019

SUBJECT: Legal Sufficiency Review – Draft “Hate Crime Civil Enforcement
Clarification Amendment Act of 2019”
(AE-19-650)

This is to Certify that this Office has reviewed the above-referenced draft legislation and found it to be legally sufficient. If you have any questions in this regard, please do not hesitate to call me at 724-5524.

Brian K. Flowers

ATTACHMENT E

**Council of the District of Columbia
COMMITTEE ON THE JUDICIARY & PUBLIC SAFETY
NOTICE OF PUBLIC HEARING
1350 Pennsylvania Avenue, N.W., Washington, D.C. 20004**

REVISED

**COUNCILMEMBER CHARLES ALLEN, CHAIRPERSON
COMMITTEE ON THE JUDICIARY & PUBLIC SAFETY**

ANNOUNCES A PUBLIC HEARING ON

**HATE CRIMES IN THE DISTRICT OF COLUMBIA AND THE FAILURE TO PROSECUTE
BY THE OFFICE OF THE UNITED STATES ATTORNEY**

**BILL 23-0409, THE “SEXUAL ORIENTATION AND GENDER IDENTITY
PANIC DEFENSE PROHIBITION ACT OF 2019”**

AND

**BILL 23-0435, THE “TONY HUNTER AND BELLA EVANGELISTA
PANIC DEFENSE PROHIBITION ACT OF 2019”**

**Wednesday, October 23, 2019, 10:00 a.m.
Room 412, John A. Wilson Building
1350 Pennsylvania Avenue, N.W.
Washington, D.C. 20004**

On Wednesday, October 23, 2019, Councilmember Charles Allen, Chairperson of the Committee on the Judiciary and Public Safety, will convene a public hearing to discuss “Hate Crimes in the District of Columbia and the Failure to Prosecute by the Office of the United States Attorney”; Bill 23-0409, the “Sexual Orientation and Gender Identity Panic Defense Prohibition Act of 2019”; and Bill 23-0435, the “Tony Hunter and Bella Evangelista Panic Defense Prohibition Act of 2019”. The hearing will take place in Room 412 of the John A. Wilson Building, 1350 Pennsylvania Avenue, N.W., at 10:00 a.m. *Please note that this hearing notice has been revised to include the two bills.*

On August 21, 2019, the *Washington Post* published an article revealing that “hate-crime prosecutions and convictions are at their lowest point in at least a decade.” Although there were 204 bias-motivated crimes reported in the District in 2018, the U.S. Attorney’s Office for the District of Columbia (“USAO”) prosecuted only three cases as hate crimes. Similarly, in 2017, of the 178 reported hate crimes, the USAO charged only two cases as such, and both were ultimately dismissed. The USAO’s failure to prosecute bias-motivated crimes is especially problematic given that reported hate crimes in the District have nearly doubled since 2016. This hearing will be an

opportunity to explore the prevalence of hate crimes in the District, the effect hate crimes have on vulnerable or marginalized communities, the District government's response, and the reasons underlying the USAO's lack of prosecutions.

The hearing will also consider two related bills. The stated purpose of B23-0409, the "Sexual Orientation and Gender Identity Panic Defense Prohibition Act of 2019", is to limit criminal defenses and authorization for the use of force relating to a victim's sexual orientation or gender identity. The stated purpose of B23-0435, the "Tony Hunter and Bella Evangelista Panic Defense Prohibition Act of 2019", is to curtail the availability and effectiveness of defenses that seek to partially or completely excuse crimes such as murder and assault on the grounds that the victim's sexual orientation, gender identity, or other inherent identity, is to blame for the defendant's violent action, and to require an anti-bias jury instruction in criminal trials if requested by the prosecutor or defendant.

The Committee invites the public to testify or to submit written testimony. Anyone wishing to testify at the hearing should contact the Committee via email at judiciary@dccouncil.us and provide their name, telephone number, organizational affiliation, and title (if any), by **close of business Wednesday, October 16**. Representatives of organizations will be allowed a maximum of five minutes for oral testimony, and individuals will be allowed a maximum of three minutes. Witnesses should bring **twenty copies** of their written testimony and, if possible, also submit a copy of their testimony electronically in advance to judiciary@dccouncil.us.

For witnesses who are unable to testify at the hearing, written statements will be made part of the official record. Copies of written statements should be submitted to the Committee at judiciary@dccouncil.us. **The record will close at the end of the business day on Wednesday, November 6.**

**Council of the District of Columbia
COMMITTEE ON THE JUDICIARY & PUBLIC SAFETY
NOTICE OF PUBLIC OVERSIGHT ROUNDTABLE
1350 Pennsylvania Avenue, N.W., Washington, D.C. 20004**

**COUNCILMEMBER CHARLES ALLEN, CHAIRPERSON
COMMITTEE ON THE JUDICIARY & PUBLIC SAFETY**

ANNOUNCES A PUBLIC OVERSIGHT ROUNDTABLE ON

**HATE CRIMES IN THE DISTRICT OF COLUMBIA AND THE FAILURE TO PROSECUTE
BY THE OFFICE OF THE UNITED STATES ATTORNEY**

**Wednesday, October 23, 2019, 10:00 a.m.
Room 412, John A. Wilson Building
1350 Pennsylvania Avenue, N.W.
Washington, D.C. 20004**

On Wednesday, October 23, 2019, Councilmember Charles Allen, Chairperson of the Committee on the Judiciary and Public Safety, will convene a public oversight roundtable to discuss “Hate Crimes in the District of Columbia and the Failure to Prosecute by the Office of the United States Attorney”. The roundtable will take place in Room 412 of the John A. Wilson Building, 1350 Pennsylvania Avenue, N.W., at 10:00 a.m.

On August 21, 2019, the *Washington Post* published an article revealing that “hate-crime prosecutions and convictions are at their lowest point in at least a decade.” Although there were 204 bias-motivated crimes reported in the District in 2018, the U.S. Attorney’s Office for the District of Columbia (“USAO”) prosecuted only three cases as hate crimes. Similarly, in 2017, of the 178 reported hate crimes, the USAO charged only two cases as such, and both were ultimately dismissed. The USAO’s failure to prosecute bias-motivated crimes is especially problematic given that reported hate crimes in the District have nearly doubled since 2016. This roundtable will be an opportunity to explore the prevalence of hate crimes in the District, the effect hate crimes have on vulnerable or marginalized communities, the District government’s response, and the reasons underlying the USAO’s lack of prosecutions.

The Committee invites the public to testify or to submit written testimony. Anyone wishing to testify at the roundtable should contact the Committee via email at judiciary@dccouncil.us and provide their name, telephone number, organizational affiliation, and title (if any), by **close of business Wednesday, October 16**. Representatives of organizations will be allowed a maximum of five minutes for oral testimony, and individuals will be allowed a maximum of three minutes. Witnesses should bring **twenty copies** of their written testimony and, if possible, also submit a copy of their testimony electronically in advance to judiciary@dccouncil.us.

For witnesses who are unable to testify at the roundtable, written statements will be made part of the official record. Copies of written statements should be submitted to the Committee at judiciary@dccouncil.us. **The record will close at the end of the business day on Wednesday, November 6.**

ATTACHMENT F

**Council of the District of Columbia
COMMITTEE ON THE JUDICIARY & PUBLIC SAFETY
AGENDA & WITNESS LIST
1350 Pennsylvania Avenue, N.W., Washington, D.C. 20004**

**COUNCILMEMBER CHARLES ALLEN, CHAIRPERSON
COMMITTEE ON THE JUDICIARY & PUBLIC SAFETY**

ANNOUNCES A PUBLIC HEARING ON

**HATE CRIMES IN THE DISTRICT OF COLUMBIA AND THE FAILURE TO PROSECUTE
BY THE OFFICE OF THE UNITED STATES ATTORNEY**

**BILL 23-0409, THE "SEXUAL ORIENTATION AND GENDER IDENTITY
PANIC DEFENSE PROHIBITION ACT OF 2019"**

AND

**BILL 23-0435, THE "TONY HUNTER AND BELLA EVANGELISTA
PANIC DEFENSE PROHIBITION ACT OF 2019"**

**Wednesday, October 23, 2019, 10:00 a.m.
Room 412, John A. Wilson Building
1350 Pennsylvania Avenue, N.W.
Washington, D.C. 20004**

AGENDA AND WITNESS LIST

- I. CALL TO ORDER**
- II. OPENING REMARKS**
- III. WITNESS TESTIMONY**
 - i. Public Witnesses**
 - 1. Japer Bowles, Chair, ANC Rainbow Caucus
 - 2. John Guggenmos, Commissioner, ANC 2F02
 - 3. Mike Silverstein, Commissioner, ANC 2B06

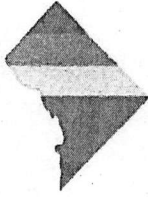
4. Kishan Putta, Commissioner, ANC 2E01
5. Mark Rodeffer, Public Witness
6. Bobbi Strang, President, Gay and Lesbian Activists Alliance
7. Ruby Corado, Executive Director, Casa Ruby
8. Holly Goldmann, Director of External Affairs, Casa Ruby
9. Q Garcia-Geary, Programs Youth Fellow, SMYAL
10. Nina Ginsberg, President, National Association of Criminal Defense Lawyers
11. Richard Gilbert, Chair, Legislative Committee, District of Columbia Association of Criminal Defense Lawyers
12. Sasha Buchert, Senior Attorney, Lambda Legal

ii. Government Witnesses

1. Kevin Donahue, Deputy Mayor for Public Safety and Justice
2. Kelly O'Meara, Executive Director, Strategic Change Division, Metropolitan Police Department
3. Toni Jackson, Deputy Attorney General, Public Interest Division, Office of the Attorney General
4. Jessie Liu, United States Attorney for the District of Columbia
5. Katya Semyonova, Special Counsel to the Director for Policy, Public Defender Service for the District of Columbia

IV. ADJOURNMENT

ATTACHMENT G



**Rainbow Caucus of
LGBTQ Advisory Neighborhood Commissioners**
Washington, D.C.

Dear Chairman Allen,:

Thank you for the opportunity to provide testimony on the rise in hate crimes in the District of Columbia and the committee's consideration of Bill 23-0409 and Bill 23-0435 -- the Advisory Neighborhood Commission (ANC) Rainbow Caucus is in support of D.C. becoming the next jurisdiction to eliminate the LGBTQ+ panic defense strategy.

The Rainbow Caucus initially formed to create a forum for D.C. Advisory Neighborhood Commissioners to discuss issues affecting LGBTQ+ residents in D.C. and to further the goal of equality and justice for our community. The Rainbow Caucus, now 23 ANC Commissioners strong, collectively gives voice to the communities we have been elected to serve through advocacy, education, and outreach. It was only natural for our caucus to prompt and support leadership on this matter.

According to data from the LGBTQ Bar Association, juries have acquitted dozens of murderers of their crimes through a defense team's use of an LGBTQ+ panic defense strategy. As recently as April 2018, an LGBTQ+ panic defense was used to mitigate a murder charge

(as previously mentioned) The LGBTQ+ panic defense strategy is not a free-standing defense to criminal liability, but rather a legal tactic used to bolster other defenses. When a perpetrator uses an LGBTQ+ panic defense, they are claiming that a victim's sexual orientation or gender identity not only explains—but excuses—a loss of self-control and the subsequent assault.

Whereas, the mission of the Rainbow Caucus is to address equity and equality for our LGBTQ residents, the full or partial acquittance of the perpetrator/s of crimes, particularly hate crimes against LGBTQ+ victims implies that LGBTQ+ lives are worth less than others.

As previously mentioned, we have met with members of our community, and with the LGBT Bar Association, and have agreed on a number of reforms and steps that we bring to you. We believe these reforms should be taken to help us to feel and be safe once again.

Actions have consequences and making D.C. the next jurisdiction to eliminate the LGBTQ+ panic defense strategy shows our community that you are listening and care about equality and justice.

The people in the room have much more work to permit members in the LGBTQ+ community to be safe, fed, housed, and employed. This is only the first step, I implore this committee to take a stand.

For more information regarding our position on these bills, please don't hesitate to contact us.

Executive Board:

Japer Bowles, ANC 1C07
ANC Rainbow Caucus, *Chair*
1C07@anc.dc.gov
He/Him/His

Monika Nemeth, ANC 3F06
ANC Rainbow Caucus,
Member-At-Large
Chairwoman of 3F
3F06@anc.dc.gov
She/Her/Hers

Mike Silverstein, ANC 2B06
ANC Rainbow Caucus,
Secretary
2B06@anc.dc.gov
He/Him/His

Membership:

Kent Boese, ANC 1A08
Chairman of 1A
1A08@anc.dc.gov
He/Him/His

James Turner, ANC 1B09
Chairman of 1B
1B09@anc.dc.gov
He/Him/His

Ted Guthrie, ANC 1C03
Chairman of 1C
1C03@anc.dc.gov
He/Him/His

John Fanning, ANC 2F04
Chairman of 2F
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He/Him/His

Andy Litsky, ANC 6D04
Vice-chairman of 6D
6D04@anc.dc.gov
He/Him/His

Alex Padro, ANC 6E01
Chairman of 6E
6E01@anc.dc.gov
He/Him/His

Michael Wray, ANC 1A09
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He/Him/His

Jason Clock, ANC 1A12
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He/Him/His

Robb Hudson, ANC 1B11
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He/Him/His

Bridget Pooley, ANC 1C02
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She/Her/Hers

Matthew Sampson, ANC 2B01
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He/Him/His

Randy Downs, ANC 2B05
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He/Him/His

Michael D. Shankle, ANC 2C01
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He/Him/His

John Guggenmos, ANC 2F02
2F02@anc.dc.gov
He/Him/His

Madeleine Stirling, ANC 2F05
2F05@anc.dc.gov
She/Her/Hers

Aaron Polkey, ANC 4D03
4D03@anc.dc.gov
He/Him/His

Jason Burkett, ANC 5D06
5D06@anc.dc.gov
He/Him/His

Edward Daniels, ANC 6D07
6D07@anc.dc.gov
He/Him/His

Drew Courtney, ANC 6C06
6C06@anc.dc.gov
He/Him/His

Anthony Lorenzo Green, ANC
7C04
7C04@anc.dc.gov
He/Him/His

I was particularly struck as I was driving to pick up my niece who goes to CSU in Fort Collins, that here I am, on Friday night, October 12th, 21 years to the day that Matthew Shepard died in a hospital here in Fort Collins. Because I grew up in Laramie and as a big guy that fit in, doing everything I was supposed to do to fit in, but small-framed Matthew Shepard was a target because he was small and because they knew he was gay. I left Laramie, Wyoming, ten years before Mathew was beaten and left for dead by Russell Henderson and Scott McKinney. In the trial, a year later, McKinney and Henderson would both raise the "Homosexual Panic Defense" as an attempt to explain and excuse their actions. While ultimately it was unsuccessful, allowing this defense legally codifies homophobia. I was not surprised by McKinney and Henderson's defense because as I said, I grew up in Laramie Wyoming, where my church and most Wyoming Churches viewed being gay as a mentally sick sinner who will burn in hell; and the common belief was, "those straight-recruiting AIDS-spreading gays deserve what they have coming to them". I wasn't surprised by their defense. Only surprised this violent action and defense didn't happen sooner to someone else. And 21 years later, I'm disappointed that the District wasn't the first to ban the LGBTQ defense. That 21 years later, I could be the victim of a violent crime and a legal strategy allowing the defendant's violent reaction would be his justification and as the excuse itself.

John Guggenmos, Commissioner, ANC 2F02

TESTIMONY OF MIKE SILVERSTEIN, ANC 2B06 AND MEMBER OF ANC RAINBOW CAUCUS AT DC COUNCIL HATE CRIMES HEARING, OCTOBER 23, 2019

I'm here for Ashanti and Zoe, whose lives were taken. I'm here for Karl and Braden. I'm here for Ashley. I'm am here - as we all are - to be a voice for the voiceless - members of our community who have been victims of violence because of who they are.

Thank you, Mr Chairman, for listening to the concerns of our community and for holding this hearing. My name is Mike Silverstein, and I represent ANC 2B06, in Dupont Circle

The week following this year's Capital Pride Parade and street fair was a stark reminder that hate crimes are not something happening far off - somewhere in flyover country or in the deep south. They happen here. And we are not always safe, even in the city that we love.

Three horrific crimes of violence were committed against members of the LGBT+ community within less than seven miles of here. Two of these were undoubtedly hate crimes. Zoe Spears, a young and deeply loved transgender woman, was shot and left to die, just off Southern Avenue, across the District line, just across the street from where she lived. And three days later, Karl and Braden, two young gay men were set upon and badly beaten by a mob of teenagers on U Street. One of them suffered broken bones around his eye.

These incidents, plus the Council's refusal to even consider a request from 15 LGBT+ organizations to fund additional programs for health equity and safety for the most vulnerable in our community, led many in the LGBT+ community to ask us to give voice to their concerns - which are most certainly our concerns as well.

We are the ANC Rainbow Caucus of openly LGBT+ Advisory Neighborhood Commissioners. There are 23 of us, from all quadrants of the District. We, like you, are elected officials, and we represent our Single Member Districts, but also our community.

About the time we met with you, the Washington Post article detailing 204 reported hate crimes in DC last year, 58 arrests, 3 prosecutions that include the hate crime enhancement, and zero convictions, you agreed to hold this hearing to give voice to the concerns of our community - concerns about our safety, and about the very lives of our transgender siblings. And this morning, the Washington Post informs us that the rate of reported hate crimes this year in DC is surpassing last year's record.

Since you last met with us, we have met with members of our community, and with the LGBT Bar Association, and have agreed on a number of reforms and steps that we bring to you. We believe these reforms should be taken to help us to be safe once again. Other members of our community will speak to specific steps, but let me outline them for you.

First, a ban on Gay Panic and Trans Panic Defense. The idea that someone might attack us or kill us because of our sexuality or gender identity - and that might be a mitigating factor - is insulting and dehumanizing. DC should join up to a dozen other

TESTIMONY OF MIKE SILVERSTEIN, ANC 2B06 AND MEMBER OF ANC RAINBOW CAUCUS AT DC COUNCIL HATE CRIMES HEARING, OCTOBER 23, 2019

states that have recently done this. There are two bills that have been introduced. The ANC Rainbow Caucus takes no sides on which bill is best. Just get it done.

Second, clarify the law and the jury instructions on exactly what constitutes a hate crime. The head of the LGBT Bar Association read from the current jury instructions and they do not even include the phrase gender identity. But they include other outdated language such as handicapped, instead of disability.

The defining issue, as you will read in written testimony from the LGBT Bar Association, is the conflict between the U-S Attorney's office, which argues that for an offense to be a hate crime, hatred against a protected class must be a primary factor in commission of the crime, but the Public Defender's Office and defense attorneys argue that hatred must be the only driving force. That, we argue, is an impossibly high bar.

Work with the LGBT Bar Association to re-examine and, if necessary, clarify the statute so that jury instructions are that if hatred against a protected class is a primary driving force, that it is a hate crime.

Third, the LGBT+ community must know - for our own safety - when and where crimes against us have been committed, whether arrests have been made, whether a hate crimes enhancement is being sought, whether charges are dropped, whether there's a plea bargain, and absolutely we must know the final disposition of cases. And, Mr Chairman, this includes juvenile offenses.

The fact that the community did not know ANYTHING about the Ashley Taylor case until the Washington Post article came out underscores that there have been serious failures here. The U-S Attorney's Office notified the District about this case. And yet word never reached the community. This must never happen again.

And we must all acknowledge that some of the most horrific attacks and the worst harassment have been committed by juveniles and because of privacy concerns regarding juvenile offenders we are left in the dark about disposition of these cases.

What happened to the juvenile who stomped on a 24-year old gay man, crushing the bones around his eye. putting him in the hospital? We, as a community, may have disagreements about whether to make public the names of those young people who attack us, but we are united that we have a right to know the disposition of the cases.

What about the juveniles who robbed and threatened to transgender women at the gas station? Same thing. If our people are robbed, beaten, and attacked in public, the disposition of justice cannot be kept secret.

This hearing is about our safety, and, above all, about whether you value the lives and dignity of everyone in the District, including every one of us in the LGBT+ community.

Testimony of Kishan Putta
Commissioner, DC Commission of Asian and Pacific Islander Affairs
Commissioner, Advisory Neighborhood Commissioner 2E01
October 23, 2019

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My name is Kishan Putta. I hope the District will become one too few jurisdictions to pass legislation like the ones being considered today. I specifically support the Tony Hunter and Bella Evangelista act because it covers various categories of hate crimes.

The District sadly has one of the highest hate crime rates per capita in the country - in several categories - sexual orientation and gender identity hate crimes, as well as many hate crimes based on religion, race, ethnicity, and immigrant status.

I serve on the DC Commission on Asian and Pacific Islander Affairs and am the chair of the DC Democrats Asian Pacific Islander Caucus. But this is nonpartisan. Many members of the API community and immigrant community in general have been victims of hate crimes in the years since 9/11 and in the years since the last presidential campaign when anti-immigrant and anti-muslim rhetoric have been used by the now president who has also promoted racists and hate mongers of all sorts. This not partisan - it is factual. And I worry that it can sadly only get worse in the upcoming presidential campaign year.

I'm also the elected Commissioner for the neighborhoods of Burleith, Hillandale, and part of Georgetown and previously was the Commissioner at the border of Logan Circle and Dupont Circle. At that time, working with Commissioner Silverstein, we called out for action on LGBTQ hate crimes in the Dupont-Logan area - and I also commend Commissioner Guggenmos as well for all his work.

Where I live now in Burleith - right after the Charlottesville hate crimes and protests in 2017 - antisemitics slurs were painted on a building 2 blocks from my home. We immediately alerted authorities, but DGS's response was to paint over it before the police could even arrive to investigate it. We called together stakeholders and told them they should not make this mistake again and they agreed - we hope they remember - we will not forget.

My communities are very deeply concerned about the way hate crimes are being handled and prosecuted - or not. I shared with my communities the coverage, namely in the Washington Blade, of US Attorney Liu's October 10 meeting where she proposed changes to DC code and in her office.

I'm here to say that it is not enough. There are so many cases where others overheard racial or homophobic slurs shouted during an attack that were not even tried as hate crimes let alone convicted.

This is unacceptable. She has promised that the Hate Bias Crimes Task Force would be more engaged. I would like to ask for a list of the members and the communities they represent and if it does not represent all interested communities, I would like the task force either expanded or at least supplemented by an advisory committee. If it does not represent all interested communities, it should.

Testimony
of
Mark Rodeffer
Regarding Hate Crimes in DC
Before the
DC Council Committee on the Judiciary & Public Safety
Wednesday, October 23, 2019

My name is Mark Rodeffer. I'm a gay man who was the victim of a hate crime in 2013. The person who committed the hate crime hired a lawyer who made homophobic arguments to the jury and said I lied about the assault because I am gay.

I am grateful that the DC Council is considering legislation to limit criminal defenses that seek to justify violent acts and other criminal behavior because the victim was gay, lesbian, bisexual, trans, or had other characteristics that the perpetrator disliked.

I appreciate the intent of the two bills being considered today, but I believe the issue is more complicated than just the "heat of passion" defense.

Let me tell you my story. In January 2013, I tried to enter a restroom at the Washington Sports Club in Columbia Heights. A man was in the unlocked restroom stall. I saw him upon opening the door, and I immediately turned around. As I walked away, he loudly stated that he was not a "fucking faggot." I ignored the comment and tried to use a different stall. He followed me, and as I tried to shut the door to the stall, he pushed his way in, struck me in the face, and repeatedly yelled that he was not a "fucking faggot."

After the shock wore off, I called 911, and the man was arrested. Prosecutors charged him with assault with a hate crime enhancement. This was during the Obama administration, I should note.

At the trial, an unscrupulous defense lawyer named David Akulian told the jury that most people would believe I was trying to make a sexual advance on the person who assaulted me. Mr. Akulian told the jury it is widely known that gay men seek unwanted sexual encounters in public restrooms. Mr. Akulian then presented the jury with truly twisted logic: he said I was ashamed of what he claimed was this widely held belief, and that because I am gay, I made up the story about being assaulted in an attempt to cover up my shame. Mr. Akulian's statements were absurd and untrue. He had no factual basis to make these claims, and he offered no evidence to support them.

Sitting in the courtroom, listening to David Akulian's lies was traumatic, much like the assault itself. But unlike the underlying crime, Mr. Akulian's lies were not only legal, they were sanctioned in a court of law.

Mr. Akulian's homophobic claims – that I was lying, that I was ashamed to be gay, and his insinuation that I was seeking sex – are all untrue. They are outright lies.

They were also effective. The jury convicted the man of assault, but acquitted him of the hate crime. That means the jury found he assaulted me but also somehow found that his motive was not hate, despite his repeated use of a homophobic slur during the assault.

The dishonest lawyer in this case did not make a "heat of passion" argument. But he presented a homophobic defense, successfully getting his client acquitted of the hate crime that his client did in fact commit.

I applaud the DC Council for considering legislation to outlaw the "gay panic" defense. But it is not enough. Unethical lawyers should not be allowed to make arguments that people in minority groups are somehow different, weird, or perverted. We should celebrate our diversity, not use it to pit people against one another. I urge the DC Council to use its authority to stop the use of bigotry as a defense for criminal acts.

Additional Written Testimony
of
Mark Rodeffer
Regarding Hate Crimes in DC
To the
DC Council Committee on the Judiciary & Public Safety
October 28, 2019

Thank you, Councilmember Allen, for allowing me to testify at the Judiciary and Public Safety Committee hearing on hate crimes in DC on October 23, 2019. After I shared my story of being the victim of a hate crime and told the committee about the unfounded, false and homophobic statements made by defense lawyer David Akulian at the trial, a witness suggested to the committee that the case was an anomaly. The facts of the case suggest the opposite.

National Association of Criminal Defense Lawyers President Nina Ginsberg said in her oral testimony that judges can be relied upon to prevent lawyers from making homophobic claims in hate crimes cases. In response to a question, Ms. Ginsberg acknowledged that David Akulian's dishonest statements to the jury were unethical and said: "That individual lawyer should be held to account." But, Ms. Ginsberg, added: "The prosecutor should have objected, the judge should have sustained the objection and not allowed the lawyer to make unfounded, unsupported arguments." She said such courtroom actions would obviate the need for the hate crime legislation pending before the committee.

During the trial, the prosecution did in fact object to Mr. Akulian making unsubstantiated claims. The prosecution argued to the judge that because no evidence was introduced in the trial to support Mr. Akulian's allegations that gay men are widely known to seek sex in public restrooms and that I was ashamed of what Mr. Akulian proclaimed to be a fact, the judge should not allow Mr. Akulian to make these unsubstantiated claims in his closing

statement. The judge overruled the prosecution and allowed Mr. Akulian to continue lying to the jury.

Ms. Ginsberg may be correct that "the judge should have sustained the objection and not allowed the lawyer to make unfounded, unsupported arguments." However, that is not what happened in the trial. This trial unfortunately demonstrates that we cannot rely on judges to prevent dishonest statements and unethical behavior from lawyers like David Akulian.

Ms. Ginsburg suggested defenses such as the one employed by Mr. Akulian are rare. Answering a question, she said "one bad lawyer" such as Mr. Akulian does not demonstrate the need for the legislation the committee is considering. As I stated in response to a question at the hearing, but before Ms. Ginsberg testified, the assistant U.S. attorneys working on the case told me before the trial that they suspected the defense would claim I was seeking sex. And that is exactly the false insinuation Mr. Akulian focused on in his closing statement to the jury. That the prosecutors correctly guessed that Mr. Akulian was going to make this false claim suggests it was not the rare behavior of "one bad lawyer," but instead a fairly obvious defense for someone who commits a hate crime against a gay man.

As the victim of a hate crime and the victim of an unscrupulous lawyer, I urge the Judiciary and Public Safety Committee to pass legislation banning the "gay panic" defense and not to allow lawyers to use bigotry as a defense for criminal acts.



**Testimony on Bill 23-409,
Sexual Orientation and Gender Identity Panic Defense Prohibition Act of 2019,
and Bill 23-435,
Tony Hunter and Bella Evangelista Panic Defense Prohibition Act of 2019**

**Before the Committee on Judiciary and Public Safety
October 23, 2019**

Good morning, Chairperson Allen and committee members. I am GLAA President Bobbi Strang. Thank you for holding this hearing on hate crimes in the District of Columbia and the two panic defense prohibition bills, B23-409 and B23-435.

The District, like many jurisdictions across the United States, has seen a dramatic rise in hate crimes since the 2016 election. GLAA concedes that part of the increase in the District may be due to better reporting as MPD has stated, but the increase in hate crimes is such that improved reporting cannot account for all of it. Equally troubling is the lack of prosecution for hate crimes by the United States Attorney's Office. We believe this lack of consequences sends a message that if a person hurts members of the LGBTQ community in the District, they will be allowed to get away with it.

The USAO has stated that they believe they cannot prosecute hate crimes in the District successfully due to vague jury instructions that leave jurors with the impression that a person cannot be found guilty of a hate crime unless their prejudice is the sole motive for the underlying offense. We are skeptical of this.

While we do recommend that the Council clarify the statute, we are not confident that this will resolve the lack of action by the USAO. The Attorney General of the United States has publicly indicated his support for dominionism and theocratic-based law, an ideology hostile to the LGBTQ community. He has also demonstrated a willingness to abuse the power of his office to achieve political ends, so we do not have confidence that the USAO in the District is allowed the authority needed to properly protect our community. Local control of ALL criminal prosecutions would help return confidence in the criminal justice system.

Moreover, while the District has progressive laws and policies, panic defenses have been used in our courts – most notably in the murders of Tony Hunter and Bella Evangelista. Our existence does not constitute incitement and should not be grounds for a legal defense. The fact that this defense has been used in the District makes clear the need for the Tony Hunter and Bella Evangelista Panic Defense Prohibition Act of 2019. We ask that you affirm our right to exist by advancing this bill.

Thank you.



Wednesday, October 23, 2019
Councilmember Charles Allen, Chairperson
Committee on the Judiciary & Public Safety
Witness Testimony, Q Garcia-Geary, SMYAL

empowering LGBTQ youth

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Good morning everyone and thank you to Councilmember Allen for holding this important hearing today.

My name is Q Garcia-Geary, I use they/them pronouns, and I am 20 years old. I am here today representing SMYAL, Supporting and Mentoring Youth Advocates and Leaders. SMYAL is a DC-based nonprofit with facilities in wards 6 and 8 that support LGBTQ+ youth from as young as the age of 6 up to 24.

I am sitting here before you today as a trans nonbinary, latinx, youth. I have purple hair, a nose ring, and am visibly queer. This way of expression is not optional. It is lifesaving for me to express myself as myself in every facet of my life. Every time I leave my apartment, I am constantly aware of my lack of safety. I never know which slurs will come my way as I walk to work. I never know if I am going to make it back to my apartment without experiencing violence. When I am out with my partner, a black nonbinary person, and I hold their hand on the metro or give them a kiss on the cheek, I never know if we are going to be attacked or assaulted. This experience is not just my own. I work at an organization that serves LGBTQ+ youth who would not be the least bit shocked to hear this. The fear of violence for simply existing is a shared experience amongst all LGBTQ+ people. We are never surprised when a member of our community is attacked. For us, hate crimes are not an anomaly, hate crimes against LGBTQ+ people are the norm.

SMYAL works directly with LGBTQ+ young people throughout the District, most of whom live east of the river, and many of whom are experiencing or have experienced homelessness. Our youth have shared details of either being assaulted or harassed due to their perceived sexual orientation or gender expression. It's happening not just in their schools, but in their neighborhoods. They've expressed needing to be constantly alert and prepared to face street harassment or defend themselves from physical attacks, both from their peers and adult strangers.

SMYAL is an IRS designated 501(c)(3) nonprofit organization (TIN 52-1394900). The referenced donation, made in 2018, was a charitable contribution, and nothing was received in return. All gifts are tax deductible to the fullest extent of the law. If you have any questions about your gift, please contact Jason Laney, Development Director, at 202-567-3155 or jason.laney@smyal.org.

supporting and mentoring youth advocates
and leaders

Today we are talking about why there is a lack of prosecutions against perpetrators of hate crimes. Our youth, including myself, do not feel comfortable reporting crimes that occur against us. Why? First of all, we fear that we will not be believed. Our society has created a culture of not believing young people and especially young people who hold marginalized identities. We are also afraid that our identities, whether racial, financial, queer or all of those combined could be used against us or more violence be perpetrated against us.

SMYAL provides community resources to support LGBTQ+ young people with the tools to advocate for themselves. We work in the community, leading cultural competency trainings so that other providers like teachers, doctors, and police have the language and understanding to affirm and support the young people they work with. This only goes so far when the systems in place are not set up to protect them. Community organizations like SMYAL can not do this work alone. We need to know that there is more than a specialized unit in the DCPD that supports us. We need to have resources that our young people can trust. We need to know that our elected officials and legal system see us. When violence occurs, we need to know that there are community resources available that will respect us, that affirm our identities, that listen to us, and where we know our safety will be prioritized.

Preventing hate crimes is not just about preventing violence. It is about creating a community where youth feel safe in their identities. It is about ensuring that every one of our young people feels safe presenting in a way that feels best to them without fear of what is going to happen to them on their walk home from school. It is also fostering a system where youth have trusted community members that they can report when harm is done to them and where perpetrators can be held accountable for their actions. I urge you all to put yourself into the mindset of a vulnerable youth when thinking about how to address this issue. For us, it is an everyday reality that we may not make it home safely. I urge you all to take action to protect the most marginalized amongst us so that safety instead of violence becomes our new normal.



District of Columbia Association of Criminal Defense Lawyers

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October 23, 2019

Honorable Charles Allen
Chair, Committee on the Judiciary and Public Safety
Council of the District of Colombia
1350 Pennsylvania Avenue, N.W.
Washington, D.C., 20004

RE: Testimony for Public Hearing of the Committee on the Judiciary and Public Safety on October 23, 2019

Dear Councilmember Allen,

DCACDL is a voluntary organization composed of criminal defense lawyers in the District of Colombia. Our members come from the private bar and include attorneys who accept court appointments to represent indigent defendants in the local courts of the District of Colombia and the federal court system, to include both matters in the trial courts and on appeal. As such, we have a strong interest in legislation in the District of Colombia which can significantly affect the criminal justice system. On behalf of the District of Colombia Association of Criminal Defense Lawyers (DCACDL), I am submitting this written testimony in connection with the public hearing of the Committee on the Judiciary and Public Safety scheduled for October 23, 2019 to discuss:

1. Hate crimes in the District of Colombia and the failure to prosecute by the Office of the United States Attorney (OUSA),
2. Bill 23-0409, the "Sexual Orientation and Gender Identity Panic Defense Prohibition Act of 2019",
and
3. Bill 23-0435, the "Tony Hunter and Bella Evangelista Panic Defense Prohibition Act of 2019".

This written testimony is intended to supplement my oral testimony at the hearing.

I. THE FAILURE TO PROSECUTE HATE CRIMES

We understand the term "hate crime" to refer to "bias-related crimes" as defined at D.C. Code 22-3701(a) which is a [criminal act] "that demonstrates a defendant's prejudice based on the actual or perceived race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, gender identity, or expression, family responsibility, homelessness, physical disability, matriculation, or political affiliation of a victim of the designated act." D.C. Code 22-3703 provides that person convicted of a "bias-related crime" may be sentenced to 1 ½ times the maximum allowed fine or imprisonment for the underlying criminal act. We understand that crimes statistics show that such bias-related crimes are committed at a greater rate in recent years, and that the OUSA has failed to prosecute such crimes as bias-related crimes at a corresponding rate.

While this inquiry is properly directed to the OUSA, we would venture to comment, based on our collective experience, that the OUSA declines to prosecute such crimes as bias-related crimes because when the maximum punishment provisions of D.C. Code 22-3703 are applicable, the defendant is entitled to a jury trial when they might not otherwise be. Although DCACDL would welcome a return to more jury trials for reasons we have expressed before, the issue seems otherwise a policy matter delegated to the OUSA, subject, of course to oversight by this Committee.

II. THE PROPOSED "ANTI-BIAS" INSTRUCTIONS

A. Standard Jury Instructions in the District of Colombia

In addition to addressing substantive aspects of the law concerning "provocation" and the "heat of passion" both proposed bills include sections which mandate the giving of an "anti-bias" instruction. While DCACDL agrees with the intent of the Council to expand the range of potential categories of bias that jurors should be instructed to avoid, we disagree with legislation that mandates the language of any such instruction. Instead we urge the Committee to defer to the process by which standard jury instructions in the District of Colombia are developed.

Jury instructions can be critical portions of any criminal jury trial. While the jury is expected to be the body which determines the *facts* of a case, their verdicts must be constrained by the law itself and instructions are the vehicle by which judges inform the jury of the applicable aspects of the law. Standardized instructions, or as they are frequent known, "pattern" instructions, are used in every jurisdiction. Such instructions relieve the judge and counsel from having to start from scratch in crafting instructions. They can serve as a "checklist" to make certain important concepts are not missed. They ensure that juries in different courtrooms will receive essentially the same instructions in similar cases. They ensure that juries are instructed with language that is not only legally correct but also are as understandable to persons without legal training as possible. All sets of standard instructions inform judges and counsel that they should feel free to amend the standard instructions in cases when they do not appropriately reflect the applicable law in a given case.

We understand that the standard criminal jury instructions in the District of Colombia began many decades ago as a partnership between the Young Lawyers Section of the Bar Association of the District of Colombia and the Lexis legal publishing company. Over the years the role of the Young Lawyers Section has ended and Lexis continues to produce the jury instructions with annual revisions each year. The instructions are produced in the form of a loose-leaf notebook with a red cover, giving rise to the term "Red Book" by which the set of instructions is commonly termed. Each instruction is accompanied by a Comments section intended to

provide additional background information and legal support for the instruction. Lexis has engaged a distinguished law professor with ties to the District of Columbia to oversee the production of the annual revisions. That professor, in turn, assembles a committee, known as the "Redbook Committee" to decide on the language of the new or amended instructions. That committee is composed of representatives from the judges of the Superior Court and the United States District Court, the OUSA, the Attorney General of the District of Columbia, the Public Defender Service, and the Federal Defender's Office.¹ The Committee ascertains if new instructions are needed or if existing instructions should be amended or expanded based upon new court decisions,² changes in legislation, and recommendations of the participants and the agencies they represent. The specific language for each instruction is carefully considered, competing versions are discussed and legal research is conducted when necessary. The Redbook Committee attempts to reach consensus on any revisions. When there are implacable differences, they are highlighted in the Comments section of the applicable instruction.

One may think such a process would be simple, but it is not. Common law case decisions often contain archaic or complex legal terms of art, such as "*mens rea*" or "malice aforethought"³ which would not be normally understood by a juror untrained in the law. Legislative language is sometimes no better, as we demonstrate in the analysis of the legislation which we provide in following sections. In an effort to be comprehensive, legislation may use redundant terminology; it may contain imprecise language, leaving the Committee to decide how to formulate language to be used in an instruction to the jury. One persistent problem for the Committee is to decide when to employ the specific language from the statute when it uses language difficult for a lay person to follow; the Committee struggles to decide when simpler language can express the legislative intent.

B. Versions of an "Anti-bias Instruction"

B23-409 would add to D.C. Code a new section § 23-116 which reads as follows:

(a) In any criminal trial or proceeding, upon the request [of] a party, the court shall instruct the jury substantially as follows: "Do not let bias, sympathy, prejudice, or public opinion influence your decision. Bias includes bias against the victim or victims, witnesses, or defendant based upon his or her disability, gender, nationality, race or ethnicity, religion, gender identity or expression, or sexual orientation.

B23-435 contains a similar provision with minimal changes in language⁴

The current standard instructions include an instruction given in every case at the start of deliberation - Instruction 2.102 - Function of the Jury which contains as part of a lengthy instruction, the following

¹ Undersigned also serves on the Committee as a private attorney.

² Occasionally a Court of Appeals will decide that the language of an instruction is incorrect. The instruction will be amended in the next revision.

³ The Redbook has decided not to use the term "malice" in the instructions. Instead we describe the element as an absence of "mitigating circumstances."

⁴ "§ 23-116. (a) In any criminal trial or proceeding, upon the request of either the prosecutor or the defendant, the court shall instruct the jury substantially as follows: "Do not let bias, sympathy, prejudice, or public opinion influence your decision. "Bias" includes bias against the victim or victims, witnesses, or defendant based upon his or her disability, sex, national origin, race, color, religion, gender identity or expression, or sexual orientation."

You should determine the facts without prejudice, fear, sympathy, or favoritism. You should not be improperly influenced by anyone's race, ethnic origin, or gender. Decide the case solely from a fair consideration of the evidence.

DCACDL agrees that the standard instruction can be improved by expanding, consistent with the language in the proposed bills, the range of characteristics which the jury should be instructed they should not be improperly influenced by, such as:

You should determine the facts without prejudice, fear, sympathy, or favoritism. You should not be improperly influenced by anyone's *disability*, race, *national or* ethnic origin, *religion*, gender *identity or expression, or sexual orientation*. Decide the case solely from a fair consideration of the evidence.
(additional language highlighted)

We believe that this language is superior to the language in the proposed bills for several reasons. First, it omits the term "bias." There is a reluctance for people to see themselves as biased, and an instruction which cautions jurors not to be "biased" may not have the same impact as simply instructing them not to "be improperly influenced" by the same characteristics. Moreover, we believe the language not to "be improperly influenced" by these factors is a more general, yet accurate statement of the law. First of all, in some cases it is appropriate to consider one of the identified characteristics. Indeed, if a defendant is prosecuted for a bias-related crime, the identified characteristic is central to the bias-related element. Moreover, the instruction instructs the jury not be improperly influenced by a *positive* view of a person's characteristics. Finally, if the Council mandates specific language, it is possible that jurors in federal court may receive a different instruction than jurors in Superior Court.

The Redbook Committee is scheduled to meet on October 25, 2019, two days after the hearing. We propose to take up the proposed changes to the standard instruction at that meeting and I will be advocating for the proposed language or similar language. The Committee can promptly inform the Council if such a change is adopted which should eliminate the requirement for a legislatively mandated instruction.

III. THE "GAY PANIC DEFENSE"

Although, as set forth in the following section, the pending bills go much further than addressing the "gay panic defense," banning such a defense is their stated legislative purpose. Thus it is appropriate to discuss the concept of the "gay panic defense" in general. DCACDL believes it is essential in understanding the "gay panic defense" to understand that it is about sex – whether intended or attempted and whether promised or threatened. If one attacks a gay couple walking hand in hand down the street, beats or clubs a sleeping homeless person, or vandalizes a synagogue, one is not acting in the "heat of passion;" one is committing a hate crime pure and simple. That is *not* what the "gay panic defense" is about. The most common circumstances when a defendant asserts a "gay panic defense" are when a heterosexual male engages with a stranger whom he believes to be biologically a woman for purposes of a sexual encounter, whether commercial or consensual, and discovers during the encounter that the stranger is biologically a male or when a heterosexual male receives an unexpected, unwanted, overt sexual advance from someone he believes to be another male. The defense then argues that he is not guilty of the most serious charge (perhaps in conjunction with other arguments that might constitute a complete defense) that the defendant lacked the requisite mental state of "malice," defined in the standard jury instructions as "an absence of mitigating circumstances," which is further defined as a defendant acting "heat of passion caused by adequate provocation." "Heat of passion" can include such emotions as rage

resentment, anger, terror and fear.” “Adequate provocation” is defined “as conduct on the part of another that would cause an ordinary, reasonable person in the heat of the moment to lose his/her self-control and act on impulse and without reflection.” It is the responsibility of the jury to both find the defendant’s version of pertinent facts true and to determine whether a reasonable person in the defendant’s shoes could lose control of his emotions and act with excessive violence.

Some may simply view such a defense as make believe. While this could be true in some cases, that is precisely the jury’s role. We think, however, the Council ignores basic human psychology when it ignores the role that sexual interactions can play in human emotions. Sex is different than our everyday encounters. It is intensely personal, profoundly implicates our self-identity and frequently evokes powerful emotions. These emotions can be positive ones of affection and desire, but they can also be negative ones of revulsion, fear and shame. This can be particularly true if the defendant himself has been the victim of sexual abuse as a child. DCACDL believes it is wrong to simply pretend such emotions are not real.

Since persons of all sexual orientations and gender identities experience the emotions in connection with sexual interactions, DCACDL suspects the true basis of the pending legislation is the belief that the evocation of strong emotions which underly a true “gay panic defense” of a heterosexual male defendant are not worthy of legal consideration. While understandable when the victim is sympathies and the violence is excessive, DCACDL submits this belief is simply hypocritical and a violation of equal protection. One of the reasons that the LGBTQ community has gained greater support in the greater community is the increasing realization that sexual orientation and gender identity are often fixed at birth and not a conscious choice. If that is so, however, that means that some persons are born with a heterosexual orientation and a gender identity that comports with their biological identity. They may justifiably have a true aversion to personally engaging in homosexual conduct, even if they are tolerant of such differences in others. Moreover, years of religious doctrine and cultural influence may unfortunately convince some heterosexual persons that homosexual conduct is an “abomination” and “unnatural.” If these factors combine in an instant when confronted by unexpected and unwanted homosexual encounter such that they constitute “mitigating circumstance,” a defendant should be permitted to make his case to the jury.

We wish to be clear about the point we are making. DCACDL completely agrees with the idea that being gay or transgendered does not mean the person deserves to be violently assaulted or even killed for that reason. The existence of “mitigating circumstances” does not relieve a defendant from criminal liability. The punishments for manslaughter or aggravated assault can be severe, but the severity of criminal punishment involves a balancing not only of the acts committed and the damage inflicted, but also the defendant’s mental state. The law has for generations recognized that the heat of passion caused by adequate provocation can ameliorate a defendant’s state of mind, not his actions themselves. In the rare cases when a genuine gay panic defense is fairly presented by the evidence, the defendant should be entitled to have a jury consider it. We all want “justice” for victims, but just as it is not “justice” to convict a person of first-degree murder when there has been no premeditation, it is not “justice” to convict a person of second-degree murder when there are reasonable “mitigating circumstances.”

IV. TEXTUAL ANALYSIS OF THE PROPOSED LEGISLATION

Both proposed bills seek to add a new section to the District of Columbia Criminal Code, D.C. Code 23-115. Assuming that the Council disagrees with DCACDL’s position that no legislation is needed to preclude a gay panic defense, we continue to believe that both bills are ambiguous and overbroad.

A. B23-409

B23-409 proposes to add three paragraphs to the new D.C. Code 23-115. Subparagraph (a) reads as follows:

“(a) For a crime of violence, adequate provocation for a defense premised on “heat of passion” shall not exist if the defendant’s actions are related to the discovery of, knowledge about, *or potential disclosure* of the victim’s actual or perceived gender identity or expression, or sexual orientation. including under circumstances in which the victim made an unwanted, non-forcible romantic or sexual advance toward the defendant, or if the defendant and victim dated or *had a romantic relationship*.

This paragraph is the proposal most closely related to banning the gay panic defense. Nonetheless there are two provisions of this proposed provision that trouble us. First, we are unable to understand what the *potential* disclosure of information has to do with a gay panic defense. We ask whose information might be potentially disclosed, by whom might it be disclosed, and to whom it may be disclosed? If information about the victim’s sexual orientation, and gender identity or expression has not yet been disclosed to the defendant, how is a gay panic defense even applicable? Does the Council statute contemplate potential disclosure about the *defendant’s* sexual orientation, gender identity or expression, even though it refers only to the victims’ information?

We also have concerns about language that would bar a gay panic defense even if the parties had a romantic relationship? If there is an existing romantic relationship the implication is either that the defendant *already knows* about the victim’s sexual orientation, and gender identity or expression, in which case a defense that the defendant panicked would seem illogical, or the victim has successfully *deceived* the defendant about the victim’s sexual orientation, and gender identity or expression, in which case an additional legitimate basis for anger might be more likely.

The bill contains a second paragraph which reads:

“(b) A defendant does not suffer from *reduced mental capacity* based solely on the discovery of, knowledge about, or potential disclosure of the victim’s actual or perceived gender identity or expression, or sexual orientation. including under circumstances in which the victim made an unwanted, non-forcible romantic or sexual advance toward the defendant or if the defendant and victim dated or had a romantic relationship.

DCACDL remains confused about the purpose of this language. In addition to our concerns about “potential disclosure” and “romantic relationship,” we do not understand what is meant by “reduced mental capacity.” It is not a term we use in criminal practice in the District of Colombia. To our knowledge the term does not appear in any other criminal statute or jury instruction. There is a concept in the law of “diminished mental capacity,” but that doctrine is not permitted to reduce a defendant’s criminal responsibility in the District of Colombia. See, *United States v. Yunis*, 924 F.2d 1086, 1096 (D.C.Cir.1991) (“in view of the changes in the federal law since 1984, defendant would be precluded as a matter of law from introducing evidence of ‘mental disease or defect or any other mental condition’ that bears on the issue whether defendant possessed the requisite *mens rea* to commit the crime.” On the other hand, a defendant’s mental state may be relevant for purposes of sentencing, but sentencing is traditionally an area which is entrusted to the judge’s discretion and

the judge is entitled to consider a wide range of information, including information about the defendant's mental state. We do not understand the Council to be seeking to change the law in that regard. Thus, we are at a loss to understand why this paragraph is needed.

Finally, B23-409 contains the following paragraph:

(c) A person is not justified in using force against another based solely on the discovery of, knowledge about, or potential disclosure of the victim's actual or perceived gender identity or expression, or sexual orientation, including under circumstances in which *the victim made an unwanted, non-forcible romantic or sexual advance* toward the defendant, or if the defendant and victim dated or had a romantic relationship.

Once again, DCACDL fails to understand the purpose of this subparagraph. We agree that the mere fact of disclosing one's sexual orientation or gender identity or expression would not warrant the use of force, but that is already the law in the District of Columbia. Going further, however, if read literally, the bill would seem to constitute a significant change in the law of self-defense. An unwanted sexual touching, even if not a forced touching, is still an assault under District of Columbia law. Is it the intent of the Council that one may grope another individual and the other individual may not resist that touching with appropriate physical force?

B. B23-435

DCACDL recognizes many Councilmembers sponsored this bill, but with all due respect, this bill is even more confusing and overbroad than B23-409. The bill's new paragraph reads as follows.

"§23-115" §23-115. Limit on defenses that seek to excuse violence on the basis of a *victim's identity*.

"(a) For any crime of violence, sufficient or adequate provocation for a defense premised on "heat of passion" shall not exist if the defendant's actions are related to the discovery of, knowledge about, or the potential disclosure of:

"(1) One or more of the following characteristics or perceived *characteristics of the victim*: disability, gender identity or expression, national origin, race, color, religion, sex, or sexual orientation, *regardless of whether the characteristic belongs to the victim or the defendant*, even if the defendant and victim dated or participated in sexual relations, or if the defendant or victim romantically pursued the other; or

"(2) The *victim's association with a person or group with one or more of the characteristics, or perceived characteristics identified in paragraph (1)* of this subsection.

In addition to the same problems we identified in the language of Bill 23-409, this bill has two major problems. First of all, while the bill first purports to talk about the characteristics of the victim, which would at least make sense in the context of a gay panic defense, the bill goes on to say that it does not matter whether the applicable characteristic is that of the victim *or the defendant*. How can that make any sense? Which is it? How would disclosure of a characteristic of the defendant relate to a gay panic defense? If the disclosure of a defendant's characteristic were something in the nature of blackmail, why should the defendant be deprived of

any defense well-recognized in the law?

Finally, how in the world does a victim's *association with a group* possibly relate to a gay panic defense? To be sure, it might be related to a bias-related crime, such as attacking someone who is marching with Black Lives Matter, but that is a different statute altogether. As explained above, a generalized hatred of someone who is different which results in a crime of violence would never be grounds for "mitigating circumstances." No judge would ever permit such a defense to go to the jury.

V. CONCLUSION

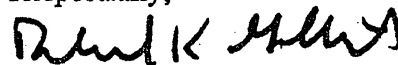
DCACDL applauds the extension of complete civil rights to the LGBTQ community and we deplore the senseless acts of violence perpetrated on members of it and other minority communities. We also agree that it might be sound public policy to more vigorously prosecute bias-related crimes, to include seeking the enhanced penalties available under that statute. We do not however support depriving criminal defendants of long recognized defenses simply because of the characteristics of the victim. A claim that a defendant who commits a violent act is acting in the heat of passion caused by adequate provocation is a complex task. Not only must the defendant persuade the jury that his version of events is true, but he must also persuade the jury that an ordinary, reasonable person might in those circumstances lose their self-control and act on impulse. The facts matter and can involve a complicated array of emotions. We believe the Council should not arbitrarily deprive a defendant of his constitutional right to present his defense, if he can make it.

Therefore, DCACDL recommends that:

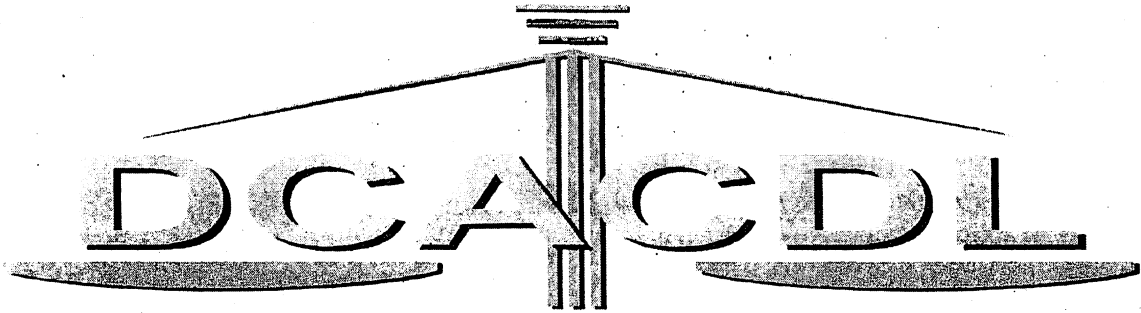
1. The Council defer any action on mandating an "anti-bias" instruction until the Committee tasked with drafting standard jury instructions has an opportunity to modify the existing standard instruction on the jury's role in the trial.
2. The Council not seek to legislatively limit the use of a gay panic defense when circumstances might otherwise warrant it.
3. That in the alternative, should the Council seek to limit a defendant's right to a "gay panic defense," the Council should pass only subparagraph (a) of the proposed D.C. Code §23-115 in B23-409 and eliminate references to "potential disclosure" and "romantic relationships."
4. That subparagraphs (b) and (c) of the proposed D.C. Code §23-115 in B23-409 should not be enacted.
5. That B23-435 in its entirety should not be enacted.

Thank you for your consideration. I look forward to appearing before the Committee.

Respectfully,



Richard K. Gilbert
Chair, Legislative Committee of the
District of Columbia Association of
Criminal Defense Lawyers



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November 6, 2019

Honorable Charles Allen
Chair, Committee on the Judiciary and Public Safety
Council of the District of Columbia
1350 Pennsylvania Avenue, N.W.
Washington, D.C., 20004

RE: Supplemental Statement Testimony Concerning Bills B23-409 and B23-435

Dear Councilmember Allen,

At the hearing held by your Committee on October 23, 2019, the District of Columbia Association of Criminal Defense Lawyers (DCACDL), along with our parent organization, the National Associations of Criminal defense Lawyers (NACDL), submitted testimony in opposition to Bill 23-0409, the "Sexual Orientation and Gender Identity Panic Defense Prohibition Act of 2019," and Bill 23-0435, the "Tony Hunter and Bella Evangelista Panic Defense Prohibition Act of 2019." We stressed potential constitutional objections and prudential concerns about categorically barring otherwise lawful defenses and partial defenses to criminal charges. DCACDL also outlined admittedly rare circumstances when a "legitimate" "gay panic" defense might arise. In addition, DCACDL also questioned some of the specific language in the two bills as overbroad and confusing. At the close of the hearing, the Committee invited DCACDL to elaborate on its concerns about the specific language in the two bills. That is the intention of this letter.

At the outset, we acknowledge that legislation is sometimes passed to achieve symbolic purposes. In the case of criminal statutes, given the significant adverse impact of convictions, punishments and collateral consequences to the defendants, their families, and their communities, however, we believe that such statutes must be narrowly focused on its specific objectives, should avoid the unforeseen consequences of overbreadth, and should avoid confusing or ambiguous language. Unfortunately, we believe the two proposed bills fall well short in providing clear and concise guidance.

I. UNDERSTANDING MITIGATING CIRCUMSTANCES AND THE “GAY PANIC” DEFENSE

The stated purpose of the bills is to abolish the “gay panic” defense. To do so, the Council need only enact the following language:

The disclosure of or knowledge about a person’s sexual orientation or gender identity or expression shall not for crimes of violence against such person constitute adequate provocation sufficient to establish mitigating circumstances resulting from the heat of passion.

In understanding why the additional language from the two bills is unnecessary, it is important to understand what a “gay panic” defense is commonly understood to be and what it is not.

For the majority of criminal statutes, and all crimes of violence, the state of mind of the defendant, known as the *mens rea*, is an essential element.¹ As a result of the development of the common law or through legislation, some serious crimes of violence require the defendant’s mental state to include an element of “malice,” which is a legal term of art. Because this term of art is not well understood by the average juror, modern jury instructions in the District of Columbia have instead formulated this element as the absence of “mitigating circumstances.” One recognized form of mitigating circumstances involves the defendant acting in the “heat of passion” caused by “adequate provocation,” which, in turn, means “conduct on the part of another that would cause an ordinary, reasonable person in the heat of the moment to lose his/her self-control and act on impulse and without reflection.” Mere words, no matter how offensive, do not constitute “adequate provocation.” (Standard Criminal Jury Instruction 4.202 – Homicide - First Degree Premeditated Murder, Second Degree Murder and Voluntary Manslaughter (Heat of Passion Caused by Adequate Provocation; No Self-Defense Raised)² If there is evidence of mitigating circumstances, the government must prove the lack of mitigating circumstances beyond reasonable doubt. Mitigating circumstances do not amount to a complete defense to the charge, they merely serve to reduce the level of the crime, such as from second degree murder to voluntary manslaughter.

A defendant is not entitled to an instruction on mitigating circumstances simply because he asks for such an instruction. The analysis of adequate provocation is an objective one and the trial court must determine if the conduct defendant claims was provocation would cause a reasonably person to lose self-control before such an instruction can be given. *See, e.g. Wise v. United States*, 972 A.2d 829, 833 (D.C. 2009). Consequently, a partial defense of mitigating circumstances does not operate as a defense to a simple bias-related crime. A person’s bias, prejudice, or even hate based on another’s sexual orientation, race, religion, etc, does not constitute adequate provocation. In contrast, what has traditionally constituted a “gay panic” defense has involved not only some bias or prejudice against gay persons, but also the imminent prospect of unwanted and unexpected homosexual sexual

¹ There are a few strict liability crimes, but they primarily occur in the regulatory law context. No “crime of violence” is a strict liability crime.

² Identical language defining mitigating circumstances appears in other homicide and assault instructions.

relations.³ A defendant who attacks a gay couple walking along the street holding hands or who shoots up a synagogue cannot claim mitigating circumstances. A person who does so has committed a bias-related crime (whether prosecuted that way or not) and will not be permitted to suggest the existence of mitigating circumstances merely because of their prejudice. Because such a defense is not available simply because of a defendant's bias or prejudice, DCACDL believes the Council need not attempt to draft legislative language which bars a defense that will not be raised in any event.

It is also important to recognize that mitigating circumstances consisting of heat of passion caused by adequate provocation is a distinct concept from self-defense. The doctrine of self-defense has been embedded in the common law for centuries. Because violent human encounters can encompass a complex array of behaviors, the law of self-defense can be quite nuanced, but it is normally a matter for judicial interpretation. DCACDL strongly urges the Council not to attempt to legislatively alter the law of self-defense. As explained below, this includes the language of proposed section 22-115 (c). If a self-defense instruction is given, the burden is on the government to disprove the defense beyond reasonable doubt; if the government fails to do so, self-defense is a complete defense to an assault.

To complicate matters, there is a second form of mitigating circumstances, commonly known as "imperfect self-defense," which is defined in the instructions as a situation "when a person actually believes that s/he is in danger of serious bodily injury, and actually believes that the use of force that was likely to cause serious bodily harm was necessary to defend against that danger, but one or both of those beliefs are not reasonable." This is distinct from the mitigating circumstances caused by adequate provocation. If not disproved by the government beyond reasonable doubt, it results, not in a complete defense, but only a partial defense that lessens the level of the offense. Its application in a particular case depends heavily on the law of self-defense, and for the same reasons as above, DCACDL strongly urges the Council not to try and alter this doctrine. We strongly suggest that to change the law of self-defense depending on the sexual orientation or gender identity or expression of the complainant would represent a paradigmatic case of a lack of equal protection.

II. TEXTUAL ANALYSIS OF THE PROPOSED LEGISLATION

Both proposed bills seek to add a new section to the District of Columbia Criminal Code, D.C. Code 23-115. Assuming that the Council disagrees with DCACDL's position that no legislation is needed to preclude a gay panic defense, we continue to believe that both bills are ambiguous and overbroad.

A. B23-409

B23-409 proposes to add three paragraphs to the new D.C. Code 23-115. Subparagraph (a) reads as follows:

"(a) For a crime of violence, adequate provocation for a defense premised on "heat

³ While, theoretically, there could be any number of permutations of sexual orientation and gender identity or expression involved in an assault, practically speaking when the "gay panic" defense is asserted it is by heterosexual males who have assaulted gay men or transgendered women.

of passion" shall not exist if the defendant's actions are related to the discovery of, knowledge about, *or potential disclosure* of the victim's actual or perceived gender identity or expression, or sexual orientation, including under circumstances in which the victim made an *unwanted, non-forcible romantic or sexual advance toward the defendant*, or if the defendant and victim dated or *had a romantic relationship*.

This paragraph is the proposal most closely related to banning the gay panic defense because it speaks directly about adequate provocation. Nonetheless there are provisions of this proposed provision that trouble us. First, we are unable to understand what the *potential* disclosure of information has to do with a gay panic defense. Presumably, a *potential* disclosure is a disclosure which has not yet happened. If information about the victim's sexual orientation, and gender identity or expression has not yet been disclosed to the defendant, how is a gay panic defense even applicable? Furthermore, it is unclear by whom such information might be potentially disclosed and to whom it may be disclosed. Such unnecessary ambiguity does not belong in a criminal statute.

We note that the language about "circumstances in which the victim made an unwanted, non-forcible romantic or sexual advance toward the defendant, or if the defendant and victim dated or had a romantic relationship" is logically unnecessary as it only serves to describe some circumstances when a defense of mitigating circumstances shall not be allowed. Moreover, this language has its own difficulties. It is unclear as to what the bill means by "an unwanted, non-forcible romantic or sexual advance." An unwanted touching, especially one with a sexual component like groping another's buttocks or breasts, is an assault. DCACDL is strongly opposed to legislation which denies a defense, whether a partial defense of mitigating circumstances, or a complete self-defense argument, when the purported victim has committed a crime. We suspect that the Council may have in mind a playful, flirtatious verbal comment that plainly does not merit a violent response; however, the law already makes clear that mere words cannot be adequate provocation.

We also have concerns about language that would bar a mitigating circumstances defense even if the parties had a "romantic relationship?" If there is an existing romantic relationship the logical implication is that the defendant *already knows* about the victim's sexual orientation, and gender identity or expression, in which case a defense that the defendant panicked when discovering that fact. Heat of passion mitigating circumstances imply that something suddenly changes. We are keenly aware from the testimony at the October 23, 2019 hearing that there is a substantial amount of domestic violence directed at members of the LGBTQ community. This violence may well be charged as bias-related crimes depending on the circumstances, but its applicability to the "gay panic" defense seems unnecessarily attenuated. DCACDL's proposed simplified language removes the element of sexual orientation or gender identity and expression as a basis for adequate provocation. The Council should leave matters at that and not inject concepts which can have other significant consequences in circumstances far different from the gay panic defense.

The bill contains a second paragraph which reads:

"(b) A defendant does not suffer from *reduced mental capacity* based solely on the discovery of, knowledge about, or potential disclosure of the victim's actual

or perceived gender identity or expression, or sexual orientation, including under circumstances in which the victim made an unwanted, non-forcible romantic or sexual advance toward the defendant or if the defendant and victim dated or had a romantic relationship.

DCACDL remains confused about the purpose of this language. In addition to our concerns about "potential disclosure," "an unwanted, non-forcible romantic or sexual advance," and "romantic relationship," we do not understand what is meant by "reduced mental capacity." It is not a term we regularly use in criminal practice in the District of Columbia. To our knowledge the term does not appear in any other criminal statute or jury instruction and is sure to lead to confusion. Perhaps the Council is thinking of an old concept in the law of "diminished mental capacity," but that doctrine is *not* permitted to reduce a defendant's criminal responsibility in the District of Columbia. *See, United States v. Yunis*, 924 F.2d 1086, 1096 (D.C.Cir.1991) ("in view of the changes in the federal law since 1984, defendant would be precluded as a matter of law from introducing evidence of 'mental disease or defect or any other mental condition' that bears on the issue whether defendant possessed the requisite *mens rea* to commit the crime."); *accord, Bethea v. United States*, 365 A.2d 64, 83 (D.C. 1976). On the other hand, a defendant's mental state may be relevant for purposes of sentencing, but sentencing is traditionally an area which is entrusted to the judge's discretion and the judge is entitled to consider a wide range of information, including information about the defendant's mental state. We do not understand the Council to be seeking to change the law in that regard. Thus, we are at a loss to understand why this paragraph is needed.

Finally, B23-409 contains the following paragraph:

(c) A person is not justified in using force against another based solely on the discovery of, knowledge about, or potential disclosure of the victim's actual or perceived gender identity or expression, or sexual orientation, including under circumstances in which *the victim made an unwanted, non-forcible romantic or sexual advance* toward the defendant, or if the defendant and victim dated or had a romantic relationship.

Once again, DCACDL fails to understand the purpose of this subparagraph. We agree that the mere fact of disclosing one's sexual orientation or gender identity or expression would not warrant the use of force, but that is already the law in the District of Columbia; one cannot avail themselves of the defense of self-defense based solely on spoken words that do not convey a threat. Going further, however, if read literally, the bill would seem to constitute a significant change in the law of self-defense. As explained above, an unwanted sexual touching, even if not a forced touching, is still an assault under District of Columbia law. We are confident that it is not the intent of the Council that one may grope another individual and the other individual may not resist that touching with appropriate physical force. Of course, one may not use unreasonable force in self-defense, but the law of self-defense already addresses that proposition. DCACDL believes that the law of self-defense is currently properly balanced, and no further changes need be made.

B. B23-435

DCACDL recognizes many Councilmembers sponsored this bill, but with all due respect, this bill is even more confusing and overbroad than B23-409. The bill's new paragraph reads as follows.

"§ 23-115" § 23-115. Limit on defenses that seek to excuse violence on the basis of a *victim's identity*.

"(a) For any crime of violence, sufficient or adequate provocation for a defense premised on "heat of passion" shall not exist if the defendant's actions are related to the discovery of, knowledge about, or the potential disclosure of:

"(1) One or more of the following characteristics or perceived *characteristics of the victim*: disability, gender identity or expression, national origin, race, color, religion, sex, or sexual orientation, *regardless of whether the characteristic belongs to the victim or the defendant*, even if the defendant and victim dated or participated in sexual relations, or if the defendant or victim romantically pursued the other; or

"(2) The *victim's association with a person or group with one or more of the characteristics, or perceived characteristics identified in paragraph (1)* of this subsection.

B23-435 expands dramatically the range of individual characteristics for which it wishes to preclude a mitigating circumstances defense based on adequate provocation. While DCACDL certainly agrees that these individual characteristics, if the cause of a defendant's crime of violence, would give rise to a bias-related crime, but we are unaware of any instances when discovery of or knowledge about a complainant's disability, race, national origin, or religion has been used to assert as adequate provocation to support a mitigating circumstances partial defense. Thus, such an expansion seems unnecessary for purposes of restricting mitigating circumstances defenses. As a purely practical matter, to the extent that the Council seeks to bar the "gay panic" defense as a symbolic gesture of support to the LGBTQ community, including all of these additional characteristics which are not the basis of any serious mitigating circumstances defense seems to dilute the that symbolic gesture.

Moreover, the bill has major logical problems. First of all, while the bill first purports to talk about the characteristics of *the victim*, which would at least make sense in the context of a gay panic defense, the bill goes on to say that it does not matter whether the applicable characteristic is that of the victim *or the defendant*. Frankly, that makes no sense at all and is internally inconsistent. We fail to see how disclosure of a characteristic of the *defendant* relates to a gay panic defense or any other mitigating circumstances based upon adequate provocation. If the disclosure of a defendant's characteristic were something in the nature of blackmail, which is a crime *perpetrated against the defendant*, why should the defendant be deprived of any defense well-recognized in the law, to include mitigating circumstances?

Finally, how in the world does discovery of or knowledge of a victim's *association with*

another person or a group possibly relate to a mitigating circumstances defense?⁴ To be sure, it might be related to a bias-related crime, such as attacking someone who is marching with Black Lives Matter, but that is a different statute altogether. As explained above, a generalized hatred of someone who is different which results in a crime of violence would never be grounds for “mitigating circumstances.” No judge would ever permit such a defense to go to the jury. This bill just dives headfirst into confusion without any seeming practical benefit.

III. THE PROPOSED “ANTI-BIAS” INSTRUCTIONS

Both proposed bills include sections which mandate the giving of an “anti-bias” instruction. While DCACDL agrees with the intent of the Council to expand the range of potential categories of bias that jurors should be instructed to avoid, we disagree with legislation that mandates the language of any such instruction. Instead we urge the Committee to defer to the process by which standard jury instructions in the District of Columbia are developed. The Redbook Committee is met on October 25, 2019, two days after the hearing, and agreed to take up the proposed changes to the standard instruction during its 2020 revision. DCACDL recommends allowing the Redbook Committee to proceed with this revision rather than mandating specific language in legislation.

V. CONCLUSION

Assuming that the Council intends to reject DCACDL’s recommendation to retain the “gay panic” defense is carefully restricted circumstances, DCACDL continues to recommend that:

1. The Council should replace subparagraph (a) of the proposed D.C. Code §23-115 in B23-409 with the following language:

The disclosure of or knowledge about a person’s sexual orientation or gender identity or expression shall not for crimes of violence against such person constitute adequate provocation sufficient to establish mitigating circumstances resulting from the heat of passion.

2. That subparagraphs (b) and (c) of the proposed D.C. Code §23-115 in B23-409 should not be enacted.

3. If the above recommendations are rejected, the Council should eliminate references to “potential disclosure,” “unwanted, non-forcible romantic or sexual advance,” and “romantic relationships” from any resulting language, and

4. That B23-435 in its entirety should not be enacted.

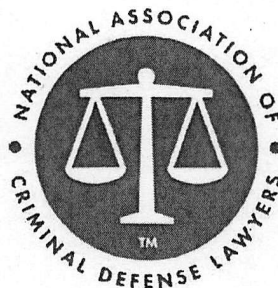
Thank you for your consideration. I remain available to answer any questions the Committee might have about this complex subject.

⁴ B23-435 requires that the person or group have “one or more the characteristics or perceived characteristics identified in paragraph (1).” Yet everyone has a sex, race and national origin. The statute as written does not even require that the characteristic be related to the crime of violence. The other person or group just has to have such a characteristic. DCACDL cannot imagine how this provision could ever be implemented fairly.

Respectfully,

/s/

Richard K. Gilbert
Chair, Legislative Committee of the
District of Columbia Association of
Criminal Defense Lawyers



**Written Statement of
Nina J. Ginsberg, President**

**on behalf of the
National Association of Criminal Defense Lawyers**

**Before the
Committee on the Judiciary & Public Safety
of the Washington, DC, City Council**

**Re:
Bill 23-409 (the "Sexual Orientation and Gender Identity Defense Prohibition Act of 2019)
and
Bill 23-435 (the "Tony Hunter and Bella Evangelista Panic Defense Prohibition Act of
2019)**

October 23, 2019

The National Association of Criminal Defense Lawyers (NACDL) appreciates this opportunity to present its views in opposition to two pending bills before this committee -- Bill 23-409, the "Sexual Orientation and Gender Identity Defense Prohibition Act of 2019," and Bill 23-435, the "Tony Hunter and Bella Evangelista Panic Defense Prohibition Act of 2019."¹ The stated purpose of B23-409 is "to limit criminal defenses and authorization for the use of force relating to a victim's sexual orientation or gender identity." And the stated purpose of B23-435 is "to curtail the availability and effectiveness of defenses that seek to partially or completely excuse crimes such as murder and assault on the grounds that the victim's sexual orientation, gender identity, or other inherent identity, is to blame for the defendant's violent action, and to require an anti-bias jury instruction in criminal trials if requested by the prosecutor or defendant."

NACDL proudly stands with our allies in the LGBTQ community and others in the criminal justice community in support of the Equality Act (H.R. 5), which prohibits discrimination and segregation based on sex, sexual orientation, and gender identity in public accommodations and facilities, education, federal funding, employment, housing, credit, and very significantly, in the jury system. The Equality Act is currently pending in Congress. NACDL is a long-time member of the National LGBT/HIV Criminal Justice Working Group. In fact, just last week, NACDL joined with allied organizations to call for the repeal of a New York anti-loitering law known to many as the "Walking While Trans Ban." NACDL also works to oppose HIV/AIDS criminalization, training lawyers to defend such cases as well as filing amicus, or friend-of-the-court, briefs in the appellate courts. And, of course, we are not just allies of the LGBTQ community -- the people we serve, our clients, and our membership are comprised of every conceivable gender identity and sexual orientation. We recognize and, like you, abhor violence against LGBTQ people in the District and elsewhere. However, for the reasons set forth here and that we expect NACDL's affiliate, the District of Columbia Association of Criminal Defense Lawyers, to outline in its testimony, Bills 23-409 and 23-435 will do nothing to address any rising tide of violence and will not function as the kind of tool their authors hope to provide in the prosecution of hate crimes.

I speak today about the broader implications of bills like those under consideration today -- bills that, through legislative action, categorically prohibit specific defenses in criminal cases. NACDL's mission, vision, and values compel it to oppose Bill 23-409 and Bill 23-435 because they are categorical, legislative prohibitions of specific defenses in criminal cases. Such prohibitions undermine the constitutional right to present a defense.

The constitutional right of every accused person to present a defense must be assured by the assiduous application of existing rules of evidence and principles of relevance and materiality. Every day, District of Columbia judges make determinations regarding the availability of legal defenses only after a full and fair presentation of *all* relevant evidence, including evidence of behavior and views of witnesses for the defense and the prosecution that may be socially

¹ The National Association of Criminal Defense Lawyers is the preeminent organization advancing the mission of the criminal defense bar to ensure justice and due process for persons accused of crime or wrongdoing. A professional bar association founded in 1958, NACDL's many thousands of direct members in 28 countries -- and 90 state, provincial and local affiliate organizations totaling up to 40,000 attorneys -- include private criminal defense lawyers, public defenders, military defense counsel, law professors and judges committed to preserving fairness and promoting a rational and humane criminal justice system.

unacceptable and offensive to many. We rely on the thoughtful deliberation by properly instructed jurors to parse this evidence and render verdicts based on the application of the law, as instructed by the court, to the evidence presented at trial. The categorical, legislative prohibition of specific defenses falsely presumes that judges are not capable of determining that which is relevant and admissible evidence, when in fact judges, who have heard all of the evidence during a trial, are in the best position to apply long-established rules of evidence to the unique facts and circumstances of the cases which come before them. Moreover, these bills also denigrate the ability of your constituents, the persons who are selected to serve on juries in the District to follow instructions, and presupposes that these citizens are incapable of discharging their duty to render fair verdicts due, in the case of these bills, to their own homophobia, transphobia, and bigotry. NACDL believes District residents are better than this. Our Constitution, the judges of the District of Columbia, and the persons who give their time and experience to serve as jurors in the District deserve better.

On February 16, 2019, after significant study by NACDL's Task Force on Defenses, NACDL's Board of Directors adopted a resolution "Concerning Categorical Legislative Prohibitions of Defenses in Criminal Cases."² It maintains that legislative efforts to categorically prohibit certain defenses chip away at the foundational principles of our criminal justice system by undermining well-established rules of evidence that serve to balance principles of relevance and due process rights of accused persons.

The right to due process, enshrined in the Sixth and Fourteenth amendments to the United States Constitution and analogous state constitution provisions throughout the United States, includes the rights to confront, cross examine, and compel the attendance of witnesses. Considered together, all of these rights are integral to ensuring the singular fundamental right of criminally accused persons to present a defense.

The right to present a defense encompasses the presentation of any evidence that shows that an accused person either did not commit the crime or that his or her actions were excused, justified, or mitigated in some way. Where the law allows an affirmative defense, mitigation, or justification, it reflects society's collective determination, enshrined in the law, that conduct that may otherwise be considered worthy of punishment may be excused or considered less blameworthy. Some defenses like defense of self or others, necessity, and duress are such fundamental precepts that they are universally understood to afford context and justification for otherwise unlawful conduct. Other defenses and forms of mitigation reflect enormous advances in our understanding of human psychology and brain development. And regardless of why a violent act may have been committed, proof of guilt beyond a reasonable doubt is always required.

It is in the crucible of trial that these general principles are applied to facts through the presentation of testimony and evidence to juries of our peers. That process is guided by accepted rules of evidence and established case law interpreting the application of those rules and defining

² This NACDL Board Resolution is available at <https://www.nacdl.org/Content/Concerning-Categorical-Legislative-Prohibitions-of->

the defenses that have developed through thousands and thousands of trials and review by higher courts charged with interpreting our state and federal constitutions and statutes.

Outside of the courtroom, the tragic circumstances of many cases justifiably give rise to a public outcry. Sympathy for victims of crime targeted because they are vulnerable, oppressed, or marginalized often leads to important and meaningful community advocacy to legislate policy changes that protect and make life safer for members of these groups. The impulse to legislate solutions in the wake of tragic cases, however, has led lawmakers to pass statutes designed to categorically prohibit certain defenses and thereby undermine the ability of defendants to present a defense. These prohibitions derive from the public discourse around high profile cases which tends to stir passions and to distill complicated facts and circumstances into sensationalistic headlines and rhetorical soundbites.

Categorically prohibiting defenses through legislation may feel like a meaningful solution in the aftermath of a high-profile crime, but it is a misguided impulse. These laws dramatically impinge on accused persons' rights to confront their accusers and mount a defense. Evidence at trial, whether presented by the prosecution or the defense, is always adapted, limited, and shaped to comport with constitutional requirements of due process and to fulfill the practical purpose of trial, the pursuit of truth. Indeed, evidence that does not satisfy the standard of relevance is excluded. Because categorical prohibitions of defenses do not evolve through well-considered case law, they must be mechanically applied by judges without regard to the trial's truth-seeking function. Predictably, limiting the constitutional right of accused persons to mount a defense results in coerced guilty pleas, false convictions, and convictions of more serious crimes than legally justified by the evidence.

Statutes that limit defenses or the evidence that juries are permitted to consider also undermine the trust that the public has and should have in judicial discretion and the ability of juries to reach just verdicts. Legislation that focuses on limiting certain defenses and the consequential media attention that follows encourages the public to believe, incorrectly, that trials are conducted by judges mechanically applying the law instead of through an adversarial process culminating in a fair jury verdict that is based on a thorough and searching consideration of all of the relevant evidence at trial.

Ultimately, jury trials conducted in a manner to ensure full and transparent exposure and examination of bias and prejudice in open courtrooms guided by the principles of due process and the right to confront witnesses are the best method of de-stigmatizing societally marginalized individuals who come into the criminal justice system whether as witnesses, victims, or defendants.

NACDL seeks to promote transparent trial processes and to educate the public that trials must be a search for truth through the complete and rigorous examination of all relevant evidence and consideration of any argument for acquittal or mitigation presented by the unique facts and circumstances in each case.

Finally, and perhaps most significantly, this legislation is unprecedented. We can find no other example in which this legislative body has sought to categorically limit defenses in this way – in

a way that is likely unconstitutional and contravenes well-established District of Columbia case law. Today, the proposed legislation is in response to violence against an already marginalized community. But Councilmembers, I ask you, how will the line be drawn? Should the defense of necessity be categorically outlawed for homeless people accused of breaking and entering enclosed structures when they only sought to escape dangerously cold temperatures? One could imagine that in jurisdictions where abortion becomes increasingly outlawed, that bills like these set the precedent for categorically outlawing necessity as a defense for doctors who act to save a woman's life. Several states have categorically eliminated defenses related to mental illness. Is that a road the District wishes to go down? Frequently unconstitutional on their face, always potentially violative of due process - categorical legislative prohibitions of specific defenses, these bills included, do nothing to address the underlying social ill they purport to address and pose grave risks to our rule of law.

NACDL urges this body to vote no on Bills 23-409 and 23-435.



Lambda Legal
making the case for equality

October 23, 2019

Good morning Chairman Allen and members of the Committee. My name is Sasha Buchert and I'm a Senior Attorney at Lambda Legal, and I'm testifying in support of the *Tony Hunter and Bella Evangelista Panic Defense Prohibition Act of 2019* and in support of the *Sexual Orientation and Gender Identity Panic Defense Prohibition Act of 2019*. Founded in 1973, Lambda Legal is the oldest and largest national legal organization whose mission is to achieve full recognition of the civil rights of lesbians, gay men, bisexuals, transgender people and everyone living with HIV through impact litigation, education and public policy work. Through Lambda Legal's Fair Courts Project, we provide training for judges, court staff and attorneys nationwide on LGBT cultural competency and bias related to gender and sexuality.

LGBTQ people, and transgender women of color in particular, move through the world under the constant threat of impending violence. In the words of one transgender woman of color in a recent New York Times article, "it's always in the forefront of our minds, when we're leaving home, going to work, going to school."¹

And this fear is well-substantiated. At least 21 transgender people, almost all of them transgender women of color, have been murdered this year already.² Almost all of the murders involve the victims being shot multiple times, and commonly involve beatings and burnings. Two of those murders took place in the DC area; Zoe Spears a Black transgender woman, was found lying in the street with signs of trauma in Fairmount Heights in June and Ashanti Carmon, also a Black transgender woman was fatally shot, also in Prince George's County.³ There has also been a troubling increase in violence targeting people based on their sexual orientation. There were a record number of suspected hate crimes in D.C. last year—and a disproportionate number are incidents based on sexual orientation.⁴

There's a long history of defendants seeking to justify such violence by asserting that it was motivated by the defendant's transphobia, homophobia or other bias. In Bella's case, the defendant argued that he became enraged when he discovered her gender identity, and in Mr. Hunter's case, the defendant told police that he fatally punched Tony in self-defense after Mr. Hunter supposedly made a sexual overture.

More recent examples include that of Islan Nettles, a transgender woman of color who was walking home with a friend in 2013 when she ran into a group of men. As the groups collided, one of the men began flirting with Nettles, when one of his friends shouted, "That's a guy!" the man then pushed

¹ Rick Rojas and Vaness Swales, *18 Transgender Killings This Year Raise Fears of an "Epidemic"* NEW YORK TIMES (Sept. 27, 2019), available at <https://www.nytimes.com/2019/09/27/us/transgender-women-deaths.html>.

² Sadly, this is not exceptional. There were 26 murders in 2018, 30 in 2017, and 26 in 2016. See Violence Against the Transgender Community in 2019, Human Rights Campaign, available at <https://www.hrc.org/resources/violence-against-the-transgender-community-in-2019>.

³ On June 18, 2019, Zoe Spears, 23, a Black transgender woman, was found lying in the street with signs of trauma in Fairmount Heights, Maryland https://www.washingtonpost.com/local/public-safety/second-transgender-woman-killed-in-same-dc-suburb/2019/06/14/82957314-8eb9-11e9-b08e-cfd89bd36d4e_story.html; Ashanti Carmon, 27, another Black transgender woman was fatally shot on March 30, 2019.

⁴ Michael Miller, *A 12-year-old black girl walking home from school. Gay pals leaving a bar. A Trump family friend watching TV. A Muslim veteran driving to work; In 2018, They All Became Victims of a Record-Setting Year of Hatred in D.C.*, (Aug. 21, 2018), available at <https://www.washingtonpost.com/graphics/2019/local/dc-hate-crimes/> (There were 61 anti-gay incidents investigated in D.C. in 2018).





Lambda Legal
making the case for equality

and has voted in support of this type of legislation—in fact the Act is based on the model language put forward by the ABA.¹¹

We believe it is responsible to address a few of the arguments that have been made against similar legislation.

- *Eliminating the defense will increase dependence on criminalization and incarceration.*
 - Lambda Legal recognizes that the criminal legal system disproportionately incarcerates and harms people of color. We recognize that biases towards people of color are rife throughout the criminal justice system. Our support for a bill that acts to remove the use of bias against LGBTQ people is not an endorsement of the criminal legal system or other biases within it. These cases inevitably receive a lot of media attention, sometimes exactly because of this defense, and permitting it inevitably sends a message that that this violence is culturally understandable and even permissible.
- *Eliminating the defense will limit defenses for LGBT people in domestic violence situations.*
 - A defendant would retain all defenses, they would just not be able to justify their violence on the “discovery of, knowledge about, or the potential disclosure” of their victim’s protected characteristic.
 - This bill does not take away defenses available such as self-defense, diminished capacity, etc.... It will only prevent juries from being presented with the claim that these defenses can be based on the idea that violence against LGBTQ people, simply because of their identities, can be considered justifiable.”
- *A judge can already dismiss the panic defense or with proper instructions to a jury.*
 - Unfortunately, judges and juries are not exempt from overt or implicit bias.

Policy Recommendations:

- We recommend clarifying that this defense would also apply to diminished capacity and self-defense in the *Tony Hunter/Bella Evangelista* bill.
- We recommend expanding the prohibition to all protected characteristics.

Conclusion

The panic defense is really just using the bias of jurors and the judge to their advantage and it perpetuates anti-LGBT stigma. It runs contrary to our constitutional values as a society, our existing hate crimes statute and it should be eliminated before it can be used again.

We urge the committee to support this legislation.

Thank you,

Sasha Buchert
Senior Attorney
Lambda Legal

¹¹ <https://www.americanbar.org/groups/crsi/publications/member-features/gay-trans-panic-defense/>

Committee on the Judiciary and Public Safety

Subject: Bill 23-0409, the "Sexual Orientation and Gender Identity Panic Defense Prohibition Act of 2019," and Bill 23-0435, the "Tony Hunter and Bella Evangelista Panic Defense Prohibition Act of 2019."

Written Testimony of Naida Henao, NVRDC's *Strategic Advocacy Counsel*

November 6, 2019

Thank you Chairman Allen, other Committee members, and staff for your commitment to the safety of all DC residents. Founded in 2012, the Network for Victim Recovery of DC (NVRDC) has provided holistic services, including free legal representation, advocacy, and case management, for over 3,800 crime victims. On behalf of those clients, and all crime victims in DC, we applaud the Council for addressing the District's rising number of reported hate crimes, and for taking an affirmative stance on the protection of those who live, work, visit, and go to school in DC through the introduction of Bills 23-0409 and 23-0435. While we are aware that legislation alone will not make the city safer overnight, we are proud that the Council has taken this stand against hate.

As was noted at the October 23, 2019 hearing on these bills, the District's reported hate crimes are increasing at an alarming rate; however, there is not an amount of accountability that mirrors the escalation of those crimes. While increased prosecution rates are necessary, they alone will not heal the pain and suffering inflicted on every individual, family, and community. This is why NVRDC is fully supportive of the Council's initiative to ensure that the District's legislation does not passively harbor the remnants of prejudicial and outdated modes of thinking, which actively harm the very victims of hate crimes we are seeking to support.

NVRDC makes this recommendation based on a shared concern with the Public Defender Service (PDS) in terms of the language of the legislation. As PDS indicated in their testimony, the

eight¹ other jurisdictions that have employed similar legislation use stronger and more specific language when it comes to the factual nexus between the defendant's action and the discovery of, knowledge about, or potential disclosure of the enumerated victim characteristics. The other jurisdictions require that the defendant's actions are "because of,"² "resulting from,"³ or "resulting solely from"⁴ the victim's characteristics. In contrast, Bill 23-0435 only requires that the defendant's action is "related to" these characteristics.⁵ This legal term lacks the specificity and causality of the other terms, and thus prompts NVRDC to wonder if it may have any unintended effects or barriers to prosecution.

With that being said, NVRDC supports the adoption of the American Bar Association's policy and model law language addressing "gay and trans panic" legal arguments.⁶ NVRDC simply requests that the Council consider investigating further into the reasons for which the eight other jurisdictions have opted out of picking the "related to" version of the model ABA law in favor of more conservative language. In theory, over-inclusive language may be beneficial in the prosecution of hate crime cases; however, in practice, litigation stemming from legislation often plays out differently in court. For these reasons, NVRDC feels strongly about contacting those eight jurisdictions to inquire whether any issues have stemmed from adopting a narrower standard once the law has gone into effect and been litigated.

¹ Hawaii, Illinois, New York, California, Nevada, Connecticut, Maine, Rhode Island. Links for the legislations are available at: <https://lgbtbar.org/programs/advocacy/gay-trans-panic-defense/>

² Hawaii and Illinois.

³ New York, California, Nevada.

⁴ Connecticut, Maine, Rhode Island.

⁵ B23-0435 states "(a) For any crime of violence, sufficient or adequate provocation for a defense premised on "heat of passion" shall not exist if the defendant's actions are related to the discovery of, knowledge about, or the potential disclosure of: (1) One or more of the following characteristics or perceived characteristic of the victim: disability, gender identity or expression, national origin, race, color, religion, sex or sexual orientation, regardless of whether the characteristics belong to the victim or the defendant ..."

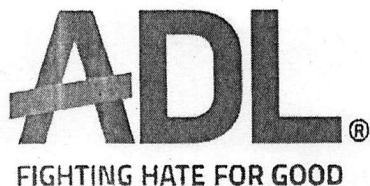
⁶ American Bar Association, Gay and Trans Panic Defenses Resolution (Aug. 12-12, 2013), available at: <https://lgbtbar.org/wp-content/uploads/2014/02/Gay-and-Trans-Panic-Defenses-Resolution.pdf>

We want to clarify that this concerns by *no means* signifies that NVRDC supports the underlying arguments of LGBTQ+ panic “defenses.” NVRDC strongly feels that the argument that someone’s identity can provoke uncontrollable homicidal rage in a reasonable person undermines the principles of humanity, acceptance, and diversity. Our concern is merely a minor technical legal note that we hope will assist the courts in accurately targeting persons committing hate crimes.

Conclusion

Under the “gay and trans panic” doctrines, a hate crime victim’s identity simultaneously becomes their death sentence and the exoneration of their murderer. We are thankful that the District is taking a stand against a doctrine that, at its core, excuses murder based on prejudice. With these bills, the DC Council is taking a step towards ensuring our justice system is free from the bias and hatred in our world. For the aforementioned reasons, NVRDC requests that this Committee continue its zealous support of these bills, and its support of the LGBTQ+ residents of the District.

NVRDC thanks you for your time and consideration. We welcome the opportunity to answer any questions you may have.



Council of the District of Columbia
Committee on the Judiciary & Public Safety
Public Hearing on "Hate Crimes in the District of Columbia"
November 6, 2019

Statement of Doron F. Ezickson
ADL Washington D.C. Regional Director

ADL (the Anti-Defamation League) is pleased to submit this statement in connection with the DC Council's public hearing which took place on October 23rd on "Hate Crimes in the District of Columbia and the Failure to Prosecute by the Office of the United States Attorney." We appreciate that the Council is interested in learning more about the prevalence of hate crimes in the District, the effect hate crimes have on vulnerable or marginalized communities, best practices for hate crime response, and the possible cause of low prosecution rates here in DC

Over the past three decades, ADL has been recognized as a leading resource on effective responses to violent bigotry. In addition to drafting model hate crime statutes for state legislatures, we were privileged to lead a broad coalition of civil rights, religious, educational, professional, law enforcement and civic organizations working in support of the 2009 Matthew Shepard and James Byrd Jr. Hate Crimes Prevention Act ("HCPA") for more than a decade.

ADL also specializes in training law enforcement on the topic of hate crimes and has conducted numerous trainings for officers across the District, including for the U.S. Attorney's Law Enforcement Task Force. Additionally, every new recruit to the Metropolitan Police Department ("MPD") participates in a training at the U.S. Holocaust Memorial and Museum led by ADL, which examines the vital role law enforcement must play in safeguarding our democracy and the civil rights of those in the District.

We hope that this Council will view ADL as a resource and thought partner as it examines how best to ensure that communities, law enforcement, and other local stakeholders are coordinating to confront the rising tide of hate and extremism here in the District.

The Special Impact of Hate Violence

Each and every one of us has a stake in effective responses to violent bigotry. These crimes demand priority attention because of their special impact. Bias crimes are intended to intimidate not only the victim, but also members of the victim's community, leaving them feeling fearful, isolated and vulnerable. Failure to address this unique type of crime can often cause an isolated

incident to explode into widespread community tension. The damage done by hate crimes, therefore, cannot be measured solely in terms of physical injury or financial harm. By making members of targeted communities fearful, angry, and suspicious of other groups – and of the power structure that is supposed to protect them – these incidents can damage the fabric of our society and fragment entire communities.

Hate Crime Data

The FBI has been tracking hate crimes since 1991 pursuant to the Hate Crime Statistics Act of 1990 (“HCSA”). Though clearly incomplete, the FBI’s annual HCSA Reports provide the single best national snapshot of bias-motivated criminal activity in the United States.¹

In 2017, the FBI HCSA Report² documented 7,175 hate crime incidents nationwide – a 17% overall increase relative to 2016. Here in DC, 193 hate crimes were reported to the FBI in 2017, representing a nearly 70% increase relative to the 115 incidents reported in 2016. Of the 193 hate crimes reported in 2017, well over half (108) were motivated by race, and a startling 36% were motivated by sexual orientation or gender identity.

In addition to the data reported to the FBI, the Metropolitan Police Department also records data with respect to criminal acts “that demonstrate[] an accused’s prejudice based on the actual or perceived race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, gender identity or expression, family responsibility, homelessness, physical disability, matriculation, or political affiliation” of a victim.³

MPD’s reporting⁴ reveals that bias-related incidents have more than doubled in the District over the last decade, and between 2017 and 2018, hate crimes based on gender identity/expression nearly tripled (increasing by 162%). The data available for 2019 shows that the number of hate crimes reported this year is already outpacing the number of hate crimes reported during the same timeframe in 2018.

MPD, in large part through its Special Liaison Branch, as well as through a commitment to building a culture of proactive reporting across the department has helped to ensure that bias-motivated incidents are taken seriously when reported. The department is considered a model law enforcement agency nationally for its approach to responding to bias-motivated incidents, as

¹ The HCSA has also proven to be a powerful mechanism to confront violent bigotry, increasing public awareness of the problem and sparking improvements in the local response of the criminal justice system to hate violence, since, in order to effectively report hate crimes, police officials must be trained to identify and respond to them.

² <https://ucr.fbi.gov/hate-crime/2017>.

³ See Bias-Related Crime Act of 1989, DC Official Code § 22-3700 et. seq.

⁴ <https://mpdc.dc.gov/hatecrimes>.

well as for the transparency and consistency of their data collection and reporting. It is possible that part of the upward trends we are witnessing may be due to an increase in reporting by victims who trust the police to take affirmative action on their behalf. Further research is needed on this topic.

Prosecuting Hate Crimes in DC

On August 21, 2019, the *Washington Post* published an article revealing that “hate-crime prosecutions and convictions are at their lowest point in at least a decade” here in the District. Of the 204 bias-motivated crimes reported in the District in 2018, only three were prosecuted as hate crimes, and of the 178 reported hate crimes in the District in 2017, only two cases were prosecuted as hate crimes (and both cases were ultimately dismissed). This data is concerning in light of the fact that the number of reported hate crimes in the District has nearly doubled since 2016. It is important to note that only about a third of these reported bias crimes actually resulted in arrests. Even accounting for the 59 arrests in 2018 and the 55 arrests in 2017 which were presented to the USAO for prosecution, the rates of prosecution for the hate crimes enhancement in these cases remain concerningly low.

Unfortunately, there are no quick fixes to the challenges identified by the *Washington Post*. But, there are certainly steps that this City Council, the MPD, the U.S. Attorney’s Office (“USAO”), and the community can take to ensure that hate crimes are taken seriously in the District and that perpetrators are held accountable to the fullest extent of the law. We believe it is critical that further discussions and decisions on this issue must involve the engagement of all relevant stakeholders in the reporting, investigation and prosecution of hate crimes. The actual or perceived politicization of the response to hate crimes does not serve the safety and security of residents, the workforce or visitors of the District.

Recommendations

1) Reexamine DC’s hate crimes framework in consultation with key stakeholders

As an initial matter, we would strongly urge the DC Council to reexamine the District’s hate crime framework, in consultation with MPD, the USAO, and other key stakeholders in our community, to ensure that it is operating as intended, and criminalizing the conduct that DC residents believe should be encapsulated by a hate crime law.

In ADL’s view, the DC hate crime statute is somewhat narrow relative to other jurisdictions. While the statute appropriately functions as a “penalty enhancement” statute (i.e., a person found guilty of a bias-related crime must be fined/imprisoned up to 1.5 times the maximum punishment otherwise authorized), it uniquely requires that a prosecutor prove a criminal act that *demonstrates the accused’s prejudice* towards a protected characteristic of the victim. “Prejudice” is not defined in the statute, and it is also not an element of ADL’s model hate crime

law, formulation that has been upheld as constitutional by the U.S. Supreme Court in *Wisconsin v. Mitchell*, 508 U.S. 476 (1993).

ADL's formulation defines a hate crime as the *intentional selection* of a victim or property based on a *belief or perception* regarding the victim's protected characteristic (or the victim's association with someone with a particular protected characteristic), ensuring that hate crime perpetrators who specifically target victims because of a protected, immutable characteristic are held accountable, regardless of "prejudice" towards a protected characteristic. ADL's model statute ensures that hate crime perpetrators who share a protected characteristic with the victim can still be prosecuted under the law. It also captures "mixed-motive" hate crimes and "associational" hate crimes (i.e., crimes where the victim is targeted due to the victim's association with another individual or group with a certain protected characteristic).

ADL's model language is below, with key elements bolded and underlined:

A hate crime is the "intentional selection of the person against whom the crime is committed, or the intentional selection of the property that is damaged or otherwise affected by the crime, in whole or in part because of the actor's belief or perception regarding the race, color, ethnicity, national origin or ancestry, religion, sex, gender, gender identity, sexual orientation, or disability of that person or of the owner or occupant of that property, or because of the victim's or property's association with another person or group of a certain actual or perceived race, color, ethnicity, national origin or ancestry, religion, sex, gender, gender identity, sexual orientation, or disability, whether or not the actor's belief or perception is correct."

During the hearing, as well as in our meetings with the USAO, the idea that the jury instructions, developed by the red-book committee, was raised as a possible barrier to prosecutions. We believe that this should be explored further, especially in concert with any possible reassessment of the hate crimes statute for Washington DC. That said the jury instructions alone do not appear to fully account for the disparity we see in the number of hate crimes enhancements sought by the USAO.

2) Speak out against hate and extremism in the District at every opportunity

When hate crimes occur here in the District, it is absolutely essential that the DC Council, USAO, MPD and other leaders across the city speak out and condemn hate-motivated violence as antithetical to the District's core values and moral principles. Not only will this counter-message help avoid the "normalization" of hate-motivated violence, but it will also help restore community trust and potentially deter other offenders.

3) Take steps to ensure that all victims know how to and feel safe reporting hate crimes to police

The District should also take steps to ensure that it is efficient and safe for all victims of hate crimes to contact the police. If marginalized or targeted community members – including immigrants, people with disabilities, LGBTQ community members, Muslims, Arabs, Middle Easterners, South Asians, Latinx individuals and people with limited language proficiency – cannot report, or do not feel safe reporting hate crimes, law enforcement cannot effectively address these crimes, thereby jeopardizing the safety of all.

4) Ensure that the USAO has the resources it needs to prosecute hate crimes

We support the USAO's hiring of a second hate crimes coordinator to handle misdemeanor hate crime investigations and prosecutions. Misdemeanor hate crimes are much more common than felony hate crimes, and it will therefore be essential to ensure that this new hate crimes coordinator has the resources, staffing and support needed to handle the surge in cases here in the District.

5) Solicit input from communities most impacted by hate-motivated violence

Lastly, it is important to recognize the role that community organizations and local institutions can play in combatting hate. Here in DC, the USAO Hate-Bias Crimes Task Force plays a critical role in liaising with various affinity groups and conducting outreach programs to ensure that these groups are receiving the support they need, both before and after hate-motivated crime takes place. ADL helped to establish this working group at its inception, and we hope that together with community partners across our city, we can continue to play an important role in ensuring the effective prevention, investigation and prosecution of bias-motivated crimes in the District. Our understanding is that meetings of the task-force are public, and there is virtually no barrier to participation for community representatives. The USAO has committed resources and amplified these meetings over the last year, but additional effort can and should be made to further public awareness of these important conversations.



WHITMAN-WALKER HEALTH

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**TESTIMONY OF STACEY KARPEN DOHN, PhD, SENIOR MANAGER OF BEHAVIORAL HEALTH,
IN SUPPORT FOR DC BILLS 23-0435, TONY HUNTER AND BELLA EVANGELISTA PANIC
DEFENSE PROHIBITION ACT OF 2019, AND 23-0409, SEXUAL ORIENTATION AND GENDER
IDENTITY PANIC DEFENSE PROHIBITION ACT OF 2019**

NOVEMBER 6, 2019

I am the Senior Manager of the Behavioral Health Department and a psychotherapist at Whitman-Walker Health, (Whitman-Walker or WWH) a Federally Qualified Health Center in Washington, DC offering affirming, community-based health and wellness services to all people, with a special expertise in lesbian, gay, bisexual, transgender and queer/questioning (LGBTQ) care and HIV care. I have been employed by Whitman-Walker for the past five years, and was a Masters and then Doctoral Intern at WWH for the two years before that. I earned my PhD in Counseling and MA in Clinical Mental Health Counseling from the George Washington University, prior to my graduate studies I earned a BA in Gender and Sexuality Studies from New York University. I am a Licensed Professional Counselor in the District of Columbia. My CV is attached.

At Whitman-Walker, I manage the daily operations of all services provided by the Behavioral Health Department across WWH's four sites in DC, by our staff of psychotherapists, psychiatrists, psychiatric nurse practitioners, and peer recovery specialists. I oversee the design, implementation, and delivery of behavioral health treatment for mental health care (including individual therapy, group therapy, and psychiatry), substance use disorder (including intensive outpatient/outpatient program for co-occurring addiction and mental health diagnoses, Medication Assisted Treatment (MAT) program for opioid addiction, and harm reduction), and peer-based services at all Whitman-Walker Health center sites. Based on my expertise serving trauma-impacted youth in the US, Morocco, Tanzania, Ghana and South Africa, I facilitated the expansion of Behavioral Health Department to include providing mental health care to LGBTQ youth, specifically victims of violence. I developed and implemented gender affirming protocols and internal workflow for transgender and gender expansive patients: including conducting mental health assessments for transgender/gender expansive patients seeking hormone therapy or gender affirming surgery.

My colleagues and I witness firsthand the fears that many LGBTQ individuals live with on a daily basis. For many of our LGBTQ and HIV-positive patients, fears of discrimination, stigmatization and victimization are ingrained in the day-to-day tasks of living; such as walking out of one's home, taking the Metro, going to work, etc. Each of these activities, which may seem mundane to most people, are for those who feel constantly targeted, a daily reminder that they are vulnerable, simply based on who they are, how they look, who they love, and how they may identify.

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In my psychotherapy sessions with LGBTQ youth and adults, I sit with patients who have survived hate crimes, family expulsion, religious excommunication, job loss, and denial of medical care. Children as young as six years old have asked me if they are safe to be open about their identities in their schools and communities. They want to know if they will be hurt because of who they are. I struggle with my powerlessness because I know that I cannot promise them that their fears are unfounded.

It seems on a nearly daily basis that there is news of a murder or a beating of someone based on gender identity or sexual orientation. Though I try to assure my patients that they are safe within the four walls of my office, I know that once they leave I may never see them again. At Whitman-Walker, my colleagues and I are too familiar with learning about violence that our patients have endured both in the past and in the present. When a patient stops engaging in services and is no longer in contact with me, I often fear the worst. Sometimes we know the cause of their absence, other times we do not. Patients simply do not return, and we are only left to wonder. I dread the messages from area hospitals informing us of the death of a patient. When I see a headline in the news of a LGBTQ identified individual murdered or viciously assaulted, I brace myself as I hear or read the name of the victim.

"Trans panic" and "gay panic" defenses have instilled fear in the lives of LGBTQ people and their loved ones for far too long. These defenses allow anyone to use an immutable characteristic such as identity or disability to blame the victim for the violence perpetrated against them. To justify and excuse violence and murder as a result of sexuality, gender identity, or HIV status is to deem LGBTQ lives and people living with HIV as inherently less worthy and less human as compared to those who do not identify as LGBTQ or those who are HIV negative. This message has devastating effects on the wellbeing of LGBTQ communities. For example, LGB youth are almost five times as likely to have attempted suicide compared to heterosexual youth (CDC, 2016).

In 1973, the American Psychiatric Association removed the diagnosis of homosexuality and homosexual panic disorder from the Diagnostic and Statistical Manual of Mental Disorders. To claim that "homosexual panic" causes someone to act violently is psychologically unfounded. In "trans panic" cases, defendants argue that the discovery of the victim's gender identity is incongruent with their sex assigned at birth is an adequate cause to beat or kill. To bolster an argument for self-defense, defendants claim that the victim's sexual orientation or gender identity was such a threat that they had to "defend" themselves by violence.

Inherent in these arguments is the inference that an LGBTQ person is a threat and, therefore, others should lawfully be allowed to hurt people of varying sexual orientations and gender identities or people living with HIV. Violence directed towards them is argued as being justified simply because of who they are or their HIV status. Their identity, not their actions, is being deemed a viable reason for assault or murder. As such, my patients live with the knowledge that their identities make them vulnerable and that their lives may be cut short because of hatred and prejudice. LGBTQ people have for decades fought to disassociate themselves with homophobic and transphobic associations with predation, deviance, and perversion. To continue the use of gay panic and trans panic legal defenses legally sanctions these associations.

The supposition that LGBTQ people are a threat to non-LGBTQ people is easily debunked. Statistics show us that LGBTQ individuals are at a far greater risk of harm in their lifetimes as compared to non-LGBTQ identified individuals. For example, In the US Transgender Survey, nearly half (47%) of 28,000 respondents who identify as transgender or non-binary have been sexually assaulted at some point in their lifetime. Nearly one in ten (9%) respondents reported that they were physically attacked in the past year because of being transgender. Thirteen percent (13%) of respondents said that someone had physically attacked them in the past year, such as by grabbing them, throwing something at them, punching them, or using a weapon against them for any reason. Those who were currently working in the underground economy (41%) were more than three times as likely to report being physically attacked in the past year (US Transgender Survey, 2015).

Whitman-Walker Health is in full support of Bill 23-409 and Bill 23-435. To continue to allow for the use of the "gay panic" or "trans panic" or "HIV panic" defense is morally wrong and causes great harm to not only the victims of these crimes, but for all LGBTQ and HIV positive people who live in fear that their identity or HIV status will be the cause of being assaulted or murdered and that a jury of their peers will condone this violence. In a society in which "gay, trans, or HIV panic" defenses are allowed, LGBTQ youth and adults and people living with HIV are under a constant threat of discrimination and violence. To argue the reverse, that LGBTQ people are an inherent threat to others, a threat so severe that violence against them is protected by law, is an affront to our collective humanity.

Thank you for this opportunity to testify to support this very important legislation.



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Dear Council Judiciary Committee,

I am Valerie Jablow, and I have lived in DC since 1991. Thank you for taking public testimony regarding failures of prosecuting hate crimes in DC.

I am sending here my testimony about my personal experiences in 2019 with hate crime reporting in DC. I believe that my experiences shed light on the failure to prosecute hate crimes in DC.

Simply put, I have learned that the way in which DC metropolitan police (MPD) records hate crimes can be very poor, while MPD has apparently not exercised due diligence in connecting reports of hate crimes. Together, those issues make protective court interventions (for cease and desist orders, for example) impossible and likely deter reporting and prevent effective prosecutions, which effectively empowers those who commit hate crimes.

1. The first possible hate crime I reported to MPD in 2019 occurred at the end of May in the late afternoon.

My teenage son had a couple of his high school friends over at our house. He is white, and his two friends are black. They had arrived through the public alley behind our house. Our property has a solid metal garage door and a solid metal door facing that alley, which together form a solid wall when the doors are closed. In the usual practice of my son and his friends, they used the smaller of the two (locked) doors to enter our back yard. Since it was a nice day, they hung out in our back yard for the better part of an hour, playing ping pong, after which my son's two friends left by the same alley door to go home.

Shortly afterward, another of my son's friends (who is white) arrived at our alley door. When my son let him in, his friend remarked that there was something weird scratched into our alley door. In fact, the word "DIE" had been scratched into our metal alley door; I have attached a picture to this email.

I asked my son's (white) friend if he had seen anyone (he hadn't) or if either of them had ever noticed the word on the door before (they hadn't). As we use that door frequently, it was not likely that the scratched word had been there very long—and in fact was likely put there after the visit of my son's African American friends, since they too had reported not seeing that when they entered our yard through that door.

Because of that timing, the appearance of that word on my door appeared to me to be a possible hate crime against my son's black friends or against our family for hosting them.

Thus, I called MPD and told them exactly what I said here and that I feared it was a hate crime.

But in the police report (19093043, a scan of which is attached here), there is no mention of any of that, except a note that there is "no evidence" for a possible hate crime.

Worse, the officer put down that the "suspect" was black.

This is simply incredible:

I repeatedly said to the officer who took the report that I had NO idea who did this; that none of us had heard or seen anything; and that I feared it arose because of the timing of my son's arrival with his two black friends and their departure shortly thereafter in a section of our city that is largely white.

The truly sad thing about this police report is that the police asked about the white friend who was the first to notice the word on the door. I told the officer that young man's name, his address, and his phone number. Yet, the report contains a fictional description of a black "suspect" that was never provided by me or anyone else as far as I know--along with a nonsensical note on p. 7 about the white friend completely unrelated to this incident.

2. The second possible hate crime I reported to MPD happened in August on a weekday morning.

That day, at about 6:30 am, I took my dog out my front door of my house. Everything looked fine on my block, and I returned through my front door shortly thereafter.

At about 7:40 am, I left my house again through my front door and noticed a folded flyer that consisted of two pages with anti-Semitic ravings (see attached scan) dropped in my front yard as well as the front yards of all my neighbors on my side of my street.

I then walked around my own block as well as adjacent blocks, to see who else was given these flyers. It appeared that some houses on the opposite side of my block also received it as well as a few around the corner from my house.

A simple google search shows that the man whose name appears on one of the pages, Peter J. Cojanis, apparently left flyers like this recently elsewhere in our area. (See here: <https://www.arlnow.com/2018/07/06/anti-semitic-flyers-distributed-near-courthouse/>)

A few days later, when I called the police to report this (19145554, see attached scan), the officer who responded said that the man is well-known for doing just this and that the officer personally reported another similar flyer incident near Eastern Market. The officer said that he would try and make my report as detailed as possible, in an effort to ensure someone in MPD could connect all the incidents.

I asked that the incident above, of the word "DIE" scratched into my alley door, also be mentioned in his report.

But as you can see from the MPD report for this incident, all of that was omitted.

Worse, some of my neighbors reported similar incidents of anti-Semitic flyering, which I told the officer about and asked that those reports be put into my crime report as well.

For instance, anti-Semitic flyers were placed at a neighbor's house in May, which they reported to Capitol police (not MPD). Then, in July 2019, that same neighbor's house received similar anti-Semitic flyers, which a houseguest reported to MPD (because my neighbors were out of town at the time).

Other neighbors in another block told me that they received similar anti-Semitic flyers in October 2018 and reported it to MPD. However, MPD denied ever receiving a report from them about this when I asked for it.

When he took my report on this incident, the officer mentioned to me that he thought this person, Peter Cojanis, was likely "harmless." The officer also noted that if I got enough police reports of this man doing this flyering, I could go to a judge and get a cease and desist order.

I find all of this simply incredible, and I hope you understand why:

--Who is the judge of what "harmless" is? Some of my neighbors are Jewish who received these flyers, which are clearly filled with hatred for Jewish people. Given the numerous and recent documented incidents of this one person alone doing anti-Semitic flyering, when does "harmless" stop and "harmful" begin?

—By my count, MPD has AT LEAST three reports of similar anti-Semitic flyering in a recent time period in my neighborhood alone. Yet, not only is there no reference to other similar, recent incidents in either of my reports, but the officer who took my report on the flyer said that MPD has no good way to connect similar incident reports.

--How am I to ask a judge for a cease and desist order if MPD has no accurate and/or complete reporting such that similar incidents are connected?

—And how is any attorney going to prosecute a case wherein the reporting entity, MPD, is apparently not connecting events and inaccurately reporting them in the first place?

As a DC resident, I ask that you do the following immediately, which may help with the prosecution of hate crimes here:

1. Ensure that MPD reports real or possible hate crimes accurately, completely, and seriously, which in my experience is certainly not happening;
2. Make MPD invest in officer training and systems to connect incidents of real or possible hate crimes accurately and completely; and
3. Ensure that MPD does not diminish, belittle, or misconstrue citizen concerns such that residents are led to believe that reporting a real or possible hate crime is a useless exercise and that hate-filled screeds are "harmless."

After my two reported incidents this year, I am very concerned that there are at least a few people near me who harbor hatred and purposely work to instill fear in others through it. Worse, those actors are empowered in their deeds by the fact that MPD does not seem to care to figure out any patterns in such incidents as what I reported--or even do the basics of reporting them accurately and comprehensively.

Thank you for your help.

Valerie Jablow



October 22, 2019

Dear Chairperson Charles Allen:

Thank you for the opportunity to provide written testimony concerning the Committee on the Judiciary & Public Safety's public hearing on the rise in hate crimes in the District of Columbia and the committee's consideration of Bill 23-0409 and Bill 23-0435. The LGBT Bar Association of DC (LGBT Bar) urges the committee to become the next jurisdiction to eliminate the "gay panic" defense. Both bills accomplish this important goal and the LGBT Bar supports passing Bill 23-0409. The LGBT Bar also requests the committee update the bias-crime statute to reduce alleged uncertainty in its requirements.

The LGBT Bar was founded in 1990 and serves the gay, lesbian, bisexual, and transgender lawyers, law students, and legal professionals in our city. The LGBT Bar works to advance the interests of the LGBT community, to be their voice within the legal community, and to improve their professional and personal lives. An affiliate of the National LGBT Bar Association, the LGBT Bar acts in coalition with other local and national groups dedicated to LGBT concerns.

There has been a significant increase in bias-related crimes in the District of Columbia.¹ In 2018, there were 205 bias-related crimes reported in our city—almost double from two years prior and triple from three years prior. This year there is also a wave of bias-related crime prejudiced on gender identity/expression and sexual orientation with already more reports to date than in six of the last eight years. As the committee noted in its public hearing announcement, almost none of these crimes were prosecuted under the bias-related crime statute. This lack of prosecutions combined with the confusion as to the outcome of these cases has created a sense of fear and uncertainty within the LGBT community of the city.

Multiple legal organizations support the elimination of the "gay panic" defense. In 2013, the American Bar Association unanimously approved a resolution calling for the elimination of this defense.² Bill 23-0409 contains both elements supported by the ABA and the National LGBT Bar Association³: it eliminates discovery of a person's sexual orientation or gender identity as provocation for a violent crime and it instructs the judiciary to remind jurors that bias and prejudice should not factor into their decision. While the District has victims of bias-related crimes based on other traits, the "panic defense" has historically been uniquely used

¹ Metropolitan Police Department, *Bias-Related Crimes (Hate Crimes) Data*, <https://mpdc.dc.gov/hatecrimes> (last visited Oct. 22, 2019).

² Am. Bar Assoc., <https://lgbtbar.org/wp-content/uploads/2014/02/Gay-and-Trans-Panic-Defenses-Resolution.pdf> (Aug. 13, 2013).

³ The LGBT Bar Assoc., *LGBTQ+ Panic Defense*, <https://lgbtbar.org/programs/advocacy/gay-trans-panic-defense/> (last visited Oct. 22, 2019).

Testimony of Joseph P. Vardner
Committee on the Judiciary & Public Safety
October 22, 2019

to justify violent crimes against LGBT individuals. For these reasons, the LGBT Bar supports passage of bill 23-0409.

Elimination of the “gay panic” defense is important but insufficient to resolve the lack of bias-related crimes being charged in our city. Additional hurdles remain. For example, in recent years, the jury instructions utilized by the United States Attorney have deviated from the District’s bias-related crime statute. While the statute requires evidence “that demonstrates an accused’s prejudice” the jury instructions require evidence that the crime was committed “because of” prejudice.⁴ The burden placed on prosecutors by the jury instructions is greater than what the statute requires. The District’s judiciary has relied upon a privately published manual titled Criminal Jury Instructions for the District of Columbia, nicknamed the Red Book, for years. Thus far, the District’s prosecutors have been unsuccessful in persuading the author or publisher in aligning the model jury instructions with the statute. The LGBT Bar urges the committee to send a message to the publisher of the Red Book encouraging them to align their publication with the statute. The LGBT Bar also supports amending the bias-related crime statute to clarify its elements—particularly regarding the burden placed on prosecutors when establishing the mental element in multi-motive bias-related crimes.

If you have any question or would like to discuss our position concerning the bills, please reach out to the LGBT Bar’s President Joseph Vardner at president@gaylaw.org.

⁴ Compare D.C. Code § 22-3701 (defining a bias-related crime as “a designated act that demonstrates an accused’s prejudice”) with Appendix 1 (Criminal Jury Instructions for DC Instruction 8.104: Bias Related Crime) (requiring the jury find the designated act was committed “because of prejudice”).

Appendix 1

Criminal Jury Instructions for DC Instruction 8.104

Instruction 8.104 BIAS RELATED CRIME

D.C. Official Code §§ 22-3701, 22-3703 (2001)

The elements of the offense of a bias-related crime, each of which the government must prove beyond a reasonable doubt, are that:

1. [Name of defendant] committed a criminal act against another person, in this case the crime of [describe offense] and
2. S/he committed the crime of [describe offense] because of prejudice based on the actual or perceived [race, color, or national origin] [sex] [age] [marital status] [personal appearance] [sexual orientation] [homelessness] [family responsibility] [physical handicap] [matriculation] [political affiliation] of the other person.

The elements of the crime of [describe offense] each of which the government must prove beyond a reasonable doubt are that:

[Insert appropriate elements for criminal act.]

If you are not convinced that the government has proven beyond a reasonable doubt the elements of a bias-related crime as that offense has been defined, then you must find the defendant not guilty of this offense.

In making your determination, it does not matter if [name of defendant] had additional motives for doing what he did, such as personal anger or revenge. If you find beyond a reasonable doubt that s/he committed the offense of [name of criminal act] against the victim, then you must find him/her guilty of [name of criminal act]. If you find further beyond a reasonable doubt that [name of defendant's] [name of criminal act] of the [victim] [victim's property] was committed because of [name of defendant's] prejudice against the victim's [race, color, or national origin] [sex] [age] [marital status] [personal appearance] [sexual orientation] [homelessness] [family responsibility] [physical handicap] [matriculation] [political affiliation], then you must find the defendant guilty of this offense.

If you find that the government has not proven beyond a reasonable doubt that [name of defendant] committed the offense of [name of criminal act], then you must find him/her not guilty of this offense. If you find that the government has proved beyond a reasonable doubt that [name of defendant] committed the offense of [name of criminal act] but that the government did not prove beyond a

reasonable doubt that the [name of criminal act] was committed by the defendant because of his/her prejudice, then you must find the defendant did not commit a bias-related offense.

Where the alleged bias is based on homelessness, the following definition of homelessness should be given:

"Homelessness" means the status or circumstance of an individual who:

[lacks a fixed, regular, and adequate nighttime residence][.] [; or]

[has a primary nighttime residence that is

[a supervised publicly or privately operated shelter designed to provide temporary living accommodations, including welfare motels, hotels, congregate shelters, and transitional housing for the mentally ill][.] [; or]

[an institution that provides a temporary residence for individuals intended to be institutionalized][.] [; or]

[a public or private place not designed for, or ordinarily used as, a regular sleeping accommodation for human beings]].

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Executive Office of Mayor Muriel Bowser



Public Hearing on

**Hate Crimes in the District of Columbia and the Failure to Prosecute
by the Office of the United States Attorney**

**Bill 23-409, the "Sexual Orientation and Gender Identity Panic Defense
Prohibition Act of 2019"**

and

**Bill 23-435, the "Tony Hunter and Bella Evangelista Panic Defense
Prohibition Act of 2019"**

Testimony of

Kevin Donahue
Deputy Mayor for Public Safety and Justice

Before the
Committee on the Judiciary and Public Safety
Council of the District of Columbia
The Honorable Charles Allen, Chairperson

John A. Wilson Building
Room 412
1350 Pennsylvania Avenue, NW
Washington, DC 20004
October 23, 2019
10:00 a.m.

Good morning, Chairperson Allen, members, and staff of the Committee on the Judiciary and Public Safety. I am Kevin Donahue, Deputy Mayor for Public Safety and Justice, and I am here to discuss hate crimes in our city and the District government's response to them. I am joined by Kelly O'Meara, Director of the Strategic Change Division at the Metropolitan Police Department (MPD).

I want to begin by centering on the victims of hate crimes, their trauma, and their needs. Over the past few years, we have seen a nationwide increase in hate crimes targeting individuals for where they were born, what language they speak in public, who they love, what race or ethnicity they identify with, and what religion they follow. Places that we all thought were safe spaces – schools, churches, synagogues, government buildings – have all been targets of deadly hate. While the Internet has transformed our daily lives, it has also made it very easy to find receptive audiences for sharing and reveling in hatred, bigotry, and extremism. The combination of all too easy access to firearms plus individuals motivated by radical nationalism, white supremacy, and religious extremism has led to many instances of death and terror throughout the country.

It is distressing that active shooter trainings, metal detectors, and armed security guards are now a regular presence at our schools, our religious institutions, and many public gatherings. It is a sad reality of the world we live in. And, as government leaders, our role is to do all we can to reduce the likelihood of hate-fueled attacks and, if they do happen, to ensure the criminals who commit them are brought to justice and to provide their victims with everything they need to recover.

Hate Crimes in the District of Columbia Have Spiked Since 2016

The District is at the national forefront of how we respond to hate crimes. Our agencies work together to offer support for victims and communities who have been targeted and to train government employees to make notifications if they identify signs of a potential bias-related crime. As I later present data from MPD, it is important to remember that hate crime statistics are about "reported" cases, and MPD is focused on ensuring every crime that may have been motivated by bias is counted and investigated. The District government is working hard to support individuals and communities still traumatized by past attacks, while also identifying new instances of bias-related crimes.

Based on incidents reported to MPD, there has been a surge of hate crimes in the District over the past three years. In 2016, 106 hate crimes were reported to MPD, representing a spike of 60 percent over 2015. The number continued to spike in 2017, with 177 reported incidents, representing a 67 percent spike. In 2018, the number increased 16 percent, with 205 incidents reported. As of September 30, 2019, we have seen a 14 percent increase from the same time period last year, with 165 hate crimes reported to MPD.

In looking at the bias types of these hate crimes, we find that last year, crimes with bias motives based on sexual orientation were the most prevalent (60 instances), followed by ethnicity/national origin (49 instances), race (39 instances), and gender identity/expression (34 instances). The most common underlying crimes are simple assault (75 instances), threats/stalking (57 instances),

destruction of property/displaying symbols (38 instances), aggravated assault (20 instances), and robbery (11 instances).

While we strive to create an environment where residents feel safe and supported, the reality is that the District exists within the larger context of our country. In the past few years, we have seen our national political discourse veer towards more extreme politics that encourage and reward outlandish and offensive behavior. Unfortunately, some of that behavior has found its way to our city, but we continue to do our best to combat it and remain an inclusive, vibrant city.

The District's Bias-Related Laws

Under District law,¹ a bias-related crime is a criminal act or attempted criminal act “that demonstrates an accused’s prejudice based on the actual or perceived race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, gender identity or expression, family responsibility, homelessness, physical disability, matriculation, or political affiliation of a victim.”

It is important to note that while we often refer to “hate crimes,” District law doesn’t designate any specific crimes as such. Instead, it creates enhanced sentencing penalties for persons convicted of an underlying crime that was motivated, in whole or in part, by bias.²

There are some nuances here that are important to note because they easily get lost or misinterpreted. First, the incident must be a crime. Hateful speech – no matter how reprehensible – is protected by the First Amendment and is not, on its own, a hate crime. Second, a “hate crime” is not a crime itself, but rather is a defendant’s motive which, if proven, results in an enhanced sentencing penalty. Third, prosecutors have the challenge of establishing, beyond a reasonable doubt, that a defendant was motivated by prejudice because of an actual or perceived difference. The Executive strongly supports the use of enhanced sentencing penalties for criminal actions that are found to be hate crimes.

For all reported crimes, an MPD officer must affirm whether any hate crime indicators are present, but that officer does not determine if it is a hate crime. Instead, all potential hate crimes are jointly reviewed by an MPD panel consisting of the Criminal Investigations Division, the Strategic Change Division, the Intelligence Branch, and the Special Liaison Branch (SLB), to ensure that cases are appropriately classified. I want to emphasize that every hate crime reported to MPD is thoroughly investigated by detectives. The officers notify the SLB³ so that members can work

¹ D.C. Official Code § 22-3700 *et seq.*

² Under D.C. Official Code § 22-3703, a person who is found guilty of a bias-related crime may be sentenced and fined up to 1.5 times the maximum term and fine authorized for the underlying crime.

³ The Special Liaison Branch serves the African, Asian, deaf and hard of hearing, LGBT, Latino, and religious minority communities. The SLB works closely with historically underserved communities, serving as a model for community policing. Members respond to crime scenes and incidents to support members of our community, whether they are arrestees, victims, or surviving family members. The SLB works closely with MPD’s Victims Services Unit and community organizations to ensure that crime victims have access to services. The Branch also works to support the community with incidents that are not necessarily criminal, such as with death notifications to family members, or in working to help locate missing persons. More proactively, SLB hosts and participates in meetings and presentations,

with the victim and the community. MPD detectives conduct a full investigation into both the criminal elements and the possible motive. We know how difficult it can be for victims to come forward, but we want to assure them that our officers take every incident seriously and that they will be treated with dignity and compassion.

If MPD is able to make an arrest, the case is presented to prosecutors, who then make their own determination on whether there is enough evidence to take the case to trial.

District Government Responses to Hate Crime Incidents

Now that we have a sense of the scope of the issue, I want to highlight some of the District's initiatives aimed at reducing the number and impact of hate crimes.

Since the 2016 election, some of our most vulnerable communities became more concerned and fearful. After meeting with representatives from the African, Asian, deaf and hard of hearing, Latino, and LGBTQ communities – all of which are served by MPD's special liaison programs – Chief Newsham moved MPD's Special Liaison Branch directly under his office and under the supervision of the Strategic Change Division, at the end of 2016. The change has helped to raise the profile of these issues within MPD so that the liaison units have greater access to coordinate with all bureaus.

MPD has also partnered with Rev. Thomas Bowen, the Director of the Mayor's Office of Religious Affairs, to respond to community fears and build community relationships moving forward. This began in the immediate aftermath of the January 2017 attack on a mosque in Quebec and the presidential Executive Orders on travel restrictions from predominantly Muslim countries. By visiting mosques and Islamic centers throughout the city, Rev. Bowen helped MPD to strengthen connections with members of the Muslim community. Rev. Bowen, Director Monica Palacio of the Office of Human Rights (OHR), and MPD have also hosted several weekly conference calls with religious leaders in response to attacks on religious communities in other parts of the country. Since then, the SLB has expanded its mission to include faith-based communities frequently targeted by bias within in the District.

The Office of Victims Services and Justice Grants (OVSJG) manages the DC Victim hotline, which is the single point of entry of all victims' services in the District. OVSJG produces hotline materials specifically directed at victims of hate crimes and is instrumental in helping victims quickly access services.

Since 2017, Director Palacio has led the Mayor's DC Values in Action initiative. Director Palacio works closely with MPD and others to coordinate critical information for District agencies and the public to know about how to respond to a hate crime or hate speech targeting people or property. As a result, the team developed a Hate Crime Protocol, which District agencies use to ensure timely coordinated responses to reported hate crimes and bias acts aimed to harm or instill fear in District residents.

providing the community with public safety materials and information that will help promote a better understanding of interacting with MPD members in criminal and casual contact situations.

The Bowser Administration Supports Elimination of the “Panic Defense”

Before I close, I want to acknowledge the Executive’s general support for the two bills related to eliminating the “panic defense.” Both Bill 23-409, the “Sexual Orientation and Gender Identity Panic Defense Prohibition Act of 2019” and Bill 23-435, the “Tony Hunter and Bella Evangelista Panic Defense Prohibition Act of 2019” would prohibit defendants from using “gay panic” as a defense during a criminal trial.

The use of this defense implies that a victim’s sexual orientation or gender identity somehow justifies a defendant’s loss of self-control and subsequent attack. It implies that LGBTQ lives are worth less than others’ lives and that is not a public policy that we can ever support. In enacting this legislation, the District would join several other progressive states, such as California, Illinois, Rhode Island, Nevada, Connecticut, Maine, Hawaii, and New York. It is also important to get input from prosecutors on how these bills impact cases.

The Need to Enact the “Community Harassment Prevention Amendment Act”

Finally, I strongly urge the Committee to pass Bill 23-134, the “Community Harassment Prevention Amendment Act of 2019.” This legislation protects our communities by making it illegal to intentionally target specific entities with the intent of causing fear or distress. It also expands the properties where it would be illegal to display emblems intended to harm or intimidate people. By expanding the statute to apply to any public property or private property of another without permission, the bill provides additional recourse in cases of displays of certain symbols of hate. It is important to note that a substantial number of hate crimes – on average, one fifth to one third – are property crimes, primarily graffiti, not violent or interpersonal crimes. Providing law enforcement with a tool for combatting this harassment will ensure that individuals can safely assemble to advance their common interests and will fill a potential enforcement gap in the law.

This bill was introduced by Mayor Bowser a year ago and this Committee held a hearing on it in June. We appreciate that Council enacted the emergency⁴ and temporary⁵ versions of this legislation at the Mayor’s request. But, the emergency bill expired in May and the temporary bill expires in less than a month. We urge the Committee to move expeditiously to mark up the permanent bill and send it to the Council for a vote.

The Bowser Administration strongly supports holding perpetrators of hate crimes accountable for their actions against their victims and our communities.

Thank you for the opportunity to testify today on this important issue. I welcome any questions.

⁴ The Community Harassment Prevention Emergency Amendment Act of 2018, effective February 6, 2019 (D.C. Act 22-644, expiring on May 7, 2019).

⁵ The Community Harassment Prevention Temporary Amendment Act of 2018, effective April 11, 2019 (D.C. Act 22-642, expiring on November 22, 2019).



Statement of Toni Michelle Jackson
Deputy Attorney General, Public Interest Division
Office of the Attorney General

Before the

The Committee on the Judiciary & Public Safety
The Honorable Charles Allen, Chairperson

Public Hearing

“Hate Crimes in the District of Columbia and the Failure to Prosecute by the
United States Attorney’s Office”

October 23, 2019
Time 10:00am
Room 412
John A. Wilson Building
1350 Pennsylvania Avenue, NW
Washington, District of Columbia 20004

Introduction

Greetings Chairman Allen, Councilmembers, staff, and residents of the District of Columbia. My name is Toni Michelle Jackson, and I have the privilege to serve as the Deputy Attorney General of the Public Interest Division in the Office of the Attorney General for the District of Columbia. I am pleased to appear before the Committee on Judiciary and Public Safety on behalf of Attorney General Karl A. Racine to testify on hate crimes in the District of Columbia and the prohibition of the panic defense.

Bias-Motivated Violence in the District of Columbia

Bias-motivated violence is on the rise in the District of Columbia. MPD's data show that the total number of bias-motivated violent incidents more than doubled from 2011 to 2018, and we are on track for an even higher number in 2019.¹ In particular, there have been sharp increases in bias-motivated violence based on ethnicity, national origin, religion, gender identity, and gender expression. For example, there has been a seven-fold increase in bias-motivated violence based on ethnicity and national origin and a three-fold increase in such violence based on gender identity and expression. These troubling trendlines are continuing.

We know that bias-motivated violence is on the rise not only from the data, but also from our conversations with our neighbors and constituents. This summer, OAG held a series of five listening sessions across the District to discuss civil rights issues and to hear directly from District residents on the issues they are encountering in their communities. In every listening session, we heard from attendees about the same issues reflected in the data: bias-motivated violence against the LGBTQ+ community and the rise of anti-Semitic, anti-Muslim, and anti-immigrant violence.

¹ There were 92 reported bias-motivated violent incidents in 2011 and 205 such incidents in 2018. The year-to-date numbers in 2019 exceed those of 2018. Metropolitan Police Department, Bias-Related Crimes (Hate Crimes Data), <https://mpdc.dc.gov/hatecrimes>.

In addition, Attorney General Racine met with advocates for the LGBTQ+ community this summer to discuss civil rights issues, and the spike in violence targeting that community was their primary concern.

For our office, ensuring that District residents are free to be and express themselves and are safe while doing so is an utmost priority. Our office's jurisdiction over bias-motivated criminal conduct is limited to prosecution of juvenile offenders. Although OAG has not seen many incidents of juvenile arrests for bias-motivated crime, when we do, we take those cases very seriously. These efforts are necessarily and appropriately private because the purpose of the juvenile system is to hold offenders accountable and to rehabilitate them. Doing so requires confidentiality. As juvenile prosecutors, we have the dual responsibility of working to keep our community and victims safe and addressing the care and rehabilitative needs of the youth in our justice system. Thus, it is our duty to examine the reasons a youth engages in criminal conduct and devise a rehabilitative plan to effect change in a young person's life so they will not engage in criminal conduct in the future. When we are presented with a youth involved in bias-motivated crime, we strive to break down stereotypes and fears that often motivate the conduct through Restorative Justice conferencing and the ACE Diversion Program. Of course, if the criminal conduct is very serious, we prosecute those cases to our fullest ability while also working to provide services, counseling and mentoring to change a youth's thinking about people in our community who may be different from them. On behalf of Attorney General Racine, we want to assure you that we utilize every tool available to bring about change in juvenile offender's mentality.

Civil Bias-Motivated Violence Statute

While OAG's criminal jurisdiction in this arena is limited, there are other opportunities for OAG to complement the efforts of the U.S. Attorney's Office. In particular, there are important

civil actions that we can bring to help combat the rise in bias-motivated violence. And we have the staff resources to do just that. Thanks to the Council, as of the beginning of this fiscal year, we have four attorneys and an investigator to work on civil rights issues. Attorney General Racine greatly appreciates these investments to bolster OAG's commitment to ending discrimination, harassment, and, importantly, violence.

To fully harness these resources, we have introduced legislation that would give express authority to OAG to bring *civil* actions against those who commit bias-motivated violence. Under current District law, individual victims of bias-motivated violence can bring civil actions against perpetrators, and they can seek injunctions, damages, punitive damages, and attorney's fees.² This civil cause of action has not been used frequently, in part because it can be very difficult for an individual victim of a bias-motivated violent offense to find a lawyer and prosecute a case where financial recovery may be uncertain.³

Our proposed legislation addresses that problem by allowing the Attorney General to bring a civil action in the public interest. The Attorney General can do so regardless of whether the U.S. Attorney's Office criminally prosecutes the perpetrator. Under the law that we have proposed, the Attorney General would be able to investigate these matters and seek the same remedies that exist in current law. In addition, the Attorney General would be able to seek restitution for the victim and civil penalties from the perpetrator. This type of civil cause of action gives District residents a direct voice in the enforcement of our laws against bias-motivated violence. The Attorney

² D.C. Code § 22-3704.

³ There are only two reported lawsuits under the statute that have been filed since 2011 despite more than 1,000 bias-motivated violent incidents. There are likely other cases that have not been reported. Nevertheless, because some perpetrators of these offenses may be judgment proof, victims may have difficulty securing private counsel to pursue these claims, making Attorney General enforcement particularly important.

General, acting in the name of the District, can send a clear message that this type of violence is not tolerated in the District.

The proposed legislation also expands the category of conduct that is within the ambit of the civil bias-motivated offense. Specifically, in addition to providing a cause of action against those who commit violent offenses motivated by protected classes like race, sex, disability, gender identity, religion, and national origin, the statute also creates a cause of action against individuals who commit offenses that interfere with rights protected by District and federal law. That means, for example, that if an individual commits a violent offense that interferes with a person's right to seek reproductive health care, the victim or the Attorney General can bring a civil cause of action under the statute.

This proposed legislation brings District law in line with the trend in other states. For example, Massachusetts has a substantially similar statute. Using that authority, the Attorney General of Massachusetts obtained a preliminary injunction against an individual who used a homophobic slur and violently attacked three individuals at a bar. The Massachusetts Attorney General also has brought litigation against a landlord who violently evicted a tenant based on the tenant's national origin and religion, even though there were no criminal charges. The Connecticut Attorney General's Office has pending legislation that would give it similar authority.

The proposed legislation also makes some clarifying technical changes to existing law. For example, existing law only created a civil cause of action for violent offenses motivated by the victim's *physical* disability. This legislation makes clear that bias-motivated offenses based on any disability are actionable. The legislation also makes clear that the prohibition on bias-motivated offenses applies to businesses as it does to people.

We urge passage of this legislation to create a new tool to attack bias-motivated crimes, so that the District and its residents have an opportunity to publicly condemn violence motivated by bias and violence that interferes with an individual's ability to live their lives freely.

Panic Defense

Finally, we also recognize that other aspects of our laws further marginalize communities that are targeted by violence, such as the LGBTQ+ community. One aspect of this, as the Committee has recognized, is the so-called panic defense. This defense provides an excuse for violent crime based on the victim's identity. OAG supports eliminating this defense, which only compounds the negative effects of the increase in bias-motivated violence. OAG does not believe that there is any valid criminal justice reason to allow a perpetrator to use a victim's identity to justify or excuse violence. To the contrary, sanctioning the notion that a victim's LGBTQ+ identity, for example, can justify violence only opens these communities up to further bias-motivated violence. We support eliminating this defense, as eight other states have done, and requiring courts to give anti-bias jury instructions when a party so requests.

Conclusion

I greatly appreciate the opportunity to testify at this this Public Hearing concerning these important issues. OAG stands ready to work with the Council, Executive, U.S. Attorney's Office, community, and other stakeholders to eradicate the scourge of bias-motivated violence in the District of Columbia and to make the District's laws more just for all members of our community. I am happy to answer any questions that members may have.



U.S. Department of Justice

Jessie K. Liu
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October 23, 2019

VIA ELECTRONIC MAIL

The Honorable Charles Allen
Chairman
Committee on the Judiciary & Public Safety
Council of the District of Columbia
1350 Pennsylvania Avenue, N.W.
Suite 110
Washington, D.C. 20004

Dear Chairman Allen:

We are pleased to have an opportunity to discuss the work of the United States Attorney's Office for the District of Columbia (USAO-DC or Office) in protecting our community from bias-related crimes.

Prosecuting bias-related crimes is critical to keeping our community safe. When one member of a group is the victim of a bias-related crime, all members carry with them a fear that they, too, may be targeted because of who they are. The Office, in partnership with law enforcement, uses all appropriate prosecutorial tools to hold the perpetrators of such crimes accountable.

The title of today's Committee hearing — "Hate Crimes in the District of Columbia and the Failure to Prosecute by the Office of the United States Attorney" — is based on a misapprehension of certain raw data and the process by which these crimes are addressed by the Office. In fact, USAO-DC is not failing to prosecute

defendants who may have committed bias-related crimes. Rather, our dedicated career prosecutors file criminal charges on the underlying offense in almost all arrests presented to us as potentially involving bias.

The Committee's hearing notice states: "Although there were 204 bias-motivated crimes reported in the District in 2018, the U.S. Attorney's Office for the District of Columbia ("USAO") prosecuted only three cases as hate crimes. Similarly, in 2017, of the 178 reported hate crimes, the USAO charged only two cases as such, and both were ultimately dismissed." It is important to recognize, however, that many of these reports did not result in arrests, which means they were never presented to the Office for possible prosecution. More often than not, the police concluded that a reported incident either did not constitute a crime or that the evidence of the offense, including evidence of the perpetrator's identity, did not support making an arrest. Thus, of the 204 alleged bias-related crimes that were reported to the Metropolitan Police Department in 2018, only 59 resulted in an arrest that was presented to the Office for prosecution. Similarly, of the 178 alleged bias-related crimes that were reported to the Metropolitan Police Department in 2017, only 55 were presented for prosecution. Although both the Metropolitan Police Department and USAO-DC take every report of a potential bias-related crime seriously, not every such report can or should result in a prosecution.

Furthermore, the hearing notice gives the inaccurate impression that USAO-DC is not prosecuting alleged bias-related crimes *at all* unless it charges the bias-related enhancement. As you know, the D.C. Code does not have a stand-alone "bias-related crime" provision. Rather, it creates an enhanced offense when an underlying crime is bias-related, which allows, but does not require, a judge to impose a higher sentence upon conviction for the enhancement.¹ In the vast majority of the alleged bias-related arrests in 2017 and 2018 presented to USAO-DC for prosecution, the

¹ D.C. Code § 22-3701(1) defines a "bias-related crime" as follows:

a designated act that demonstrates an accused's prejudice based on the actual or perceived race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, gender identity or expression, family responsibility, homelessness, physical disability, matriculation, or political affiliation of a victim of the subject designated act.

D.C. Code § 22-3703 increases the maximum penalty for a criminal offense to 1½ times the maximum otherwise authorized by statute when the underlying crime is found to be "bias-related," as defined in D.C. Code § 22-3701.

Office charged the underlying crime, often D.C. Code offenses such as assault or threats. Specifically, of the 59 alleged bias-related crimes in 2018 presented for prosecution, we charged the underlying offense in 52 cases; of the 55 alleged bias-related crimes in 2017 presented for prosecution, we charged the underlying offense in 49 cases.

There are good reasons why a prosecutor may not charge the enhanced "bias-related" version of an underlying offense that is presented by the police for potential prosecution. Most fundamentally, police and prosecutors evaluate alleged offenses under different standards. Police make arrests based on probable cause, the same standard used, for example, in obtaining a search warrant. But prosecutors must prove each charged offense beyond a reasonable doubt, the highest threshold in the legal system. In some cases, the facts may create probable cause, but fall short of proof beyond a reasonable doubt. Not surprisingly, in some cases, the evidence will give rise to reason to believe that the crime was motivated by bias, but will not meet the exceptionally stringent beyond-a-reasonable-doubt standard. Moreover, to obtain a conviction on the bias enhancement, it is not enough that the victim identifies with, or is perceived to identify with, a protected status. It is also not enough that the perpetrator may be prejudiced against individuals identifying with such a status. Rather, prosecutors must prove, beyond a reasonable doubt, a causal nexus between the underlying crime and the perpetrator's prejudice or bias.

One of the 2018 cases in which the Office charged a bias-related enhancement illustrates this point. In that case, the victim, a black male from Cameroon, was driving in his vehicle through Georgetown after a social gathering when he encountered the defendant, a white male, on a bicycle in the middle of the street. The victim honked his horn, and the defendant responded with expletives. The victim then passed the defendant and, while doing so, heard a thump on the back of his car. Assuming that the defendant had struck his car with an object, the victim pulled over to call the police. The defendant then shouted at the victim, "Are you really calling the police?" and directed a racial slur at him. Subsequently, the defendant hit the victim on the head with a metal u-lock while yelling racial slurs at him. The victim required 21 stitches as a result of the assault. The Office charged assault with a dangerous weapon and assault with significant bodily injury with bias-related enhancements. The jury convicted on these underlying offenses, but hung on the enhancements.²

² In another case, stemming from an incident that occurred in 2016, the defendant slashed the face and neck of the victim, an Hispanic woman, while yelling several times, "I don't like Hispanic women." Both the defendant and the victim had children at the same school. The Office charged aggravated assault while armed, with a bias-

There is an open question as to whether, to convict a defendant of a bias-related crime, the jury must conclude that the defendant's bias was a *but-for* cause of the offense, or whether it need conclude only that the defendant's bias was a *contributing* factor. The D.C. Code defines a bias-related crime as a crime that "demonstrates an accused's prejudice based on the victim's actual or perceived" race, sex, sexual orientation, gender identity or expression, or other protected status. The standard jury instruction states that the government must prove that the defendant committed the crime "because of prejudice," but also that "it does not matter" if the defendant "had additional motives for doing what he did, such as personal anger or revenge." This language is a potential source of confusion. USAO-DC has taken the position that the statute requires that the government prove only that the defendant's bias was a contributing factor to the crime. In contrast, the Public Defender Service for the District of Columbia has argued that D.C. law requires a but-for causal relationship between bias and a criminal act to support a conviction for a bias-related offense. The issue is currently before the D.C. Court of Appeals.

It is important to note that in cases where USAO-DC does not charge an offense as being bias-related, the court can still consider credible evidence of that aspect of the perpetrator's conduct when determining the sentence for the underlying crime. Thus, in the bicycle-lock assault case described above, the Office asked the judge to consider the defendant's motivation for the crime when fashioning an appropriate sentence, even though the jury declined to convict on the enhancement. Courts can impose a sentence up to the maximum allowed for the underlying offense. Even where the evidence may be insufficient to prove the enhancement beyond a reasonable doubt, we can and do ask the court to consider credible evidence of bias at sentencing.

Moreover, pursuant to the Crime Victims' Rights Act, every victim has the right to be present at sentencing and to submit to the court a victim impact statement "containing information concerning any emotional, psychological, financial, or physical harm done to or loss suffered by the victim."³ This is true even when the enhancement is not charged or where the jury does not convict on the enhancement. Even so, D.C. law does not require judges to sentence bias-related crimes differently from any other crimes, and it is relatively rare for courts to impose an enhanced sentence (that is, a sentence above the statutory maximum available for the unenhanced offense) even when the jury convicts on the bias-related enhancement. As the *Washington Post* reported, defendants have served additional jail time

related enhancement, for that attack. The jury convicted on the underlying offense, but acquitted on the enhancement.

³ D.C. Code § 23-1904.

pursuant to enhanced sentences in only four of the 42 cases since 2008 in which they were convicted of a bias-enhanced offense.

Your hearing notice also quotes the *Washington Post*'s assertion that "hate-crime prosecutions and convictions are at their lowest point in at least a decade." Since the publication of the *Post*'s article, some commentators have suggested that the purported decline in the prosecution of bias-related crimes could be attributable to a change in policy or personnel – specifically, in the transition from my predecessor, Channing D. Phillips, to me in late September 2017. The facts do not support such a conclusion. First, there has been no change in policy with respect to the investigation and prosecution of bias-related crimes at USAO-DC between 2012 (the first year for which the *Post* provided statistics) and 2019. Rather, experienced career prosecutors continue to seek justice for victims on a case-by-case basis, as they always have done. Indeed, in the months after I took office, the Office added a bias-related enhancement to two cases that originally had been charged in 2016 and 2017 without the enhancement. Second, a downturn in the rate at which the Office charges the bias-related enhancement is first discernable in 2016, well before any transition in USAO-DC leadership. From 2012 to 2015, this Office charged the bias-related enhancement in between 40 and 50 percent of cases presented by the Metropolitan Police Department for prosecution as potential bias-related crimes, but that figure dropped to about 10 percent in 2016 and fell into the single digits in 2017 and 2018. We are seeking to understand why that occurred, but it is not the result of a change in policy or Office leadership.

We welcome all opportunities to improve our ability to protect the community and enforce its laws. In response to community feedback and to enhance our ability to achieve justice for victims, we have made several changes to our procedures for reviewing potential bias-related crimes. For example:

- We have created a new Early Case Assessment Section that increases stability and consistency in our intake process. That Section is headed by an experienced prosecutor who previously served as the Assistant Section Chief for juvenile papering at the District of Columbia Office of the Attorney General.
- We have appointed a second hate-crimes coordinator to review potential bias-related crimes and assist in their investigation and prosecution.
- We have issued specific charging guidance to Assistant United States Attorneys in potential bias-related cases to ensure that we will charge the enhancement when it is in the interests of justice to do so.

- We have implemented improved record-keeping mechanisms that will enable us to track potential bias-related crimes more effectively.
- We have set up monthly meetings with the Metropolitan Police Department's Special Liaison Branch to discuss bias-related incidents in the city.
- We have set up internal monthly meetings to discuss potential bias-related crimes and our Office's handling of those matters.

We also remain committed to assisting the victims of potential bias-related crimes and to engaging with the community about bias-related incidents. We currently have approximately 17 victim advocates on our staff, who are an excellent source of support and are knowledgeable resources about the forms of assistance available to all crime victims.

In addition, we are deeply involved in community outreach. For example:

- We host a quarterly meeting of the Hate-Bias Task Force, a collaboration of agency and community partners in the District who focus on addressing the needs of affinity groups in the city and combating bias-related crimes. I was pleased to join the Task Force's meetings in July and October 2019.
- We participate in the District of Columbia's Violence Prevention and Response Team (VPART). VPART's mission is to address, reduce, and prevent crime within and against the LGBTQ community in the District of Columbia. VPART seeks to achieve this by creating a strong partnership between the community and government, which enables it to focus on coordinating a community response to violence.
- We have conducted senior abuse and financial exploitation seminars for LGBTQ members at the Metropolitan Community Church of Washington, D.C., and at the Turkey Thicket Recreation Center as part of our overall efforts to protect senior citizens.
- We recently met twice with the ANC Rainbow Coalition and remain committed to engaging with them on the issue of bias-related crimes in the District of Columbia.
- We have a strong line of communication with Casa Ruby, a non-profit that serves LGBTQ youth.

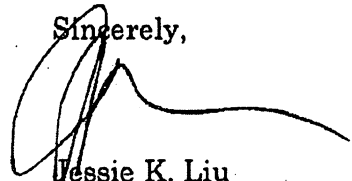
- We are working with a number of groups to plan for and help host a LGBTQ youth summit during the spring of 2020.

Recently, I also was privileged to join members of the LGBT Liaison Unit of the Metropolitan Police Department's Special Liaison Branch on a ride-along, which allowed me a first-hand glimpse of the work they do and to hear directly from community members. This was the first of a series of ride-alongs that my team and I plan to do.

Finally, we also are committed to participating in and providing training on bias-related crimes. For example, the Mayor's Office on LGBTQ Affairs conducted a cultural sensitivity training at USAO-DC in June 2018, and our Assistant United States Attorneys in turn have provided presentations and training on bias-related crimes to the Metropolitan Police Department and to a citizen advisory council. This fall, members of my senior staff, the Office's hate crimes coordinators, and I met with representatives of the Anti-Defamation League (ADL); I also invited them to speak at the most recent meeting of the Law Enforcement Task Force, a group comprising senior local and federal law enforcement leaders in the District of Columbia that I host each month. At that meeting, ADL representatives gave a well-received presentation on recognizing and combating bias-related crimes and white nationalist/white supremacist ideology.

In all these things, we remain committed to seeking justice in bias-related crimes. We look forward to continuing to work with all community partners, including the Council, to protect D.C. residents from bias-related crimes.

Sincerely,



Jessie K. Liu
United States Attorney
United States Attorney's Office
for the District of Columbia

cc: The Honorable Anita Bonds, Councilmember, Judiciary Committee
The Honorable Mary M. Cheh, Councilmember, Judiciary Committee
The Honorable Jack Evans, Councilmember, Judiciary Committee
The Honorable Vincent C. Gray, Councilmember, Judiciary Committee

THE
PUBLIC
DEFENDER
SERVICE
for the District of Columbia



COMMENTS OF THE PUBLIC DEFENDER SERVICE
FOR THE DISTRICT OF COLUMBIA

concerning

THE SEXUAL ORIENTATION AND GENDER IDENTITY PANIC DEFENSE
PROHIBITION ACT OF 2019 AND THE TONY HUNTER AND BELLA
EVANGELISTA PANIC DEFENSE PROHIBITION ACT OF 2019

BILL 23-409 and BILL 23-435

Presented by

Katerina Semyonova

before

COMMITTEE ON THE JUDICIARY AND PUBLIC SAFETY
COUNCIL OF THE DISTRICT OF COLUMBIA

Chairman Charles Allen

October 23, 2019

Avis E. Buchanan, Director
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Thank you for the opportunity to testify on Bill 23-409, the Sexual Orientation and Gender Identity Panic Defense Prohibition Act of 2019, and Bill 23-435, the Tony Hunter and Bella Evangelista Panic Defense Prohibition Act of 2019. I am Katerina Semyonova, Special Council to the Director on Policy and Legislation at the Public Defender Service for the District of Columbia.

PDS opposes much of the substantive language in both bills. While PDS believes that a so-called “gay panic” defense would almost never be advanced in D.C. Superior Court, PDS has deep concerns about any statutory changes that decrease a jury’s ability to hear any defense proffered by the defendant. Given that the District has one of the highest incarceration rates in the country, the Council should not be taking steps to curtail potential defense evidence. Both bills cut into the heat of passion defense that a defendant can present to a jury to mitigate his conduct. The proposed limitations on heat of passion may have the unintended consequence of preventing individuals who are targeted because of their race, gender, or sexual orientation from presenting a full defense. Bill 23-409 also includes a worrisome provision that unnecessarily addresses self-defense law and inapplicable terminology about “reduced mental capacity.”

Under current law, in prosecutions for mayhem, malicious disfigurement, assault with intent to commit murder, and first and second degree murder, the prosecution must prove the absence of mitigating circumstances, but only in cases where there is sufficient evidence to warrant an instruction on mitigation.¹ Jurors are never instructed on

¹ Standardized jury instructions for use in Superior Court are provided in the Criminal Jury Instructions for the District of Columbia, hereafter “Redbook.” See comments to Instruction 4.201.

mitigation, heat of passion, or provocation if a judge does not determine in the first instance that legally sufficient evidence of mitigation exists. Where the evidence warrants an instruction on mitigation and the prosecution fails to prove the lack of mitigating circumstances, jurors may convict the defendant of lesser included offenses such as assault or manslaughter, which do not require a lack of mitigating circumstances.

Jurors in Superior Court are instructed that mitigating circumstances can exist in two situations, one of which is heat of passion caused by adequate provocation.² As the judge would instruct the jury: "One [mitigating circumstance] exists when a person acts in the heat of passion caused by adequate provocation. Heat of passion includes such emotions as rage, resentment, anger, terror and fear. Adequate provocation is conduct on the part of another that would cause an ordinary, reasonable person in the heat of the moment to lose his self-control and act on impulse and without reflection. For a provocation to be considered "adequate," the person's response must not be entirely out of proportion to the seriousness of the provocation. An act of violence or an immediate threat of violence may be adequate provocation, but mere words, no matter how offensive, are never adequate provocation."³

² Standardized jury instructions for use in Superior Court are provided in the Criminal Jury Instructions for the District of Columbia, hereafter "Redbook." Instruction 4.202 of the 2018 revision states: The other mitigating circumstance is "when a person actually believes that s/he is in danger of serious bodily injury, and actually believes that the use of force that was likely to cause serious bodily harm was necessary to defend against that danger, but one or both of those beliefs are not reasonable. Thus, mitigating circumstances are similar to self-defense, which is a complete defense to the charges, but different in that self-defense requires that person's actual beliefs about both the danger and the need to respond to it be reasonable."

³ Redbook Instruction 4.202.

Bill 23-435 states that adequate provocation for a defense premised on heat of passion shall not exist if the defendant's actions are related to the discovery of or knowledge about one or more of the following characteristics or perceived characteristics of the victim including disability, gender identity or expression, national origin, race, color, religion, sex, or sexual orientation. Bill 23-409 prohibits heat of passion mitigation under the same standard but has a shorter list of characteristics and includes circumstances where the knowledge or discovery occurs in the context of a non-forcible romantic or sexual advance toward the defendant.

While the proposed language aims to eliminate bias in jury decision-making and by extension protect vulnerable individuals, it inappropriately curtails a full assessment of the facts by a jury. For instance, under Bill 23-435, an African-American man on trial for killing a white man after the man threatened him and used racial epithets against him would not be able to state that his fear of the man was "related to... his knowledge" of the man's race. The defendant's lawyer would not be able to explicitly argue that the race of the decedent in combination with other circumstances present in the case warrant a finding that the defendant acted in the heat of passion. The failure to explicitly address how race played a role in that case could lead to a miscarriage of justice and create a trial where the defense is hamstrung in presenting relevant facts. The same problem would manifest if a transgender defendant's perception of the degree of threat posed by the an individual is related to the individual's status as heterosexual male among other circumstances.

If the Council's concern is that a defendant's assaultive actions will be excused on a so-called gay panic theory, that concern is unwarranted. Provocation exists only when

the conduct of another would cause a reasonable person to lose control and mere words, no matter how offensive are never adequate. This reasonableness standard and the prohibition on mere words serving as adequate provocation prevent the use of a frivolous defense based on antiquated notions of gay panic and render the language in both bills unnecessary.

However, if the Council seeks to create this limitation on a defendant's right to present a full defense, PDS suggests modifying the language to foreclose a heat of passion defense only when the defense is based solely on the defendant's discovery of, knowledge about, or potential disclosure of the victim's characteristics. The current language, prohibiting the defense when it is "related to" the discovery of, knowledge or the potential disclosure of the victim's characteristics is vague and will lead to arbitrary and potentially overbroad application. There could be countless instances where a defendant's conduct is "related to the victim's characteristics" but the characteristics are not the primary driver for the conduct. In such instances, the primary driver may be the complainant's aggressive actions that incidentally reveal the complainant's gender or sexual identity. Under these bills, it is unclear whether the jury would be able to hear the complete evidence despite the tenuous link between the information and the defendant's conduct.

Eight states have passed versions of panic defense prohibitions. These laws address mitigation, resulting in conviction on a lesser included offense, as a result of heat of passion or the analogous extreme emotional disturbance framework. All eight states have required a more direct causal link between the defendant's actions and the discovery of the complainant's characteristics than the "related to" standard in the pending bills.

Rhode Island, Connecticut, and Maine provide that provocation is not objectively reasonable or adequate if it “resulted solely from” the discovery of, knowledge about, or potential disclosure of the other person’s actual or perceived gender, gender identity, gender expression, or sexual orientation.⁴ Illinois and Hawaii provide that emotional disturbance or provocation, that is not otherwise reasonable, shall not be sufficient provocation when it is “because of” the discovery of the victim’s status.⁵ Nevada, New York, and California provide that the state of passion, provocation, or explanation shall be deemed unreasonable if it “resulted from” the discovery of, knowledge about, or potential disclosure of the victim’s actual or perceived gender, gender identity or sexual orientation.⁶ If these bill are enacted the District would be alone in adopting a vague and unworkable “related to” standard.

Bill 23-409 also precludes a heat of passion defense “under circumstances in which the victim made an unwanted, non-forcible romantic or sexual advance toward the defendant or if the defendant and the victim dated or had a romantic relationship.” Precluding the defense in these circumstances again sweeps too broadly. When the sexual advance consists of mere words, existing law prevents it from qualifying as sufficient provocation. But there are countless ways that non-forcible unwanted sexual advances may still be terrifying for individuals. Non-forcible sexual advances could include cornering people in rooms, blocking their passage, taking their keys or their property,

⁴ Rhode Island: H 7066, enacted 2018; Connecticut: Public Act 19-27, enacted June 21, 2019; and Maine LD 1632, enacted June 21, 2019.

⁵ Hawaii: House Bill 711, enacted 2019; Illinois: Senate Bill 1761, enacted August 25, 2019.

⁶ Nevada: Senate Bill 97, enacted May 14, 2019; New York: Senate Bill 6573, enacted June 16, 2019; California: Assembly Bill 2501, enacted September 27, 2014.

making them feel particularly vulnerable, offensive but non-forcible touching, subjecting them to shame, or sex-based extortion. In the context of unwanted sexual advances defendants should be able to explain their fears fully to a jury and should have available a heat of passion defense that can mitigate the offense. The Council should trust District of Columbia jurors to hear the evidence in such cases and separate actions that are unreasonable and grounded in prejudice and bias and those where the unique circumstances of the case warrant discussion of whether they qualify as mitigating circumstances.

Bill 23-409 has two additional provisions beyond those included in Bill 23-435. One provision states that a "defendant does not suffer from reduced mental capacity based solely on the discovery of, knowledge about, or potential disclosure of the victim's actual or perceived gender identity or expression, or sexual orientation, including under circumstances in which the victim made an unwanted, non-forcible romantic or sexual advance toward the defendant or if the defendant and the victim date or had a romantic relationship.

Given the state of District law, this language is entirely unnecessary. In its 1975 ruling in *Bethea v. United States*, the D.C. Court of Appeals rejected the "diminished capacity" defense.⁷ The Court of Appeals has since noted that the "decisions following *Bethea* were correct to characterize that case as announcing that "there is no defense of diminished capacity in the District of Columbia,"⁸ and as stating a "general rule ... prohibiting differentiation of a defendant's intellectual abilities outside the context

⁷ *Bethea v. United States*, 365 A.2d 64, 83 (D.C. 1976).

⁸ *Smith v. United States*, 686 A.2d 537, 549 (D.C. 1996).

of the insanity defense.”⁹ Further, without any reference to diminished capacity, the insanity defense establishes a two prong test, requiring a mental disease or defect¹⁰ that results in the defendant lacking a substantial capacity to conform his conduct to the law or to recognize the wrongfulness of his conduct. A so-called gay panic defense would not be raised in this context. PDS therefore recommends removing this section in its entirety from any legislation considered by this Committee.

Bill 23-409 would also amend the District’s self-defense case law by providing that “a person is not justified in using force against another based solely on the discovery of, knowledge about, or potential disclosure of the victim’s actual or perceived gender identity or expression or sexual orientation, including under circumstances in which the victim made an unwanted non-forcible romantic or sexual advance toward the defendant or the defendant and the victim dated or had a sexual relationship.”

Under the District’s existing self-defense law, an individual is absolutely prohibited from using force solely based on the discovery of someone’s sexual orientation or gender. That action would be a crime. A person only “has the right to use a reasonable amount of force in self-defense if he actually believes he is in imminent danger of bodily harm and if he has reasonable grounds for that belief.”¹¹ A person may only use deadly force in self-defense if he actually and reasonably believes at the time of

⁹ *O'Brien v. United States*, 962 A.2d at 282, 301 (D.C. 2008).

¹⁰ Pursuant to the Redbook which is used to instruct jurors in D.C. Superior Court, “Mental disease or defect includes any abnormal condition of the mind, regardless of its medical label, which affects mental or emotional processes and substantially impairs a person’s ability to regulate and control his/her conduct. A “mental disease” is a condition which is capable of either improving or deteriorating; a “mental defect” is a condition not capable of improving or deteriorating. An abnormal condition of the mind evidenced only by repeated criminal or otherwise antisocial conduct is not sufficient to establish that [name of defendant] had a mental disease or defect.”

¹¹ Redbook Instruction 9.500.

the incident that he is in imminent danger of death or serious bodily harm from which he can save himself only by using deadly force against his assailant.¹²

Under existing law, any use of force in response to the mere discovery of someone's gender identity or sexual orientation is not objectively reasonable. Even if someone's gender identity or sexual orientation is perceived as a subjective threat, the requirement of reasonableness – the objective part of the inquiry – forecloses the use of self-defense under those circumstances. Such a claim would never reach a jury. When a self-defense claim is raised by the defense, the trial judge must first decide, as a matter of law, if the evidence in the record supports the defendant's theory of self-defense.¹³

Although a defendant is entitled to an instruction on a theory of defense so long as there is some evidence to support it,¹⁴ instructions on self-defense will not be given if the defendant, as a matter of law, used excessive force¹⁵ or was not allowed to use force at all. The Council should have no concern about a jury hearing a claim of self-defense under these circumstances.

However, defendants should retain a self-defense claim in circumstances where the other party made an "unwanted, non-forcible romantic or sexual advance toward the defendant." As mentioned previously, an unwanted, non-forcible sexual advance may

¹² Redbook Instruction 9.501.

¹³ See *Bowler v. United States*, 480 A.2d 678, 682 n. 8 (D.C.1984).

¹⁴ *Hernandez v. United States*, 853 A.2d 202, 205 (D.C.2004).

¹⁵ *Dorsey v. United States*, 935 A.2d 288, 291 (D.C. 2007). In *Dorsey*, the Court of Appeals upheld the trial court's refusal to instruct the jury on self-defense where appellant shot two men in his home and the men were unarmed, had uttered no threats, did not obtain control of appellant's weapon or point it at anyone. "The evidence therefore did not show that appellant or his brother were in imminent peril of death or serious bodily harm, such that appellant reasonably could think a lethal response necessary, even though the decedent was the initial aggressor and [the decedent] was struggling to disarm [appellant's brother]."

still make a defendant subjectively terrified, and depending on the complete conduct of the other party, that fear may be objectively reasonable. Preclusion of self-defense in all these instances may also run afoul of “the inherent right of self-defense [that] has been central to the Second Amendment right.”¹⁶

If any portion this legislation moves forward PDS recommends adopting language from a similar federal bill under consideration. That language ensures that the defendant will not be prevented from providing relevant evidence about the defendant’s past traumatic experience. It provides: “PAST TRAUMA.—Notwithstanding the prohibition in subsection (a), a court may admit evidence, in accordance with the Federal Rules of Evidence, of prior trauma to the defendant for the purpose of excusing or justifying the conduct of the defendant or mitigating the severity of an offense.”¹⁷

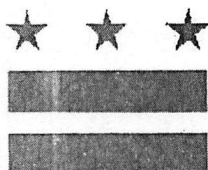
PDS has no objection in theory to the anti-bias jury instruction proposed in both bills. The Redbook already includes an anti-bias instruction, but the one in the proposed legislation is significantly more comprehensive.¹⁸ PDS proposes adding immigration status to the instruction and that the instruction adopt the structure and form of the Redbook jury instruction. The Redbook instruction helpfully explains the jury’s role in finding facts and that bias should not play a role in that decision.

PDS appreciates the opportunity to testify and stands ready to assist the Committee.

¹⁶ *Heller v. District of Columbia*, 554 U.S. 570, 628 (2008).

¹⁷ United States Senate Bill S-1721, introduced on June 5, 2019.

¹⁸ Pursuant to the Red Book, Instruction 2.102, Function of the Jury, jurors are instructed: “You should determine the facts without prejudice, fear, sympathy, or favoritism. You should not be improperly influenced by anyone’s race, ethnic origin, or gender. Decide the case solely from a fair consideration of the evidence.”



D.C. Criminal Code Reform Commission

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To: Councilmember Charles Allen,
Chairperson, Committee on the Judiciary and Public Safety
From: Richard Schmechel,
Executive Director, D.C. Criminal Code Reform Commission (CCRC)
Date: November 1, 2019
Re: Testimony for the October 23, 2019 Hearing on Bill 23-0409, "Sexual Orientation and Gender Identity Panic Defense Prohibition Act of 2019" and Bill 23-0435, "Tony Hunter and Bella Evangelista Panic Defense Prohibition Act of 2019"

I. Introduction

Thank you for the opportunity to provide written testimony to the Committee on the Judiciary and Public Safety for the record of the public hearing on the "Sexual Orientation and Gender Identity Panic Defense Prohibition Act of 2019" and "Tony Hunter and Bella Evangelista Panic Defense Prohibition Act of 2019" (hereafter "bills"), held on October 23, 2019. I am presenting written testimony on behalf of the Criminal Code Reform Commission (CCRC).

The CCRC is a small, independent District agency that began operation October 1, 2016. The CCRC's mission is to prepare comprehensive recommendations for the Mayor and Council on reform of the District's criminal statutes. Specifically, the CCRC's work is focused on developing comprehensive recommendations to reform the District's "substantive" criminal statutes—i.e. laws that define crimes and punishments.

To date, the CCRC has not submitted final recommendations to the Mayor or Council regarding defenses applicable to a broad range of crimes. The agency has yet to fully research or develop recommendations for general defenses relating to the justifiable use of force, mental incapacity, or "heat of passion." However, the agency has completed research and draft recommendations regarding the availability of a mitigation defense to murder and two general defenses: a special responsibility for care, discipline, or safety defense (applicable to parents, guardians, caretakers, and emergency medical personnel) and an effective consent defense to a range of offenses against persons.¹

The CCRC takes no position at present on the substantive merits of whether to codify a categorical exception or multiple exceptions to defenses based on the defendant's knowledge or

¹ See "Compilation of Draft RCC Statutes to Date (October 3, 2019)" available at <https://ccrc.dc.gov/page/draft-recommendations>.

discovery of the victim's actual or purported gender identity, sexual orientation, or other specified attribute. Instead, this testimony analyzes potential ambiguities and questions related to the bills' proposed language and offers some possible solutions.

II. Background Considerations

The present bills seek to codify exceptions to defenses that may be presented and considered at trial and specific jury instructions. However, in assessing whether and how to codify an *exception* to certain defenses, or an articulation of an exception to be presented to juries, the scope and operation of the underlying defenses themselves is relevant. Unfortunately, establishing the precise scope of these defenses in the District is problematic because they do not exist in the D.C. Code.

The District is among a minority of jurisdictions nationally that have no codified general defenses. For example, only thirteen states have failed to codify a defense of persons defense.² The District's lack of statutory law regarding general defenses is not surprising given that the D.C. Code's criminal statutes have never undergone a comprehensive review and reform since being passed by Congress in 1901. In the 19th century (and the first half of the 20th century), state jurisdictions rarely codified general defenses or even the elements of common crimes, instead relying on the "common law"—the sprawling, evolving set of court decisions made in individual cases—to describe exceptions to criminal liability. In the second half of the 20th century, however, most of the United States modernized their criminal codes and codified general defenses relating to: duress or necessity, the use of force in self-defense or defense of others, the use of force by police or government officials, the special rights of parents and others with duties of care, mental disability, and other defenses. This codification of general defenses in the second half of the 20th century was sparked in large part by the American Law Institute (ALI) Model Penal Code (1962). There was a recognition that the often unclear, inconsistent, and incomplete articulation of defenses in the common law were a barrier to justice. Moreover, exclusive reliance on the common law to decide what constitutes an exception to criminal liability effectively put the courts in control of what should be a legislative function—the articulation of what behavior constitutes a criminal offense and the permitted penalties.

In the absence of legislation codifying general defenses, a judicial "common law" regarding the scope and meaning general defenses has continued to evolve in the District and those other jurisdictions that have not modernized their criminal codes. District judges continue to apply prior court rulings, and issue new appellate rulings, concerning the meaning and applicability of general defenses in the District as they arise in particular cases. However, the nature of court decisions—being limited to the facts of the case before them and bound by older precedent—mean that the court decisions establishing the District's law regarding defenses are

² See Paul H. Robinson, Matthew G. Kussmaul, Camber M. Stoddard, Ilya Rudyak & Andreas Kuersten, *The Am. Criminal Code: Gen. Defs.*, 7 J. Legal Analysis 37, 50, 127-140 (2015) (Self-defense and defense of third persons are common law defenses which, in 16 jurisdictions, are found only in case law). Note, however, that one of the cited jurisdictions is the federal criminal code, and two others codify self-defense separately: N.C. Gen. Stat. Ann. § 14-51.3 and Wyo. Stat. Ann. § 6-2-602.

necessarily incomplete, may include outdated language, and may not reflect current District norms or the will of its elected representatives.³

Legal practitioners seeking a common, fixed articulation of District general defenses routinely turn to pattern jury instructions. Practically, these pattern jury instructions fill the gap in statutory law, but they have no legal authority of their own. The District's Criminal Jury Instructions for the District of Columbia (commonly referred to as the "Redbook" due to its red cover) are issued by a private company, LexisNexis, which consults with local experts when creating the instructions. The Redbook's instructions include a short commentary explaining relevant case law and often provide alternative formulations of an instruction. However, as the Redbook itself recognizes,⁴ the instructions—updated only periodically—are imperfect and incomplete. Courts and legal practitioners routinely craft the pattern jury instructions to fit the facts at hand in a particular case.⁵ In fact, jury instructions *must* be tailored by the court to ensure that the manner and mode of the presentation of law and evidence do not infringe on the due process rights of the litigants.⁶ But, this is possible only because the D.C. Code does not in any other place codify the specific language of a jury instruction, nor do the Superior Court Rules of Criminal Procedure.

III. Specific Considerations Regarding Bill Language

First, it is unclear which District defenses are curtailed by the proposed exceptions. The present bills aim to limit defenses concerning justifiable use of force, mental incapacity, and heat of passion.⁷ However, the bills' language gives rise to several questions. Does the reference to "a defense premised on heat of passion" mean to preclude raising a *partial defense* such as a mitigating circumstance in a murder case (lowering liability to manslaughter)?⁸ Or, put

³ The fact that a District court has recognized a defense does not preclude other defenses, previously unrecognized by District courts, from being recognized in the future. Courts are bound by a judicial doctrine of *stare decisis* to uphold decisions in prior cases in future cases with substantially similar facts. In this way, court rulings are essentially backward-looking and cannot prospectively create entirely new law (absent legislative authority to issue advisory opinions on particular matters). Only legislation can establish a complete articulation of criminal defenses, and only when such defenses are within constitutional bounds.

⁴ See Criminal Jury Instructions for the District of Columbia Preface for the Fifth Edition (2019) ("No matter how careful we have been, I expect that there may still be some instructions or comments that can be improved.").

⁵ See District of Columbia Rule of Criminal Procedure 30.

⁶ See, e.g., *Holloway v. United States*, 25 A.3d 898, 903 (D.C. 2011) ("A trial court generally has broad discretion in fashioning jury instructions, as long as the charge, 'considered as a whole, fairly and accurately states the applicable law.'"); *United Gas Pub. Serv. Co. v. Texas*, 303 U.S. 123, 140 (1938) ("The question whether due process in the court's procedure was accorded thus comes to the mode of trial; that is, (1) the propriety of a trial by jury, and (2) the manner in which the issues were submitted to the jury.").

⁷ Bill 23-435 refers to "a defense predicated on 'heat of passion'" whereas Bill 23-435 refers to "heat of passion," "reduced mental capacity," a defense that a person was "justified in using force against another."

⁸ Although current District murder statutes make no mention of mitigating circumstances, the District of Columbia Court of Appeals ("DCCA") has held that a person commits voluntary manslaughter when he or she causes the death of another with a mental state that would constitute murder, except for the presence of mitigating circumstances. *Comber v. United States*, 584 A.2d 26, 41 (D.C. 1990) ("The mitigation principle is predicated on the legal system's recognition of the 'weaknesses' or 'infirmity' of human nature, as well as a belief that those who kill under 'extreme mental or emotional disturbance for which there is reasonable explanation or excuse' are less 'morally blameworth[y]' than those who kill in the absence of such influences.") (Internal citations omitted.). If

differently, does the reference to “a defense premised on heat of passion” mean to preclude raising such conduct as a defense to any crime of violence, or *only* to murder? Similarly, does the reference to “reduced mental capacity” mean to preclude an insanity defense to any crime of violence, or does a “reduced mental capacity” defense here have a broader meaning?⁹

Two possible solutions to these ambiguities are to: 1) eliminate the bills’ references to exceptions for heat of passion and reduced mental capacity defenses; or 2) statutorily specify the meaning and scope of heat of passion and reduced mental capacity defenses as to all crimes of violence.

Second, the causal relationship between the protected attribute and the provocation of violence is unclear. Each bill prohibits a heat of passion defense where defendant’s actions are

evidence of mitigating circumstances is presented at trial, the government must prove beyond a reasonable doubt that mitigating circumstances were not present. *Harris v. United States*, 373 A.2d 590, 592-93 (D.C. 1977).

The DCCA has not clearly defined what constitutes a “mitigating circumstance,” but has held that mitigating circumstances include an accused “act[ing] in the heat of passion caused by adequate provocation.” See, e.g., *High v. United States*, 972 A.2d 829, 833 (D.C. 2009). Under common law, cases interpreting what constituted adequate provocation came to recognize “fixed categories of conduct” that “the law recognized as sufficiently provocative to mitigate” murder to the lesser offense of manslaughter. *Brown v. United States*, 584 A.2d 537, 540 (D.C. 1990); see also Commentary to Model Penal Code § 210.3 at 57 (“Traditionally, the courts have also limited the circumstances of adequate provocation by casting generalizations about reasonable human behavior into rules of law that structured and confined the operation of the doctrine.”); Mitchell N. Berman & Ian P. Farrell, *Provocation Manslaughter As Partial Justification and Partial Excuse*, 52 Wm. & Mary L. Rev. 1027, 1036 (2011) (“The law came to recognize four distinct-and exhaustive-categories of provocative conduct considered “sufficiently grave to warrant the reduction from murder to manslaughter of a hot-blooded intentional killing.” The categories were: (1) a grossly insulting assault; (2) witnessing an attack upon a friend or relative; (3) seeing an Englishman unlawfully deprived of his liberty; and (4) witnessing one’s wife in the act of adultery.”); LaFave, Wayne, 2 Subst. Crim. L. § 15.2 (3d ed.). In contrast, the modern approach “does not provide specific categories of acceptable or unacceptable provocative conduct” and more generally inquires whether the “provocation is that which would cause...a reasonable man...to become so aroused as to kill another” such that “the actor’s loss of self-control can be understood in terms that arouse sympathy in the ordinary citizen.” *Brown v. United States*, 584 A.2d 537, 542 (D.C. 1990); Commentary to Model Penal Code § 210.3 at 63.

Under both approaches, the accused must have acted with an emotional state that would cause a person to become so “aroused as to kill another” or that would “naturally induce a reasonable man in the passion of the moment to lose self-control and commit the act on impulse and without reflection.” *High*, 972 A.2d 829, 833-34 (D.C. 2009); *Brown*, 584 A.2d at 543 n. 17. And, under both approaches, the reasonableness of the accused’s reaction to the provoking circumstance is determined from the accused’s view of the facts. See, e.g., *High*, 972 A.2d at 833. While the DCCA has long used the traditional “adequate provocation” formulation, the court has also noted that while under the common law, “there grew up a process of pigeon-holing provocative conduct...[o]ur own law of provocation in the District of Columbia began with a general formulation similar to the modern view[.]” *Brown v. United States*, 584 A.2d at 542. Instead of being bound by common law precedent defining specific fact patterns that constitute adequate provocation, the District may already embrace the more flexible modern approach that “does not provide specific categories of acceptable or unacceptable provocative conduct.” *Id.* Ultimately the DCCA has not fully reconciled its “recognition (or non-recognition) of the Model Penal Code” approach to provocation. *Simpson v. United States*, 632 A.2d 374, 377 (D.C. 1993). For example, the DCCA has explicitly declined to decide whether the decedent must have provided the provoking circumstance.

⁹ Either proposition is problematic. While the Supreme Court has not resolved the issue, many state supreme courts have held that an insanity defense is grounded in constitutional case law and statutory limitations may be subject to constitutional challenge. See, e.g., *Finger v. State*, 117 Nev. 548, 575, 27 P.3d 66, 84 (2001). On the other hand, to the extent that “reduced mental capacity” is meant to refer to something other than an insanity defense, District courts and practice have historically rejected such a defense as existing apart from an insanity defense. *Betha v. United States*, 365 A.2d 64, 83 (D.C. 1976).

"related to" the victim's¹⁰ protected characteristics or the victim's "association with"¹¹ a member of the protected class. However, it is unclear exactly how the actions and the identity must be related and how to assess evidence of multifaceted provocation.¹² The phrase "related to" is notably different than the phrase "based solely on" in the subsections of Bill 23-409 pertaining to diminished capacity and self-defense. It is also notably different than the phrase "based on" in the definition of "bias-related crime" in D.C. Code § 22-3701(1)¹³ and the phrase "because of" in 18 U.S.C. § 249, the federal hate crime statute.¹⁴

Two possible solutions to these ambiguities are to: 1) adopt a "based on" causation standard for all exceptions, consistent with the current bias enhancement; or 2) adopt a "based solely on" causation standard for the exception to a heat of passion defense, consistent with the other exceptions.

Third, it is unclear how the jury instruction requirement will operate in practice. The present bills require:

In any criminal trial or proceeding, upon the request [of either the prosecutor or the defendant] [[sic.] a party], the court shall instruct the jury substantially as follows: 'Do not let bias, sympathy, prejudice, or public opinion influence your decision. [']Bias includes bias against the victim or victims, witnesses, or defendant based upon his or her disability, gender, nationality, race or ethnicity, religion, gender identity or expression, or sexual orientation.[']

First, it is unclear how this jury instruction is intended to relate to the exception to defense(s) articulated earlier in the bills. The proposed bias jury instruction appears to be a

¹⁰ Curiously, the statutes do not address defenses based on the potential disclosure of the *defendant's* identity or expression.

¹¹ For example, Person A (straight) doesn't like Person B (gay) simply because B is an Astros fan. Person C (straight) is B's friend. If A starts a bar fight with B, and C joins in on B's side, should A be precluded from claiming a heat of passion defense as to C but not B? This does not appear to be the intent of the bills, but the possibility arises from the drafting of the statute and the ambiguity of "associated with" language. In this hypothetical, A's fight was not "related to" B's identity in the sense of being causally linked (strongly or loosely), but if A knew B was gay and that C appears to be "associated with" A, then the plain language of the statute seems to exclude a defense as to harms to C but not B.

¹² For example, it is unclear whether a person in a heterosexual marriage who discovers their spouse engaged in a homosexual affair could nevertheless argue a heat of passion defense, premised on the discovery of the infidelity.

¹³ D.C. Code § 22-3701(1) "'Bias-related crime' means a designated act that demonstrates an accused's prejudice based on the actual or perceived race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, gender identity or expression, family responsibility, homelessness, physical disability, matriculation, or political affiliation of a victim of the subject designated act.").

¹⁴ The DCCA has not yet interpreted the phrase "based on," however, in at least one case, it has been relied upon to prosecute a gay person for assaulting another gay person. See U.S. Attorney's Office for the District of Columbia, *Twins Found Guilty of Attacking Man In Bias-Related Crime in Northwest Washington* (May 8, 2015) (available at <https://www.justice.gov/usao-dc/pr/twins-found-guilty-attacking-man-bias-related-crime-northwest-washington>); Mark Joseph Stern, *Judge Lessens Jail Time for Hate Crime Assailants, Claims Gay Victim Was Just "Jumped,"* SLATE (July 27, 2015). Federal courts disagree about the meaning of "because of." Compare *United States v. Miller*, 767 F.3d 585, 591 (6th Cir. 2014) (requiring "but-for" causality) with *United States v. Jenkins*, 120 F. Supp. 3d 650, 652 (E.D. Ky. 2013) (requiring a "substantial reason"); *United States v. Jenkins*, 909 F. Supp. 2d 758 (E.D. Ky. 2012) (requiring only "motivation").

wholly separate provision that does not appear to confer a new right or remedy¹⁵ but may risk creating a conflict of law in some cases. Under current District case law and practice, a trial court has broad discretion in fashioning appropriate jury instructions, and its refusal to grant a request for a particular instruction is not a ground for reversal if the court's charge, considered as a whole, fairly and accurately states the applicable law.¹⁶ The presentation of evidence and the jury instructions must protect the due process rights of the accused in each individual case.¹⁷ The present bills propose to codify instruction language which may comport with due process in some cases but present a conflict between constitutional law and statutory law in others.¹⁸

Second, if the bills' specific jury instruction is not intended as a general, stand-alone instruction that is not necessarily related to the exception to defense(s) articulated earlier in the bills, then there remains an important procedural question of how the exception is to be implemented. Under current District case law and practice, where it is appropriately requested by either party,¹⁹ a trial court should carefully amend each affirmative defense instruction to clarify the limitations of its reach in that particular case.²⁰ However, each affirmative defense raising a question of fact should then be presented to the factfinder—in contrast, defenses that raise matters of law are decided by the judge only.²¹ The current bills' exceptions to defenses appear to raise mixed questions of fact and law (e.g., causation), requiring submission to the factfinder. However, the bills' specification of an anti-bias jury instruction without any instruction as to the bills' exceptions to defenses makes the expected operation of any such instruction on exceptions to defenses unclear.

Two possible solutions to these ambiguities are to: 1) eliminate the bills' references to a jury instruction, referring the matter to the drafters of the Redbook; or 2) make the codified jury instruction permissive, subject to judicial approval, by replacing "the court shall" with "the court may."

Fourth, the rationale for limiting application of the defense exception to any "crime of violence" is unclear. D.C. Code § 23-1331(4) defines the term "crime of violence" to

¹⁵ The proposed instruction is notably similar, though perhaps not "substantially" similar to current Redbook instruction 2.102, which is routinely given in criminal jury trials: "You should determine the facts without prejudice, fear, sympathy, or favoritism. You should not be improperly influenced by anyone's race, ethnic origin, or gender. Decide the case solely from a fair consideration of the evidence."

¹⁶ *George Wash. Univ. v. Waas*, 648 A.2d 178, 183 (D.C. 1994) (citing *Psychiatric Institute of Washington v. Allen*, 509 A.2d 619, 625 (D.C. 1986); *Mark Keshishian & Sons, Inc. v. Washington Square Inc.*, 414 A.2d 834, 841 (D.C. 1980).

¹⁷ See, e.g., *Russell v. United States*, 698 A.2d 1007, 1016 (D.C. 1997) (reversing a conviction because the jury instructions created a risk of confusing the jury about the affirmative defense presented).

¹⁸ For example, the evidence in a particular case may require an anti-bias instruction that is substantially more specific or more robust than the pattern instruction proposed in the present bills.

¹⁹ A party is entitled to a jury instruction upon the theory of the case if there is sufficient evidence to support it. *George Wash. Univ. v. Waas*, 648 A.2d 178, 183 (D.C. 1994) (citing *Wingfield v. Peoples Drug Store Inc.*, 379 A.2d 685, 688 (D.C. 1978); *Weil v. Seltzer*, 873 F.2d 1453, 1457 (1989); *Montgomery v. Virginia Stage Lines, Inc.*, 191 F.2d 770, 772 (1951)).

²⁰ See *Pannu v. Jacobson*, 909 A.2d 178, 198 (D.C. 2006) (explaining the court bears the burden of tailoring a requested instruction and the opposition thereto to meet the demands of an accurate and fair statement of the law).

²¹ See *Cal. Artificial Stone Paving Co. v. Molitor*, 113 U.S. 609, 617 (1885); *Sparf v. United States*, 156 U.S. 51, 80 (1895) (citing *Commonwealth v. Anthes*, 5 Gray, 185, 208, 218).

encompass a list of relatively serious District offenses.²² The list does not coincide with the availability of the relevant defenses such as self-defense or adequate provocation. For example, self-defense and adequate provocation are not available to a defendant in a child sexual abuse case,²³ but are available to a defendant charged with simple assault,²⁴ possession of a prohibited weapon,²⁵ or malicious destruction of property.²⁶ While distinguishing crimes of violence from other crimes may be particularly salient for purposes of determining punishment, it is not clear that determinations of criminal liability should follow such a distinction. Notably, the District's bias-related crime penalty enhancement²⁷ applies to a range of crimes (not all) that includes property crimes such as unlawful entry and low-level assaults that are not included in the definition of "crime of violence."

Two possible solutions to these ambiguities are to: 1) eliminate the limitation on the heat of passion exception so that it would apply to any offense to which a heat of passion defense could be raised; or 2) limit the exception for a heat of passion defense to murder.

Fifth, the meaning of "force" and "non-forcible romantic or sexual advance" is unclear, affecting whether and how the bills may limit self-defense. While some types of assaultive conduct would presumably be included in any definition of force,²⁸ it is unclear whether the definition of force would include non-painful or sexual contact or whether such behavior would constitute a non-forcible romantic or sexual advance. Such non-painful or sexual contact currently is an element of various crimes of violence.²⁹ While there is a definition of "force" codified in the D.C. Code, that definition is applicable only to sex offenses³⁰ and appears to

²² The list does not include any cross-references to District statutes, nor does it consistently refer to the offenses by their provision titles in the D.C. Code. These offenses are: aggravated assault; act of terrorism; arson; assault on a police officer (felony); assault with a dangerous weapon; assault with intent to kill, commit first degree sexual abuse, commit second degree sexual abuse, or commit child sexual abuse; assault with significant bodily injury; assault with intent to commit any other offense; burglary; carjacking; armed carjacking; child sexual abuse; cruelty to children in the first degree; extortion or blackmail accompanied by threats of violence; gang recruitment, participation, or retention by the use or threatened use of force, coercion, or intimidation; kidnapping; malicious disfigurement; manslaughter; manufacture or possession of a weapon of mass destruction; mayhem; murder; robbery; sexual abuse in the first, second, or third degrees; use, dissemination, or detonation of a weapon of mass destruction; or an attempt, solicitation, or conspiracy to commit any of the foregoing offenses.

²³ See D.C. Code § 22-3002 et seq.

²⁴ D.C. Code § 22-404; see also *Parker v. United States*, 155 A.3d 835, 839 (D.C. 2017) ("whether the government has disproved a claim of self-defense turns on two questions: (1) whether a defendant reasonably believed that she was in imminent danger of bodily harm (an inquiry that may be informed, among other things, by motive evidence presented by the government); and (2) if so, whether the force used was excessive.").

²⁵ D.C. Code § 22-4514(b); *Potter v. United States*, 534 A.2d 943 (D.C. 1987).

²⁶ D.C. Code § 22-303; *Brown v. United States*, 584 A.2d 537 (D.C. 1990).

²⁷ D.C. Code § 22-3701(2) ("Designated act" means a criminal act, including arson, assault, burglary, injury to property, kidnapping, manslaughter, murder, rape, robbery, theft, or unlawful entry, and attempting, aiding, abetting, advising, inciting, conniving, or conspiring to commit arson, assault, burglary, injury to property, kidnapping, manslaughter, murder, rape, robbery, theft, or unlawful entry.").

²⁸ For example, significant bodily injury or serious bodily injury.

²⁹ For example: assault with intent to commit second degree sexual abuse or commit child sexual abuse; assault with intent to commit any other offense; sexual abuse in the first, second, or third degrees.

³⁰ D.C. Code § 22-3001 (5) ("Force" means the use or threatened use of a weapon; the use of such physical strength or violence as is sufficient to overcome, restrain, or injure a person; or the use of a threat of harm sufficient to coerce or compel submission by the victim.").

differ from the requirements of physical contact sufficient for assault liability.³¹ Clear definition of “force” and “non-forcible romantic or sexual advance,” however, is critical to any analysis of whether and how the bills constrain self-defense. Current District case law recognizes self-defense only where there is a reasonable belief that one is in imminent danger of suffering “bodily harm” and the use of “force” is not excessive.³² Whether an unwanted non-painful or sexual touch constitutes “bodily harm” or “force” under existing District case law on self-defense has not been resolved by District courts, so it is unclear what effect the bills’ terminology may have.

Two possible solutions to these ambiguities are to: 1) eliminate the bills’ references to an exception to a use of force defense; or 2) define the terms force and “force” and “non-forcible romantic or sexual advance,” including whether the terms do or do not include: coercive threats, the display of weapons (alone), and non-painful physical contact.

IV. Closing

The CCRC takes no position at present on the substantive merits of whether to codify one or more categorical exceptions to defenses based on the defendant’s knowledge or discovery of the victim’s actual or purported gender identity, sexual orientation, or other specified attribute. Instead, the CCRC has raised for Council consideration a variety of potential ambiguities and questions related to the bills’ current proposed language, as well as some possible solutions that would resolve these issues.

However, these ambiguities and questions arise, in chief, because the bills seek to codify exceptions to defenses that themselves are not codified. The District is one of a minority of jurisdictions nationally that relies solely on judicial “common law” rulings to establish general defenses such as justifiable use of force. Insofar as the scope or meaning of the underlying defenses is unclear, it also is unclear how the bills’ proposed exceptions operate. Other ambiguities and questions arise from the lack of definitions of terminology used in the bills, or the specification of other matters such as culpable mental states or procedures for applying the bills’ exception.

Assuming the Council wishes to move forward on the substantive merits of the bills, one way to provide greater specificity and avoid possible litigation would be to first define the underlying defenses (to which the bill seeks to provide an exception). Under its statutory mandate, the CCRC is currently developing recommendations for codifying several general defenses that may help resolve questions raised by the bills’ text.

³¹ See *Ray v. United States*, 575 A.2d 1196 (D.C. 1990) (assault includes offensive physical contact such as spitting on another person).

³² *Parker v. United States*, 155 A.3d 835 (D.C. 2017) (“Under the District’s long-standing common law test for self-defense, captured in our standard jury instructions, whether the government has disproved a claim of self-defense turns on two questions: (1) whether a defendant reasonably believed that she was in imminent danger of bodily harm (an inquiry that may be informed, among other things, by motive evidence presented by the government); and (2) if so, whether the force used was excessive. Motive is not separately and additionally considered as a basis for disproving a claim of self-defense.”); see also *People v. Goetz*, 68 N.Y.2d 96 (1986).

Thank you for your consideration of this testimony. For questions about the testimony or the CCRC's work more generally, please do not hesitate to contact our office or visit the agency website at www.ccrdc.gov.

Richard Schmechel
Executive Director
D.C. Criminal Code Reform Commission

ATTACHMENT H

**Council of the District of Columbia
COMMITTEE ON THE JUDICIARY & PUBLIC SAFETY
NOTICE OF PUBLIC HEARING
1350 Pennsylvania Avenue, N.W., Washington, D.C. 20004**

**COUNCILMEMBER CHARLES ALLEN, CHAIRPERSON
COMMITTEE ON THE JUDICIARY & PUBLIC SAFETY**

ANNOUNCES A PUBLIC HEARING ON

**B23-0083, THE “VULNERABLE USER COLLISION RECOVERY
AMENDMENT ACT OF 2019”**

**B23-0134, THE “COMMUNITY HARASSMENT PREVENTION
AMENDMENT ACT OF 2019”**

**B23-0253, THE “ALTERNATIVE SERVICE OF PROCESS ON DISTRICT OF COLUMBIA
RESIDENTS AMENDMENT ACT OF 2019”**

AND

B23-0300, THE “ANTITRUST REMEDIES AMENDMENT ACT OF 2019”

**Monday, June 24, 2019, 10:30 a.m.
Room 120, John A. Wilson Building
1350 Pennsylvania Avenue, N.W.
Washington, D.C. 20004**

On Monday, June 24, 2019, Councilmember Charles Allen, Chairperson of the Committee on the Judiciary and Public Safety, will convene a public hearing on Bill 23-0083, the “Vulnerable User Collision Recovery Amendment Act of 2019”; Bill 23-0134, the “Community Harassment Prevention Amendment Act of 2019”; Bill 23-0253, the “Alternative Service of Process on District of Columbia Residents Amendment Act of 2019”; and Bill 23-0300, the “Antitrust Remedies Amendment Act of 2019”. The hearing will take place in Room 120 of the John A. Wilson Building, 1350 Pennsylvania Avenue, N.W., at 10:30 a.m.

The stated purpose of B23-0083, the “Vulnerable User Collision Recovery Amendment Act of 2019”, is to amend the Motor Vehicle Collision Recovery Amendment Act of 2016 to limit the application of the doctrine of contributory negligence in cases of a collision between an electronic mobility device user of a public highway and a motor vehicle.

The stated purpose of B23-0134, the “Community Harassment Prevention Amendment Act of 2019”, is to amend the Anti-Intimidation and Defacing of Public or Private Property Criminal Penalty Act of 1982 to make it unlawful to deface or burn a religious or secular symbol on any property of another without permission or to place or display on such property a physical impression that a reasonable person would perceive as a threat to physically damage the property of another; and to amend the Omnibus Public Safety and Justice Amendment Act of 2009 to make it unlawful to harass an entity.

The stated purpose of B23-0253, the “Alternative Service of Process on District of Columbia Residents Amendment Act of 2019”, is to amend the Motor Vehicle Safety Responsibility Amendment Act of the District of Columbia to allow a plaintiff to use an alternative method of service of process when serving defendants in motor vehicle cases who reside in the District of Columbia.

The stated purpose of B23-0300, the “Antitrust Remedies Amendment Act of 2019”, is to identify remedies the Attorney General may seek in an antitrust action, to specify how monetary relief recovered on behalf of individuals in an action under D.C. Official Code § 28-4507(b) shall be distributed, and to apply the notice and exclusion provisions of that section specifically to individuals.

The Committee invites the public to testify or to submit written testimony. Anyone wishing to testify at the hearing should contact the Committee via email at judiciary@dccouncil.us and provide their name, telephone number, organizational affiliation, and title (if any), by **close of business Thursday, June 20**. Representatives of organizations will be allowed a maximum of five minutes for oral testimony, and individuals will be allowed a maximum of three minutes. Witnesses should bring **twenty copies** of their written testimony and, if possible, also submit a copy of their testimony electronically in advance to judiciary@dccouncil.us.

For witnesses who are unable to testify at the hearing, written statements will be made part of the official record. Copies of written statements should be submitted to the Committee at judiciary@dccouncil.us. **The record will close at the end of the business day on Monday, July 8.**

**Council of the District of Columbia
COMMITTEE ON THE JUDICIARY & PUBLIC SAFETY
AGENDA & WITNESS LIST
1350 Pennsylvania Avenue, N.W., Washington, D.C. 20004**

**COUNCILMEMBER CHARLES ALLEN, CHAIRPERSON
COMMITTEE ON THE JUDICIARY & PUBLIC SAFETY**

ANNOUNCES A PUBLIC HEARING ON

**B23-0083, THE “VULNERABLE USER COLLISION RECOVERY
AMENDMENT ACT OF 2019”**

**B23-0134, THE “COMMUNITY HARASSMENT PREVENTION
AMENDMENT ACT OF 2019”**

**B23-0253, THE “ALTERNATIVE SERVICE OF PROCESS ON DISTRICT OF COLUMBIA
RESIDENTS AMENDMENT ACT OF 2019”**

AND

B23-0300, THE “ANTITRUST REMEDIES AMENDMENT ACT OF 2019”

**Monday, June 24, 2019, 10:30 a.m.
Room 120, John A. Wilson Building
1350 Pennsylvania Avenue, N.W.
Washington, D.C. 20004**

AGENDA AND WITNESS LIST

- I. CALL TO ORDER**
- II. OPENING REMARKS**
- III. WITNESS TESTIMONY**

B23-0083, the “Vulnerable User Collision Recovery Amendment Act of 2019”

- i. Public Witnesses**

1. David Cranor, Representative, Bicycle Advisory Council
2. Wayne McOwen, Executive Director, District of Columbia Insurance Federation
3. Laura Miller Brooks, Public Affairs Manager, Mid-Atlantic, Lime

ii. Government Witness

1. Dena Iverson, Chief of External Affairs, District Department of Transportation

B23-0134, the “Community Harassment Prevention Amendment Act of 2019”

ii. Public Witnesses

iii. Government Witnesses

1. Kelly O’Meara, Executive Director, Strategic Change Division, Executive Office of the Chief of Police, Metropolitan Police Department
2. Katya Semyonova, Special Counsel to the Director for Policy, Public Defender Service for the District of Columbia

B23-0253, the “Alternative Service of Process on District of Columbia Residents Amendment Act of 2019”

i. Public Witness

1. Daniel Singer, Executive Board Member, Trial Lawyers Association of Metropolitan D.C.

ii. Government Witnesses

B23-0300, the “Antitrust Remedies Amendment Act of 2019”

i. Public Witnesses

ii. Government Witness

1. Catherine A. Jackson, Chief, Public Integrity Section, Office of the Attorney General

IV. ADJOURNMENT

**Statement on behalf of the
American Civil Liberties Union of the District of Columbia
before the
DC Council Committee on Judiciary and Public Safety
Hearing on Bill 23-134, "The Community Harassment Prevention Amendment Act of 2019"
Monday, June 24, 2019
by
Nassim Moshiree, Policy Director**

My name is Nassim Moshiree, and I am the Policy Director of the American Civil Liberties Union of the District of Columbia (ACLU-DC). I submit the following testimony on behalf of our more than 14,000 members in the District.

The ACLU is committed to working to reverse the tide of over-incarceration, safeguard fundamental liberties, eliminate racial disparities, and advocate for sensible, evidence-based reforms to policing and criminal justice policies.

The ACLU-DC has both constitutional and public policy concerns about Bill 23-134, "The Community Harassment Prevention Amendment Act of 2019," introduced by Chairman Mendelson at the request of Mayor Bowser. The intended purpose of Bill 23-134, as expressed by the Administration in its letter to the Council, is "to provide additional safeguards for protected classes against bias-related crimes in the District."

The bill purports to do this in two primary ways:

1) It expands the District's "Anti-Intimidation and Defacing of Public or Private Property Criminal Penalty" statute (DC Code § 22-3312.02(a)) to apply to any private or public property in the District and amends the law to include threats of harm or damage to property in addition to threats to persons.¹

¹ Current DC Code § 22-3312.02(a) states: It shall be unlawful for any person to burn, desecrate, mar, deface, or damage a religious or secular symbol on any private premises or property in the District of Columbia primarily used for religious, educational, residential, memorial, charitable, or cemetery purposes, or for assembly by persons of a particular race, color, creed, religion, or any other category listed in § 2-1401.01, or on any public property in the District of Columbia; or to place or to display in any of these locations a sign, mark, symbol, emblem, or other physical impression including, but not limited to, a Nazi swastika, a noose, or any manner of exhibit which includes a burning cross, real or simulated, where it is probable that a reasonable person would perceive that the intent is:

(1) To deprive any person or class of persons of equal protection of the law or of equal privileges and immunities under the law, or for the purpose of preventing or hindering the constituted authorities of the United States or the District of Columbia from giving or securing to all persons within the District of Columbia equal protection of the law;

2) It creates a new offense of "Harassing an Entity" under DC's existing stalking statute (DC Code § 22-3131) and adds a new penalty provision specific to this new offense.

I will focus this testimony on our overarching concerns about the latter provision, namely that the language creating this new offense is vague, overly broad, and could have the unintended consequence of chilling and criminalizing constitutionally protected speech.

First, the very definition of "entity" in the bill is vague and confusing.² The intent of the law is to protect the "members, participants, or employees" of an entity but the section as written proscribes "harassing an entity" which is not something that can be harassed. It is also unclear how someone could harass an entity without separately harassing the people belonging to that entity, which would already be covered by DC's existing stalking statute, making this provision unnecessary.

A new subsection in the "harassing an entity" provision codifies a rationale for this offense to be "helping to ensure that individuals can safely assemble to advance their common interests." This is incredibly broad, and its meaning is not limited to any specific type of assembly or class or association, but additionally, the conduct proscribed by the bill does not have a direct connection to this stated purpose of ensuring people can safely assemble. For example, someone could be guilty of the offense of "harassing an entity" by engaging in some unnamed conduct that does not necessarily cause a person to fear for her safety, either individually or in assembly.

The standard under which someone could be charged with violating this offense is also concerning. An individual can be held liable of this offense by negligently causing emotional distress to the members, participants, or employees of an entity by engaging "in a course of conduct" directed at that entity. In the proposed bill, an offense is committed if a person is made to feel "seriously alarmed, disturbed, or frightened," but also if a person is made to "suffer emotional distress," with no adjective. It should be noted that some form of emotional distress is a normal byproduct of speech we don't like and must be tolerated. Even the torts of intentional or negligent infliction of emotional distress require "severe" distress; it shouldn't take less distress to send a person to prison than to make her liable for civil damages. Under

(2) To injure, intimidate, or interfere with any person because of his or her exercise of any right secured by federal or District of Columbia laws, or to intimidate any person or any class of persons from exercising any right secured by federal or District of Columbia laws;

(3) To threaten another person whereby the threat is a serious expression of an intent to inflict harm; or

(4) To cause another person to fear for his or her personal safety, or where it is probable that reasonable persons will be put in fear for their personal safety by the defendant's actions, with reckless disregard for that probability.

² An "Entity" is defined in the bill as "a group organized by association for any established purpose, including, but not limited to a religious, social, educational, or recreational purpose." It's not clear what would qualify as an "established" purpose and what would not.

the terms of this bill, a person who says "the Republican Party is responsible for killing innocent immigrant children" could be convicted of harassment by making some Republicans feel emotionally distressed. Truth would not be a defense.

Most significantly, the new offense in question raises first amendment concerns about criminalizing speech solely based on its viewpoint. A person could be arrested under this statute for standing outside a fast-food eatery with a sign saying "eating hamburgers kills innocent animals" (which might make employees feel distressed), while a person would not be liable for standing outside the same business with a sign promoting its business.

The bill's exception clause stating that the "harassing an entity" section "does not apply to constitutionally protected activity," is insufficient to protect against concerns that the bill may criminalize speech based on its content. We would not accept a law that provided, "saying something to an officer that the officer doesn't like is a crime, unless it is constitutionally protected." Importantly, this exception clause would not prevent arrest and prosecution of individuals engaged in the conduct proscribed by the bill, even if they are ultimately acquitted on the ground that they were exercising a constitutionally protected right. We cannot expect law enforcement officers to be constitutional scholars to know whether an individual has committed a crime, nor should we expect the individuals engaged in the conduct to be constitutional scholars. If enacted into law, this bill could have a serious chilling effect on protected speech and lead to self-censorship and would likely be subject to constitutional challenges on those grounds.

Conclusion:

The DC Council should exercise caution in moving forward with any legislation that would further expand D.C.'s existing stalking statute in a way that is not narrowly tailored and has not adequately considered potential infringement on constitutionally protected speech, as is the case with Bill 23-134.

We understand the D.C. Criminal Code Reform Commission will be issuing a report on its recommendations for reform of the District's Criminal Code by the close of Fiscal Year 2020. We ask that this Committee await the release of that report before moving forward with any measures that seek to expand criminal penalties for conduct in the District.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Office of the Attorney General

ATTORNEY GENERAL
KARL A. RACINE



June 24, 2019

The Honorable Phil Mendelson
Chairman, Council of the District of Columbia
John A. Wilson Building
1350 Pennsylvania Avenue, N.W. Suite 504
Washington, D.C. 20004

RE: Bill 23-134 *Community Harassment Prevention Amendment Act of 2019*

Dear Chairman Mendelson:

The Office of the Attorney General (OAG) supports the *Community Harassment Prevention Amendment Act of 2019* (Bill 23-134). Bill 23-134 seeks to amend D.C. Code § 22-3312.02(a) and the *Omnibus Public Safety and Justice Amendment Act of 2009* by adding "harassing an entity" to the District of Columbia Official Code.

Bias-related crimes are on the rise both nationally and in the District. According to the Metropolitan Police Department, there were 205 reported bias-related crimes in 2018. As of May 31, 2019, there have been 90 reported bias-related crimes in the District this year. These crimes are reprehensible and run contrary to public safety. Bill 23-134 will offer broader and newer protections for District residents. Bill 23-134 will expand protections from defacement of public and private property to clarify that businesses, stadiums, museums, and utility-owned poles are included within the ambit of this offense. For the sake of clarity, OAG suggests that the proposed language in lines 21-22 be amended as follows (strikethrough and new language bolded):

It shall be unlawful for any person to burn, desecrate, mar, deface, or damage a religious or secular symbol on any private property of another without the permission of the owner or the owner's designee or on any public property in the District of Columbia; or to place or to display in any of these locations a sign, mark, ~~symbol~~, emblem, or other ~~physical impression~~ **symbol** including, but not limited to: a Nazi swastika, a noose, or any manner of exhibit which includes a burning cross, real or simulated, where it is probable that a reasonable person would perceive that the intent is:"

The proposed amendment would make it clear that the sign or mark does not have to be a "physical impression" left on a structure. Under this amendment the projection of noose, for

The Honorable Phil Mendelson
June 24, 2019
Page Two

example, on a building to intimidate any person or any class of persons from exercising any right secured by federal or District of Columbia laws would be covered.¹

Presently, persons associated with entities are not protected by the stalking statute, D.C. Code § 22-3133. As a crime, "harassing of entity" will enable law enforcement and prosecutors to assist during instances where an entity is purposefully targeted by a criminal course of conduct with the intent to make the entities' members fear for their safety; feel seriously alarmed, disturbed, or frightened; or to suffer emotional distress.²

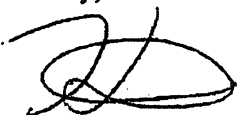
To remove a redundancy, OAG suggests that the proposed language in line 40 read as follows (strikethrough):

"Entity" means a group organized by association for any established common purpose, including, ~~but not limited to~~ a religious, social, educational, or recreational purpose."

The words "but not limited" in the existing text is superfluous. The word "including" necessarily includes that concept.

If passed, OAG would have jurisdiction to prosecute these types of offenses when committed by a person who is under the age of 18. OAG has rarely been presented with crimes pursuant to D.C. Code § 22-3312.02(a). However, OAG is committed to addressing bias-related crimes and harassment of an entity and will incorporate plans to combat these offenses into our rehabilitative plans for juveniles.

Sincerely,



Karl A. Racine
Attorney General for the District of Columbia

¹ See D.C. Official Code § 22-3312.02 (a)(2).

² See lines 46 through 59 of the Bill.

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
METROPOLITAN POLICE DEPARTMENT**



Public Hearing on

Bill 23-134, the Community Harassment Prevention Amendment Act of 2019

**Testimony of
Ms. Kelly O'Meara
Executive Director, Strategic Change Division**

**Before the
Committee on the Judiciary & Public Safety
The Honorable Charles Allen, Chair**

**Hearing Room 120
John A. Wilson Building
1350 Pennsylvania Avenue, NW
Washington, DC 20004**

**10:30 am
June 24, 2019**



Good morning, Chairperson Allen, other members, staff, and guests. My name is Kelly O'Meara, and I am the Executive Director of the Metropolitan Police Department's Strategic Change Division. I am here to discuss Bill 23-134, the *Community Harassment Prevention Amendment Act of 2019*, a bill that will close gaps in the District's law dealing with offenders trying to intimidate or cause fear in our communities.

Reports of bias-related crimes and incidents have increased in the District – and the country – in the past three years. Each hate crime takes a toll not only on the victim, but also on the community. Mayor Muriel Bowser and Chief Peter Newsham have made it a priority to provide support to individuals and communities that have been targeted by hate and bigotry. The diversity and tolerance of our residents is what makes DC vibrant, welcoming, and exceptional. As Mayor Bowser says, these are DC Values. That is why it is shocking for us to see an increase in hate crimes in our city. We will not accept this as a new norm. The proposed legislation will help us to protect our communities from hate, and to hold accountable individuals who try to harass and intimidate them.

The *Community Harassment Prevention Amendment Act* includes two primary provisions to protect communities in the District from targeted harassment. First, it amends the *Omnibus Public Safety and Justice Amendment Act of 2009* (D.C. Law 18-88; D.C. Official Code *passim*), to create the offense of Harassing an Entity. Second, it amends section 3(a) of the *Anti-Intimidation and Defacing of Public or Private Property Criminal Penalty Act of 1982* (D.C. Law 4-203; D.C. Official Code § 22-3312.02(a)) to expand the types of property on which it is unlawful to burn or desecrate religious or secular symbols, or to display certain emblems such as nooses, Nazi swastikas, or burning crosses.

While the rise in reported hate crimes has been disturbing, the harassing incidents that may not currently be covered by our extensive statute on bias-related crimes is equally troubling. As an initial matter, it is important to understand what is – and is not – a hate crime. First and foremost, the incident must be a crime. Although that may seem obvious, most speech is not a hate crime, regardless of how offensive it may be. In addition, a hate crime is not really a specific crime; it is a designation that makes an enhanced penalty available to the court.¹ In short, under the law, there is no specific “hate crime,” but rather a crime motivated in whole or in part by bias against the actual or perceived race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, gender identity or expression, family responsibility, homelessness, physical disability, matriculation, or political affiliation of a victim.²

There have been several incidents in the District over the past two years that may not be criminal, but have caused targeted communities to be fearful. Organizations have been targeted

¹ If a person is found guilty of a bias-related crime, the court may fine the offender up to 1½ times the maximum fine and imprison him or her for up to 1½ times the maximum term authorized for the underlying crime.

² Bias-Related Crime Act of 1989 (D.C. Official Code § 22-3700 *et seq.*)

with repeated harassing phone calls and letters, causing alarm among employees and members. For example, in 2017, a synagogue in the District received a series of letters that did not rise to the level of a direct threat, but were certainly concerning, especially in totality. As we reviewed the letters, MPD spoke with our partners at the Office of the Attorney General and the United States Attorney's Office to determine whether this course of conduct could be considered a violation of the District's stalking law (D.C. Official Code § 22-3133) even though the law protects an "individual." Attorneys agreed that it was unclear whether the current statute would extend to the same behavior targeting an organization. As a result, MPD worked with our partners to develop this legislation as a remedy for entities vulnerable to serious incidents of repeated harassment and implied threats.

This offense mirrors the District's existing stalking offense, and prohibits a person from purposefully engaging in a course of conduct directed at a specific entity with the intent to cause members, participants, or employees of that entity to fear for their safety, feel alarmed, disturbed or frightened, or suffer emotional distress. A course of conduct requires three or more incidents. This legislation provides law enforcement with a tool for combatting harassment to ensure that individuals can associate or assemble free from repeated and targeted threats or intimidation.

Several hate crimes two years ago prompted the proposal to amend the District statute on burning or desecrating religious or secular symbols, or displaying certain emblems such as nooses, Nazi swastikas, or burning crosses. The offense applies where a reasonable person would perceive the intent is to:

- Deprive someone of equal protection of the law;
- Intimidate or cause fear in a person; or
- Threaten to harm a person or damage property.

As you may recall, in 2017, a series of nooses and Nazi swastikas were displayed at various locations in the city. Fifteen nooses were found at museums, monuments, universities, construction sites, and other locations. Swastikas were also displayed in a dozen cases. The current statute prohibits activities such as burning or desecrating religious or secular symbols, or displaying certain items, such as a noose, Nazi swastika, or burning cross, on private premises or property in the District primarily used for religious, educational, residential, memorial, charitable, or cemetery purposes, with the above referenced intent.

Most often the swastika cases involved graffiti, so there was a clear crime of damaging or destroying property. The nooses, however, did not involve damage to, or destruction of, property, so it was not clear that the District could hold someone accountable for hanging nooses at construction sites, or on utility wires or trees. Other examples of uncovered property might include movie theaters or sports arenas, which may be privately owned but are also open to the public. The proposed language would close this gap by prohibiting these activities or displays on any private property of another without the permission of the owner or the owner's designee, or

on any public property in the District of Columbia. In addition, the Administration proposes that the display of certain emblems statute include the intent to threaten not only another person, but also his or her property. A burning cross may only demonstrate a threat to property, but it would be alarming nonetheless.

These changes are all the more important because of the increasing prevalence of bias-motivated crimes and incidents in the District, which, unfortunately, mirrors national trends. The Department is a recognized leader in identifying bias-related crimes and supporting targeted communities. In 2015, MPD conducted training for all its members in identifying and reporting hate crimes. This training is reinforced periodically throughout the year.

The comprehensive process begins with our electronic records management system that requires officers to complete a mandatory field noting whether the incident included any indicators of potential bias for all police reports. Officers notify the Special Liaison Branch³ so that members can work with the victim and the community, and detectives, who conduct a thorough investigation into both the criminal elements and the possible motive. Importantly, it is not up to a patrol officer to conclude whether a crime is motivated by bias, but only to note that there may be hate crime indicators. All potential hate crimes are reviewed by a panel consisting of the Criminal Investigations Division, Strategic Change Division, Intelligence Branch, and Special Liaison Branch, to ensure information is being shared and provide consistency in classifying hate crimes. MPD posts summary data of hate crimes on our website each month, and more detailed open data each quarter. This is available at mpdc.dc.gov/hatecrimes.

The number of hate crimes has grown from 66 in 2015 to 205 in 2018. Reports of hate crimes have continued to grow, increasing 55 percent in the first five months of 2019. Crimes based on ethnicity or national origin have increased the most, but crimes based on a bias against sexual orientation or gender identity are consistently the largest category of hate crimes.

Dating back to the 2016 election, members of some of our most vulnerable communities became more concerned and fearful. As a result, after meeting with representatives from the African, Asian, deaf and hard of hearing, Latino, and LGBT communities – all of which are served by MPD's special liaison programs – Chief Newsham moved MPD's Special Liaison Branch directly under his office under my supervision at the end of 2016. The change has helped

³ The Special Liaison Branch (SLB) serves the African, Asian, deaf and hard of hearing, LGBT, Latino, and religious minority communities. The SLB works closely with historically underserved communities, serving as a model for community policing. Members respond to crime scenes and incidents to support members of our community, whether they are arrestees, victims, or surviving family members. The SLB works closely with MPD's Victims Services Unit and community organizations to ensure that crime victims have access to services. The Branch also works to support the community with incidents that are not necessarily criminal, such as with death notifications to family members, or in working to help locate missing persons. More proactively, SLB hosts and participates in meetings and presentations, providing the community with public safety materials and information that will help promote a better understanding of interacting with MPD members in criminal and casual contact situations.

to raise the profile of these issues in the Department so that the liaison units have greater access to coordinate with all bureaus.

My team and I have been able to expand our reach in part because of the leadership and partnership with key leaders in Mayor Bowser's office. Together, we have developed proactive efforts and initiated rapid responses to emerging issues. In 2017, the Monica Palacio, Director of the Office of Human Rights, led the Mayor's DC Values in Action initiative. Director Palacio worked closely with MPD and others to coordinate critical information for District agencies and the public to know about how to respond to a hate crime or hate speech targeting people or property. As a result, the team developed a Hate Crime Protocol to ensure timely coordinated responses from District agencies.

We have also responded quickly to urgent concerns from the community. For example, in the immediate aftermath of the January 2017 attack on a mosque in Quebec and the presidential Executive Orders on travel restrictions from predominantly Muslim countries, we partnered with Reverend Thomas Bowen, the Director of the Mayor's Office of Religious Affairs. By visiting with mosques and Islamic centers throughout the city, Rev. Bowen helped MPD to strengthen connections with members of the Muslim community. Reverend Bowen, Director Palacio, and MPD have also hosted several weekend conference calls with religious leaders in response to attacks on religious communities in other parts of the country.

In 2018, the Office on Human Rights held two Listening Labs to have substantive and meaningful dialogue with residents and community-based leaders to address complex and painful topics such as the impacts of racism, anti-Semitism, xenophobia, and homophobia. The goal of the labs is to provide a safe and productive environment so that District government officials, residents, and local community leaders can engage in productive and respectful dialogue about the city's values, such as inclusion and equity for all. The Labs are designed to engage community leaders in all eight wards.

Intolerance, bigotry, and crimes motivated by bias or hate have no place in our vibrant city. The District of Columbia is committed to protecting its diverse communities, and discouraging anyone from harassing a community, causing reasonable people to fear for their personal safety or the safety of others. I would like to thank you for providing this opportunity to discuss some of the efforts to combat hate crimes in the District. I urge the Committee on the Judiciary and Public Safety to take up this legislation as soon as possible in the fall to help us in the effort. In the meantime, I am happy to address any questions that you may have.



THE
PUBLIC
DEFENDER
SERVICE

for the District of Columbia



COMMENTS OF THE PUBLIC DEFENDER SERVICE
FOR THE DISTRICT OF COLUMBIA

concerning

COMMUNITY HARRASSMENT PREVENTION ACT OF 2019
BILL 23-134
Presented by

Katerina Semyonova

before

COMMITTEE ON THE JUDICIARY AND PUBLIC SAFETY
COUNCIL OF THE DISTRICT OF COLUMBIA

Chairman Charles Allen

June 24, 2019

Avis E. Buchanan, Director
Public Defender Service
633 Indiana Avenue, N.W.
Washington, D.C. 20004
(202) 628-1200

Thank you for the opportunity to testify on Bill 23-134, the Community Harassment Prevention Act. I am Katerina Semyonova, Special Council to the Director on Policy and Legislation at the Public Defender Service for the District of Columbia. Bill 23-134 raises core First Amendment concerns by criminalizing speech based on its content. The First Amendment problems with this bill are not solved by its broad exception for protected speech. To the extent that Bill 23-134 prohibits communication and actions that are not protected by the First Amendment, many of those acts are already criminalized by existing statutes.

Bill 23-134 creates the offense of harassing an entity. The bill vaguely defines “entity” as a group organized for any established purpose. The offense would prohibit an actor from engaging in a “course of conduct” that intentionally, knowingly, or even negligently causes a reasonable person who is a member, participant, or employee of the entity to fear for their safety, feel seriously alarmed, or suffer emotional distress.¹ Importantly, the definition of “course of conduct” includes on two or more occasions, “communicat[ing] to or about another person.”²

Bill 23-134 would criminalize, for example, the act of standing outside of a bakery that refused to bake a cake for a gay wedding and communicating to others the need to boycott that baker’s business. The communication is criminalized because it would cause the baker to suffer emotional distress over the loss of business revenue. At the same time, Bill 23-134, would not criminalize the conduct of standing outside of the

¹ Bill 23-134.

² D.C. Code § 22-3132, Stalking (definitions).

bakery and telling employees or people who happen to pass by the bakery about the amazing skills of the baker.

The First Amendment precludes the enactment of laws “abridging the freedom of speech.”³ As a result of the First Amendment, a government “has no power to restrict expression because of its message, its ideas, its subject matter, or its content.”⁴ Content-based laws, which target speech based on its communicative content, are presumed to be invalid.⁵ Bill 23-134, establishes a content-based law, prohibiting negative speech that may negligently cause emotional distress, while leaving untouched positive or supportive speech.

It is not dissimilar from a federal law that prohibited the Patent and Trademark Office from registering any trademark “which may disparage ... persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt, or disrepute.”⁶ In 2017, the Supreme Court struck down that law. It held that the law “offends a bedrock First Amendment principle: Speech may not be banned on the ground that it expresses ideas that offend.”⁷ As such, the law could not survive intermediate scrutiny applied to commercial speech, let alone strict scrutiny applied to speech by individuals.⁸

³ United States Constitution, Amendment I.

⁴ *Ashcroft v. American Civil Liberties Union*, 535 U.S. 564, 573 (2002) (internal citations omitted).

⁵ *Stevens v. United States*, 559 U.S. 460, 468 (2010).

⁶ *Matal v. Tamm*, 137 S.Ct. 1744, 1753 (2017).

⁷ *Id.* at 1751. *See also*, *Street v. New York*, 394 U.S. 576 (1969), “We have said time and again that ‘the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers.’”

⁸ *Matal*, 137 S.Ct. at 1764.

Even if the Council could prohibit some of the conduct contained in Bill 23-134, for instance, the prohibition of a course of conduct that includes threats, given the flaws outlined above, the entire statute would be susceptible to a challenge for overbreadth. A statute will be invalidated as overbroad if “a substantial number of its applications are unconstitutional, judged in relation to the statute’s plainly legitimate sweep.”⁹ In 2017, the Illinois Supreme Court considered the constitutionality, on overbreadth grounds, of a stalking statute that Bill 23-134 mirrors in substantial part. The Illinois statute addressed the stalking of individuals rather than entities, but the difference is of little import since Bill 23-134 also targets individuals, but focuses on individuals who are connected with an “entity.” The Illinois Supreme Court invalidated the stalking statute as overbroad, finding that the communication language prohibited a range of speech - including attending a public meeting and repeatedly complaining about pollution caused by a local business - that was at the heart of the First Amendment’s protections.¹⁰

The Illinois statute was not saved by a provision that stated: “this section does not apply to an exercise of the right to free speech or assembly that is otherwise lawful.” Bill 23-134, similarly cannot be saved by its language that states that: “this section does not apply to constitutionally protected activity.” The exception to liability functions only as an affirmative defense at trial. It does not prevent the arrest and prosecution of individuals engaged in constitutionally protected activity. As the Illinois Supreme Court noted, “the exemption cannot eliminate the chilling effect on protected speech and the

⁹ *Stevens v. United States*, 559 U.S. at 473.

¹⁰ *People v. Relford*, 104 N.E.3d 341, 354 (Ill. 2017).

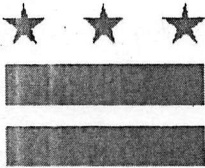
resulting self-censorship.”¹¹ Promises by the prosecution to prosecute only egregious cases of harassment rather than communication under this statute would be of no avail. As the Supreme Court stated in *United States v. Stevens*: “We would not uphold an unconstitutional law merely because the Government promised to use it responsibly.”¹²

Rather than legislating now in this complicated area, PDS would urge this Committee to wait for the comprehensive report of the Criminal Code Reform Commission (CCRC), which will include recommendations for statutory language for the offense of stalking. Given the First Amendment problems with Bill 23-134, waiting for the CCRC’s report is the appropriate course. In the meantime, the conduct prohibited in Bill 23-134, which would not be subject to First Amendment protections, such as threatening individuals, can be prosecuted under existing statutes including threats and disorderly conduct.¹³

¹¹ *Id.* at 355.

¹² *United States v. Stevens*, 559 U.S. at 480. In *United States v. Stevens*, the Supreme Court invalidated on overbreadth grounds a federal law that criminalized the commercial creation, sale, or possession of certain depictions of animal cruelty. The law applied to any visual or auditory depiction in which a living animal is intentionally maimed, mutilated tortured or killed if the conduct violates federal or state law where “the creation, sale or possession takes place.” As such, it prohibited the sale of all hunting magazines and videos in the District, since hunting is not legal in the District, and the depiction of the humane slaughter of a stolen cow.

¹³ D.C. Code § 22-1810, prohibits threatening to kidnap or injure a person or damage his property. D.C. Code § 22-407 prohibits threats to do bodily harm. D.C. Code § 22-1314.02 prohibits interfering with a medical facility by obstructing passage, disturbing the peace, trespassing, telephoning the facility to harass owner, employees, or agents, and threatening to inflict injury. D.C. Code 22-1321, the disorderly conduct statute prohibits a wide array of conduct including acting in a manner such as to cause another person to be in reasonable fear that a person or property in a person’s immediate possession is likely to be harmed, and engaging in loud, threatening or abusive language or conduct with the intent of impeding a lawful public gathering.



D.C. Criminal Code Reform Commission
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To: Councilmember Charles Allen,
Chairperson, Committee on the Judiciary and Public Safety
From: Richard Schmechel,
Executive Director, D.C. Criminal Code Reform Commission (CCRC)
Date: Submitted June 19, 2019
Re: Testimony for the June 24, 2019 Hearing on B23-134 – the “Community Harassment Prevention Amendment Act of 2019”

I. Introduction.

Thank you for the opportunity to provide written testimony to the Committee on the Judiciary and Public Safety for the record of the public hearing on the “Community Harassment Prevention Amendment Act of 2019” (hereafter “bill”), to be held on June 24, 2019. I am presenting written testimony on behalf of the Criminal Code Reform Commission (CCRC).

The CCRC is a small, independent District agency that began operation October 1, 2016. The CCRC’s mission is to prepare comprehensive recommendations for the Mayor and Council on reform of the District’s criminal statutes. Specifically, the CCRC’s work is focused on developing comprehensive recommendations to reform the District’s “substantive” criminal statutes—i.e., laws that define crimes and punishments.

To date, the CCRC has not submitted final recommendations to the Mayor or Council for the two offenses specifically amended by the bill: defacing or burning cross or religious symbol; display of certain emblems (D.C. Code § 22-3312.02); and stalking (D.C. Code §§ 22-3131 - 22-3135). However, the agency has completed research and *draft* recommendations on stalking, as well as related offenses likely to be committed as part of the behavior described by the bill, such as: trespass (D.C. Code § 22-3302); threats (D.C. Code §§ 22-407; 22-1810); and bias-related crime (D.C. Code §§ 22-3701 - 22-3703).

This testimony focuses on the bill’s proposed language expanding the District’s stalking statute, with only a few final remarks on the bill’s expansion of D.C. Code § 22-3312.02. The analysis identifies a number of issues with the purpose, scope, and constitutionality of the bill’s proposed changes.

II. The Bill’s Purposes & Overview of Changes to Stalking Statutes.

The bill was introduced by Chairman Mendelson on behalf of the Mayor, whose letter accompanying the legislation made several statements about its purpose and the need for expansion of the stalking statute. Specifically, the introductory letter stated:

- "The bill seeks to provide additional safeguards for protected classes against bias-related crimes in the District."
- "Reports of bias-related crimes and incidents have increased significantly in the District - and the country - in the past two years. As we have seen all too clearly recently, from the murder of an African American couple in a Kroger parking lot to the horrific shooting at the Tree of Life synagogue that left 11 people dead, each hate crime takes a toll not only on the victim, but also on the community. I have made it a priority of my administration to provide support to our individuals and the community that have been targeted by hate."
- "While the rise in reported hate crimes has been disturbing, the harassing incidents that may not currently be covered by our extensive statute on bias related crimes is just as troubling. Organizations have been targeted for repeated harassing phone calls and letters, causing alarm among employees and members. However, the existing stalking statute (D.C. Code § 22-3133) protects an "individual," and it is unclear whether that will extend to the same behavior targeting an organization. As a result, the legislation seeks to serve as a remedy for entities organized by association for any established purpose that are vulnerable to serious incidents of harassment and implied threats. By providing law enforcement with a tool for combatting this harassment, it ensures that individuals can safely assemble to advance their common interests."

The bill would amend or supplement four of the five sections in the D.C. Code concerning stalking. Specifically, the bill:

1. Adds to the codified statement of legislative intent in D.C. Code § 22-3131: *"This title also provides law enforcement with a tool for combatting harassment of an entity, thereby helping to ensure that individuals can safely assemble to advance their common interests."*
2. Adds to the definitions applicable to the stalking offenses, in D.C. Code § 22-3132: *"'Entity' means a group organized by association for any established common purpose, including, but not limited to a religious, social, educational, or recreational purpose."*
3. Adds a new offense called "harassing an entity" that contains language identical to the current stalking statute except that it replaces references to a "specific individual" with references to a person's illicit course of conduct directed *"at a specific entity"* and causing fear of safety, alarm, emotional distress, etc. to the *"members, participants, or employees of that entity."*
4. Adds a new offense penalty provision specific to the "harassing an entity" offense that contains language identical to the current stalking statute except that it again replaces references to a "specific individual" with references to *"an entity's members, participants, or employees"* and omits the current stalking statute's

provision that “a person shall not be sentenced consecutively for stalking and identify theft based on the same act or course of conduct.”¹

III. Bill Analysis.

The bill would specifically codify a different and much broader rationale for a harassing an entity offense than addressing hate crimes—namely, “helping to ensure that individuals can safely assemble to advance their common interests.” In support of the bill, the Mayor’s introductory letter states that bias-related crimes and incidents have increased significantly in the District and cites to national examples of hate crimes. However, the bill’s changes to the stalking statute are not limited to stalking that is based on hate or bias, nor are the bill’s changes limited to traditional “protected classes” based on race, religion, national origin, sex, age, etc. As with the current stalking statute, the bill’s new stalking an entity offense does not require any hate or bias-related motive. The bill’s definition of “entity” also is “a group organized by association for any established common purpose, including, but not limited to a religious, social, educational, or recreational purpose.” While the scope of this definition is somewhat unclear,² the “association” apparently is not limited to any traditional class. Consequently, while it may be that some³ hate or bias-related crimes would be subject to liability under the bill’s new harassing an entity offense, the new offense purports to serve a broader, different purpose.

However, the conduct proscribed by the bill’s harassing an entity statute is broader still, having no necessary connection to the stated rationale of protection of safe assembly. As with the current stalking statute, the bill’s proposed offense would criminalize a course of conduct that is done with the intent, knowledge, or negligence that such conduct would cause a covered person to experience “fear for their safety.”⁴ Notably, however, there is no requirement in the bill or the current stalking statute that a person actually experienced such a fear for safety based on the accused’s actions. The harassing an entity statute doesn’t actually require proof that any individual feared for their safety. Moreover, there are several alternative bases of liability in the bill and the current stalking statute that go beyond concerns of safety, including a course of

¹ The rationale for this omission is not obvious. It is unclear how stalking of a person and harassing an entity would differ with respect to the desirability of multiple punishments for identity theft and either stalking or harassment.

² The meaning of the phrase “group organized by association for any established common purpose” is ambiguous. It may be expansive enough to include casual friendships or narrow enough to require an externally-recognized, ongoing connection such as a sports team.

³ For example, single-instance conduct that is bias-related would *not* satisfy the “course of conduct” requirement of the harassing an entity offense.

⁴ See *Coleman v. United States*, 202 A.3d 1127, 1144 (D.C. 2019) (“The first type of mental harm listed in the stalking statute, “[f]ear for ... safety,” is not defined in the statute. D.C. Code § 22-3133(a)(3)(A). The legislative-intent section of the stalking statute, however, states that the law was designed to prevent “severe intrusions on [an individual’s] personal privacy and autonomy” and conduct that “creates risk to the security and safety of the [individual].” D.C. Code § 22-3131(a); see also Committee Report at 33 (“[T]he purpose [of the law] is to enable law enforcement to intercept behaviors that potentially lead to violence, a loss in the quality of life, or even death.”). Further, the Model Stalking Code Commentary provides the following examples of fears that would constitute fear for one’s safety: “fear of death or serious physical harm,” fear of sexual assault, fear that a child will be kidnapped or harmed, and “[f]ear of the unknown.” Model Stalking Code Commentary at 39–40. Together, these sources indicate that fear for safety means fear of significant injury or a comparable harm. Moreover, they indicate that the stalking statute is meant to prohibit seriously troubling conduct, not mere unpleasant or mildly worrying encounters that occur on a regular basis in any community.”).

conduct that would cause a covered person to “feel seriously alarmed, disturbed, or frightened”⁵ or “suffer emotional distress.”⁶ The District of Columbia Court of Appeals (DCCA) summarized the mental harms as requiring something that “must rise significantly above that ‘which [is] commonly experienced in day to day living,’” and “[o]rdinary ‘uneasiness, nervousness, [and] unhappiness’ are insufficient.”⁷ However the mental harm in stalking is characterized, it should be clear that the harassing an entity statute criminalizes a wide array of conduct that does not necessarily cause a person to fear for their physical safety, individually or in assembly.

The bill’s harassing an entity statute newly criminalizes conduct and is not redundant with the scope of the current stalking statute. While the Mayor’s introductory letter to the bill states that “the existing stalking statute (D.C. Code § 22-3133) protects an ‘individual,’ and it is unclear whether that will extend to the same behavior targeting an organization,” the CCRC’s analysis is that the current stalking statute in fact *does not* include organizations or an “entity” as defined by the bill as an “individual.” There is no indication in the legislative history for the District’s current stalking statute or the model statutes that were referenced in the legislative history that the stalking statute was intended to address stalking directed at an organization or other entity. Core behavior described in the stalking statute—e.g. “follow”—and the statute’s reference to “personal identifying information” as defined in § 22-3227.01(3)—including, e.g., a birth certificate—are inconsistent with such a construction. Notably, the current stalking statute

⁵ See *Coleman v. United States*, 202 A.3d 1127, 1145 (D.C. 2019) (“There is much more limited guidance available about what it means to ‘feel seriously alarmed, disturbed, or frightened,’ the remaining form of mental harm listed in the statute. D.C. Code § 22-3133(a)(3)(B). But the D.C. Council’s removal, in the current version of the statute, of liability for ‘seriously...annoy[ing]’ conduct tells us that serious annoyance is insufficient. D.C. Code § 22-404(e) (2001) (defining ‘harass[ment]’—one of the ways in which a person could commit the crime of stalking under the old statute—as conduct that ‘seriously alarms, annoys, frightens, or torments’); see also District of Columbia Public Defender Service, June 2, 2009, Letter to Councilmember Phil Mendelson, attachment to Committee Report, at 3 (explaining that the United States Attorney’s Office and the Office of Attorney General had “propos[ed]...replacing ‘annoy’ with ‘disturb’” and that the Public Defender Service “prefer[ed] ‘disturb’ to ‘annoy’ because [it thought it] conveys a more serious effect”); Model Stalking Code Commentary at 39 (“[T]he stalking conduct needs to address behavior that goes beyond merely annoying the victim”). And the principle of *noscitur a sociis* suggests that serious alarm, disturbance, and fright should be understood as mental harms comparable to fear for one’s safety or significant emotional distress. See *Burke v. Groover, Christie & Merritt, P.C.*, 26 A.3d 292, 303 n.8 (D.C. 2011) (“‘The maxim *noscitur a sociis*, that a word [or phrase] is known by the company it keeps, while not an inescapable rule, is often wisely applied where a word [or phrase] is capable of many meanings in order to avoid the giving of unintended breadth’ to words in a statute.” (quoting *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307, 81 S.Ct. 1579, 6 L.Ed.2d 859 (1961)) (alterations in original)).”).

⁶ D.C. Code § 22-3132 (4) (“‘Emotional distress’ means significant mental suffering or distress that may, but does not necessarily, require medical or other professional treatment or counseling”). See also, *Coleman v. United States*, 202 A.3d 1127, 1144–45 (D.C. 2019) (“This language indicates that the type of emotional distress that the victim must experience is high, reaching a level that would possibly *1145 lead to seeking professional treatment. See also Committee Report at 32 (“Stalking is a serious crime that often involves intimidation, psychological terror, and escalating severity.”). The Model Stalking Code Commentary cites with approval Wallace v. Van Pelt, in which the court explained that “emotional distress” was “a general or specific feeling of mental anguish,” “something markedly greater than the level of uneasiness, nervousness, unhappiness or the like which [is] commonly experienced in day to day living.” 969 S.W.2d 380, 386 (Mo. Ct. App. 1998) (emphases added), cited by Model Stalking Code Commentary at 49. Further, the Model Stalking Code Commentary sets forth the following examples of conduct that would cause “emotional distress”: “making repeated telephone calls to a victim at a workplace, possibly endangering her job,...engaging in conduct that destroys the victim’s credit history,” and “plac[ing] [the victim] under constant surveillance.” Model Stalking Code Commentary at 41, 49.”); Avlana K. Eisenberg, *Criminal Infliction of Emotional Distress*, 113 Mich. L. Rev. 607 (2015).

⁷ *Coleman v. United States*, 202 A.3d 1127, 1145 (D.C. 2019)(internal citations omitted).

also does not characterize the victim as a “person,” which would potentially allow for an inference that organizations were included.⁸

The conduct described in the bill's harassing an entity statute appears to criminalize a wide swathe of ordinary, constitutionally-protected First Amendment activity. For the most part, stalking statutes nationally have withstood constitutional challenges.⁹ However, the language of stalking statutes varies considerably and courts in other jurisdictions have recently struck as unconstitutional¹⁰ some uncommon language that, nonetheless, is in the District's current stalking statute and would be replicated in the bill's harassing an entity statute. First Amendment law is complex, but analysis by the Illinois Supreme Court of language almost identical to the formulation in District's stalking statute has been distilled in a helpful article by law professor Eugene Volokh as follows:¹¹

1. “The statute is a content-based speech restriction, and thus presumptively unconstitutional.” Communications that have pleasant content are not prohibited under the statutes, but communications whose content cause distress are prohibited.
2. The statute isn't limited to speech that falls within one of the few recognized exceptions to the First Amendment's protection recognized by the Supreme Court, including the “exception for true threats of illegal conduct” or “speech integrally related to criminal conduct.” While the scope of these exceptions is a litigious matter, the breadth of the Illinois (and D.C.) stalking statute clearly exceeds those bounds.
3. The statute includes constitutionally protected forms of speech, including “political speech”¹² and non-political speech.¹³
4. “The statute isn't limited “to one-to-one communications,” which might be restrictable under *Rowan v. United States Post Office Dep't* (which holds “that

⁸ See D.C. Code § 45–604 (General rules of construction for the D.C. Code state that: “The word ‘person’ shall be held to apply to partnerships and corporations, unless such construction would be unreasonable, and the reference to any officer shall include any person authorized by law to perform the duties of his office, unless the context shows that such words were intended to be used in a more limited sense.”).

⁹ Wayne R. LaFare § 16.4(b)The legislative response, 2 Subst. Crim. L. § 16.4(b) (3d ed.).

¹⁰ *People v. Relford*, 104 N.E.3d 341, 350 (Ill. 2017); *State v. Shackelford*, COA18-273, 2019 WL 1246180, at *9 (N.C. Ct. App. Mar. 19, 2019); *People v. Moroch*, 1-15-3232, 2019 WL 2438619 (Ill. App. Ct. June 10, 2019).

¹¹ See Eugene Volokh, *Ban on speech ‘about a person’ that negligently causes ‘significant mental suffering, anxiety or alarm’ struck down*, Washington Post (Nov. 30, 2017) (available online at: https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/11/30/ban-on-speech-about-a-person-that-negligently-causes-significant-mental-suffering-anxiety-or-alarm-struck-down/?utm_term=.976acd0dc7e7).

¹² Volokh quotes the Illinois Court as stating: “For example, subsection (a) prohibits a person from attending town meetings at which he or she repeatedly complains about pollution caused by a local business owner and advocates for a boycott of the business. Such a person could be prosecuted under subsection (a) if he or she persists in complaining after being told to stop by the owner of the business and the person knows or should know that the complaints will cause the business owner to suffer emotional distress due to the economic impact of a possible boycott.”

¹³ Volokh quotes the Illinois Court as stating: “The Supreme Court has acknowledged that “most of what we say to one another lacks ‘religious, political, scientific, educational, journalistic, historical, or artistic value’ (let alone serious value), but it is still sheltered from Government regulation.” Given the wide-ranging scope of the first amendment, its protection presumptively extends to many forms of speech that would fall within the broad spectrum of speech restricted by subsection (a).”

nonconsensual one-to-one communications that impinge on the privacy rights of the recipient are not protected under the first amendment”).” Instead, the Illinois statute (as in D.C.) includes liability for communications “to or about” an individual and would include Facebook posts and signage displayed publicly.

*There is no legally-recognized exception to First Amendment protection for even “hate speech” as generally understood.*¹⁴ Forceful, bigoted speech may reasonably be thought to cause a person severe emotional distress, yet even such speech is protected and cannot be specifically prohibited except where such speech constitutes a “true threat,” “solicitation of a crime,” or another recognized exception to First Amendment protection.¹⁵ Of course, the bill’s proposed statute reaches speech about a person that is far less condemnable than hate speech. Speech vilifying a business and its employees for environmental pollution, criticizing the performance of a healthcare facility, or remonstrating a governmental unit for ethical breaches may cause the members of those “entities” severe emotional distress.¹⁶ However, there may be social benefits to such speech. Unfortunately, the proposed harassing an entity offense may be even more likely to involve political or religious forms of speech—e.g., harsh criticism of a political party or condemnation of a religion—than stalking directed at specific individual persons.

*The proposed harassing an entity’s statutory savings clause*¹⁷ *does not sufficiently shield such activity* from unconstitutionally chilling speech. As Professor Volokh recounted, the Illinois Supreme Court confronted a similar savings clause and found that:¹⁸

1. The statute can’t be saved by the exception for “exercise of the right to free speech or assembly that is otherwise lawful.” First, the exemption is simply “an affirmative defense that must be raised by a defendant at trial after a prosecution has been initiated. As such, the exemption cannot eliminate the chilling effect on protected speech and resulting self-censorship.”
2. Second, “[t]he exemption does not prevent unwarranted prosecutions under a case-by-case application of the “communicates to or about” language. Nothing in the language of subsection (a) explicitly differentiates between distressing communications that are subject to prosecution and those that are not — and the State has not offered any guidance as to how Illinois citizens should tease out that difference. A case-by-case

¹⁴ Again, law professor Eugene Volokh again has written an accessible summary of this point. See, *Eugene Volokh, No, there’s no “hate speech” exception to the First Amendment*, Washington Post (May 7, 2015).

¹⁵ The “mere fact that expressive activity causes hurt feelings, offense, or resentment does not render the expression unprotected.” *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 414 (1992) (White, Blackmun, O’Connor & Stevens, JJ., concurring); see also *State v. Brobst*, 151 N.H. 420, 423 (2004); *People v. Klick*, 66 Ill. 2d 269, 273 (1977).

¹⁶ Speech on public issues should be “uninhibited, robust, and wide-open...[because such] speech occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection.” *Snyder v. Phelps*, 562 U.S. 443, 444 (2011) (citing to *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) and *Connick v. Myers*, 461 U.S. 138 (1983) (internal quotation marks omitted)).

¹⁷ D.C. Code § 22-3133(b) (“This section does not apply to constitutionally protected activity.”).

¹⁸ See Eugene Volokh, *Ban on speech ‘about a person’ that negligently causes ‘significant mental suffering, anxiety or alarm’ struck down*, Washington Post (Nov. 30, 2017) (available online at: https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/11/30/ban-on-speech-about-a-person-that-negligently-causes-significant-mental-suffering-anxiety-or-alarm-struck-down/?utm_term=.976acd0dc7e7).

discretionary decision by law enforcement officers and prosecutors does not solve the problem of the chilling effect on innocent speakers who fear prosecution based on negligently made distressing communications to or about a person. We conclude that [the exemption] is insufficient to remediate the extreme overbreadth of subsection (a) and cannot by itself make the terms of that provision constitutional.”

Notwithstanding the Illinois Supreme Court opinion and critical legal scholarship, an overbreadth challenge of this type described above has not been brought to the D.C. Court of Appeals to date, so the District’s statute remains untested.

The bill’s harassing an entity statute may, in some instances, undermine the repeated victimization standard of the current stalking statute. The current stalking statute’s statement of legislative intent recognizes that intrusions to personal privacy and autonomy must involve a “pattern” targeting the victim, and the elements of the offense require action on two or more occasions that is directed at the same “specific individual.”¹⁹ In contrast, the bill’s harassing an entity statute does not require proof of a pattern of infringement against any specific individual. As there is no apparent requirement that the “specific entity” itself or its general membership experience a harm, one-time victimization of two persons in an entity (however narrowly or broadly that term is construed) is sufficient. While affected persons may suffer serious emotional distress from such one-time victimization, providing criminal liability for such an event runs counter to the two-or-more occasions standard of the current statute.

The bill’s provisions amending the District offense of defacing or burning cross or religious symbol and display of certain emblems (D.C. Code § 22-3312.02) may not pose constitutional problems, however the bill’s amendments do not cure other defects of the statute. While the CCRC has not fully evaluated or developed draft recommendations regarding D.C. Code § 22-3312.02, the statute may generally comport with the Supreme Court ruling in *Virginia v. Black*, 538 U.S. 343 (2003) upholding a cross-burning statute as a form of conduct that may be criminalized when conducted with intent to intimidate (a “true threat” exception to the First Amendment). However, relevant to a constitutional analysis and to the clarity of the offenses as a whole, it must be noted that the bill does not specify complete culpable mental state requirements for the amended D.C. Code § 22-3312.02. As articulated in D.C. Code § 22-3312.02, the offense proscribes conduct “...where it is probable that a reasonable person would perceive that the intent is...” to intimidate, etc. However, it is unclear what intent or other mental state, if any, the offense requires, and that may be relevant as courts have only upheld a true threats exception to the First Amendment where based on at least recklessness.²⁰ The CCRC

¹⁹ The number of occasions involved in a relevant “course of conduct” under the District’s stalking statute has recently been litigated. See *Coleman v. United States*, 202 A.3d 1127, 1142 (D.C. 2019) (“In sum, although the text of D.C. Code § 22-3133 is ambiguous as to whether a defendant can be convicted of stalking absent proof that he or she possessed a culpable mental state (an intentional, knowing, or “should have known” mental state) during at least two of the occurrences that comprise the course of conduct, the statutory definitions, the last-antecedent rule, the legislative history, and the rule of lenity lead us to conclude that the defendant cannot.”).

²⁰ See, e.g., *United States v. Cassel*, 408 F.3d 622, 633 (9th Cir. 2005). See, also, *Elonis v. United States*, 135 S. Ct. 2001, 2011 (2015) (“Elonis’s conviction, however, was premised solely on how his posts would be understood by a reasonable person. Such a “reasonable person” standard is a familiar feature of civil liability in tort law, but is inconsistent with “the conventional requirement for criminal conduct—awareness of some wrongdoing.” *Staples*, 511 U.S., at 606–607, 114 S.Ct. 1793 (quoting *United States v. Dotterweich*, 320 U.S. 277, 281, 64 S.Ct. 134, 88

will engage in a more complete analysis of the offense if time permits under its statutory mandate.

IV. Closing.

While the goals of the proposed legislation are admirable, the CCRC's analysis has identified a variety of concerns about the specific language of the bill.

The scope, constitutionality, and effect of some provisions of the harassing an entity offense appear to be unrelated to or, in some cases, may conflict with, the stated goals of the legislation. I urge the Committee to review carefully the First Amendment implications of the new harassing an entity offense that is provided in the bill. Crafting criminal legislation that regulates speech is a notoriously difficult task that runs the risk of chilling the very rights of assembly and speech that one seeks to protect. The CCRC's draft recommendations to revise the District's stalking statute and explanatory legal commentary provide a solution for how a robust stalking statute can be fashioned that upholds First Amendment values.²¹

Moreover, the CCRC's analysis generally does not support the need for a new harassing an entity offense as described in the bill. I urge the Committee to consider carefully the rationale for creating a new harassing an entity crime, and to identify specific incidents in the District that have gone unprosecuted for want of the proposed harassing an entity offense. There are many other offenses that are currently available for prosecution of behavior that poses safety risks to individuals rights of association—e.g. criminal threats, trespass, disorderly conduct, stalking, and the second offense in this bill, defacing or burning cross or religious symbol and display of certain emblems (D.C. Code § 22-3312.02). The District's current criminal statutes for bias-related crime in D.C. Code § 22-3701 applies to all criminal acts, increasing the maximum authorized penalty by 50%.

Absent a clear need to address incidents in the District that cannot be prosecuted under other laws, I would recommend the Committee delay criminalizing new conduct under the bill's harassing an entity offense until it has the opportunity to review the CCRC's final recommendations for reform of the District's stalking statute. The CCRC's draft recommendations, which have already undergone a round of comments by the agency's Advisory Group and addresses a number of other changes to improve the statute besides those referenced in the analysis above. Final recommendations regarding the stalking statute and other offenses against persons are planned for release to the Council and Mayor by the close of FY 20.

L.Ed. 48 (1943); emphasis added). Having liability turn on whether a "reasonable person" regards the communication as a threat—regardless of what the defendant thinks—"reduces culpability on the all-important element of the crime to negligence," *Jeffries*, 692 F.3d, at 484 (Sutton, J., dubitante), and we "have long been reluctant to infer that a negligence standard was intended in criminal statutes," *Rogers v. United States*, 422 U.S. 35, 47, 95 S.Ct. 2091, 45 L.Ed.2d 1 (1975) (Marshall, J., concurring) (citing *Morissette*, 342 U.S. 246, 72 S.Ct. 240, 96 L.Ed. 288). See 1 C. Torcia, *Wharton's Criminal Law* § 27, pp. 171–172 (15th ed. 1993); *Cochran v. United States*, 157 U.S. 286, 294, 15 S.Ct. 628, 39 L.Ed. 704 (1895) (defendant could face "liability in a civil action for negligence, but he could only be held criminally for an evil intent actually existing in his mind"). Under these principles, "what [Elonis] thinks" does matter. App. 286.").

²¹ The CCRC's latest draft recommendations regarding stalking and other statutes is available online at www.ccrdc.org/node/1241216.

Thank you for your consideration. For questions about this testimony or the CCRC's work more generally, please contact our office or visit the agency website at www.ccrc.dc.gov.

Richard Schmechel
Executive Director
D.C. Criminal Code Reform Commission

ATTACHMENT I

**Council of the District of Columbia
COMMITTEE ON THE JUDICIARY & PUBLIC SAFETY
NOTICE OF PUBLIC HEARING
1350 Pennsylvania Avenue, N.W., Washington, D.C. 20004**

**COUNCILMEMBER CHARLES ALLEN, CHAIRPERSON
COMMITTEE ON THE JUDICIARY & PUBLIC SAFETY**

ANNOUNCES A PUBLIC HEARING ON

**BILL 23-0513, THE “HATE CRIME CIVIL ENFORCEMENT CLARIFICATION
AMENDMENT ACT OF 2019”**

**Tuesday, March 3, 2020, 2:30 p.m.
(or immediately following the Legislative Meeting, whichever is later)**

**Room 120, John A. Wilson Building
1350 Pennsylvania Avenue, N.W.
Washington, D.C. 20004**

On Tuesday, March 3, 2020, Councilmember Charles Allen, Chairperson of the Committee on the Judiciary and Public Safety, will convene a public hearing to consider Bill 23-0513, the “Hate Crime Civil Enforcement Clarification Amendment Act of 2019”. The hearing will take place in Room 120 of the John A. Wilson Building, 1350 Pennsylvania Avenue, N.W., at 2:30 p.m., or immediately following the Legislative Meeting, whichever is later.

The stated purpose of Bill 23-0513 is to amend the Bias-Related Crime Act of 1989 to expand available causes of action and remedies for hate crimes and to clarify the Attorney General’s enforcement authority.

The Committee invites the public to testify or to submit written testimony. Anyone wishing to testify at the hearing should contact the Committee via email at judiciary@dccouncil.us and provide their name, telephone number, organizational affiliation, and title (if any), by **close of business Thursday, February 27**. Representatives of organizations will be allowed a maximum of five minutes for oral testimony, and individuals will be allowed a maximum of three minutes. Witnesses should bring **twenty copies** of their written testimony and, if possible, also submit a copy of their testimony electronically in advance to judiciary@dccouncil.us.

Witnesses who anticipate needing language interpretation, or require sign language interpretation, are requested to inform the Committee of the need as soon as possible, but no later than five business days before the hearing. The Committee will make every effort to fulfill timely requests; however, requests received in fewer than five business days may not be fulfilled, and alternatives may be offered.

For witnesses who are unable to testify at the hearing, written statements will be made part of the official record. Copies of written statements should be submitted to the Committee at judiciary@dccouncil.us. **The record will close at the end of the business day on Tuesday, March 17.**

**Council of the District of Columbia
COMMITTEE ON THE JUDICIARY & PUBLIC SAFETY
AGENDA & WITNESS LIST
1350 Pennsylvania Avenue, N.W., Washington, D.C. 20004**

**COUNCILMEMBER CHARLES ALLEN, CHAIRPERSON
COMMITTEE ON THE JUDICIARY & PUBLIC SAFETY**

ANNOUNCES A PUBLIC HEARING ON

**BILL 23-0513, THE “HATE CRIME CIVIL ENFORCEMENT CLARIFICATION
AMENDMENT ACT OF 2019”**

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**Room 120, John A. Wilson Building
1350 Pennsylvania Avenue, N.W.
Washington, D.C. 20004**

AGENDA AND WITNESS LIST

- I. CALL TO ORDER**
- II. OPENING REMARKS**
- III. WITNESS TESTIMONY**
 - i. Public Witness
 - 1. Salim Adofo, Commissioner, ANC 8C07
 - ii. Government Witness
 - 1. Toni Michelle Jackson, Deputy Attorney General, Public Interest Division, Office of the Attorney General for the District of Columbia
- IV. ADJOURNMENT**

Victory of the People Movement

Jade N. Harriell Arrindell

Founder & CEO

Victory of the People Movement, LLC

P.O. Box 250-809

Brooklyn, NY 11225

(347) 815-1584

jade@victorypeoplemovement.com

Council of the District of Columbia

John A. Wilson Building

1350 Pennsylvania Avenue, N.W.

Room 120

Washington, D.C. 20004

March 3, 2020

Dear City Council,

Good afternoon esteemed Chairman and Council Members. My name is Jade Harriell Arrindell and I am an anti-racism trainer, educator, community organizer, and native Washingtonian. I am also the founder of Victory of the People Movement, LLC — which provides solutions to replacing anti-black racism with a system of justice in education, politics, and media. Thank you for the opportunity to offer my testimony in support of B23-0513 “Hate Crime Civil Enforcement Clarification Amendment Act of 2019”.

It is the year 2020 and lynching JUST became a federal crime. Like the rest of America, the District of Columbia has had a long, deplorable history of failing to face and correct issues of systemic racism, unconscious bias, and outright assaults on the most marginalized among us — people of Afrikan descent. To offer you a history lesson on atrocities committed against peoples of Afrikan decent at the national and local levels would be to give credence to the denial that racism and unconscious bias actually exist, when the District of Columbia has more than enough evidence to show for its consequences. The impact of racism in the District of Columbia has clearly resulted in educational inequities that mercilessly fast track D.C. youth to D.C. Jail to feed the prison industrial complex.

There are inadequate resources to address the District’s drug crisis in our neighborhoods, my sisters (Black women) are dying in childbirth and/or losing their seeds at numbers too far above the national average.

Perhaps the most urgent and egregious hate crime perpetuated through policies and practices in the District of Columbia today is the ethnic cleansing of Black people from



**FORTITUDE.
PREPAREDNESS.
COLLECTIVISM.**

traditionally Black neighborhoods that many would rather conveniently call “gentrification”. There’s also rampant housing discrimination, a homelessness epidemic, and over-policing which has made those same casted out residents enemies of the state and that is ultimately leading to justice being acquiesced.

Denial is easy. Accountability is hard. I am here to say the hard thing versus play the denial game. I am here today because I am interested in working with the members of City Council and serious residents of this city to replace these ills with a system of justice. While the amendment before us today is a good start, however, a distinction must be made between interpersonal and state-sanctioned hate crimes. In order to replace a system of racism, white supremacy, and acts of bigotry with a system of justice, we must extend the definition of “person” in the amendment to also include “legislators” and “law enforcement” expressly. Those in positions of power among us taking bribes from corporations, Super PACs, lobbies, and special interest groups are directly contributing to the housing crisis in the District, for example, and must be held accountable for *their* “hate crimes”.

Furthermore, persons in law enforcement within the District of Columbia tied to white supremacist groups and terror cells must also be held accountable for their “hate crimes”, as well. I’m still trying to figure out how masked white men were allowed to march in the Nation’s Capital spewing their hate with police escort but without a viable permit on the city’s tax dollars on Saturday, February 8, 2020. Could it be that these cowards were also members of or somehow tied to the District’s Metropolitan Police Force? This reeks of both corruption and coverup to me and to other concerned people across the DMV and the nation.

I commend Chairman Mendelson and the rest of the members of City Council for taking a stand against hate crimes, and it is my hope that the Council takes a closer look at ways in which it will hold all perpetrators accountable —regardless of socio-economic status and the role they play within this city.

In closing, I leave you with a few wise words from my favorite African American poet, Langston Hughes:

Freedom will not come

Today, this year

Nor ever

Through compromise and fear.

I have as much right

As the other fellow has

*To stand
On my two feet
And own the land.*

*I tire so of hearing people say,
Let things take their course.
Tomorrow is another day.
I do not need my freedom when I'm dead.
I cannot live on tomorrow's bread.*

*Freedom
Is a strong seed
Planted
In a great need.
I live here, too.
I want my freedom
Just as you.*

Thank you for your time, and I look forward to seeing this amendment enacted.

Sincerely,

A handwritten signature in black ink, reading "Jade N. Harrell Arrindell". The signature is fluid and cursive, with the first letters of each name being capitalized and prominent.

Jade N. Harrell Arrindell

Founder & CEO

Victory of the People Movement, LLC



Salim Adofo

Commissioner

District 8C07

Advisory Neighborhood Commission 8C
Single Member District 8C07

Committee on Judiciary & Public Safety
Public Hearing

Bill 23-0513 The Hate Crime Civil Enforcement Clarification
Amendment Act of 2019

Tuesday, March 3, 2020, 2:30 p.m.
Room 120,
John A. Wilson Building
1350 Pennsylvania Avenue, N.W
Washington DC

Since the founding of this country, people of African heritage have had to fight for their human and civil rights. The denial of human and civil rights of African people was so deeply embedded in the fabric of this nation that it was legalized by the United States Supreme Court. For example, Chief Justice Roger Taney ruled in 1856 *Dred Scott v. Sanford*, also known as the Dred Scott Decision, that a Black person has no rights that a white person is bound to respect.

After the Civil War, many of the Southern States implemented what is known as the *Black Codes*. Black Codes restricted the opportunities for Black people to own land, testify in court against White people, learn trades and in most cases vote in political elections. There are many examples that I can state, however the one thing that we should take away from this is just because something is legal, doesn't make it right. There is no way legislation can regulate a person's thoughts, feelings and emotions towards another person, however it can regulate a person's actions. Bill 23-0513 is a step towards this.

As introduced Bill 23-513 prohibits any criminal offense that demonstrates an accused's prejudice based on the actual or perceived race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, gender identity or expression, family responsibility, homelessness, physical disability, matriculation, or political affiliation. It clarifies that the Attorney General may bring civil actions for bias-related crimes, or when any person attempts to interfere with the exercise of federally or District-protected rights through threats, intimidation, or coercion.

Some may ask why we need to have a bill such as this in 2020, however we have not progressed as much as we think. On February 13, 2020 the Attorney General announced that the

Curtis Investment Group was sued and required to pay \$900,000 in fines for housing discrimination.

Curtis Investment Group, Inc. is a real estate and property management company based in Maryland. Curtis Investment Group and related entities, including Curtis Properties Inc., Curtis Property Management Inc., and Oxon Run Manor LLC., own and manage several residential properties in the District. These include more than 240 units across four apartment complexes in the District including Wheeler Park, 3211 – 3221 Wheeler Road, SE. These are residents that reside in the very commission that I represent.

OAG alleged Curtis violated the law by posting discriminatory online housing ads that included language such as “not accepting any vouchers or rapid rehousing.” A judge ruled last week that the company broke the law by refusing to rent or show apartments to housing voucher recipients. Now, the court will decide what penalties, costs, and other measures it will impose on Evolve.

It is clear that the Attorney General needs to have the authority this bill is requesting because as with Dred Scott and the Black Codes we see that discrimination is still an issue that impacts our community. On behalf of the residents of District 8C07, I stand in support of Bill 23-0513, The Hate Crime Civil Enforcement Clarification Amendment Act of 2019. I advise the Council of the District of Columbia to pass this bill. This bill will not fix all of the issues the District has with discrimination, however it is progressive policy that can attempt to right wrongs of the past.

Commissioner Salim Adofo
District 8C07
Advisory Neighborhood Commission 8C
District of Columbia



November 2019

Community Voices: Perspectives on Civil Rights in the District of Columbia



Karl A. Racine
Attorney General for the District of Columbia

oag.dc.gov

Community Voices: Perspectives on Civil Rights in the District of Columbia

INTRODUCTION

Background

The Council of the District of Columbia enacted the Human Rights Act (HRA) “to secure an end in the District of Columbia to discrimination for any reason other than that of individual merit,” ensuring that “[e]very individual [can] have an equal opportunity to participate ... in all aspects of life[.]”¹ The HRA is one of the strongest civil rights laws in the country; it broadly outlaws discrimination in the areas of education, employment, housing, and public accommodations based on 21 traits, including race, religion, national origin, sexual orientation, gender identity or expression, and disability.² Despite this expansive law, District residents face discrimination every day in ways that have devastating psychological, physical, and financial effects.

Bias against vulnerable populations is on the rise in our city: The Metropolitan Police Department’s data show that the total number of bias-motivated violent incidents more than doubled from 2011 to 2018, and the District is on track for an even higher number in 2019.³ That bias can block District residents from taking advantage of important life opportunities like employment, education, housing, and access to goods and services.

For example, 15% of District landlords simply refuse to rent to people attempting to pay for housing with Section 8 vouchers.⁴ Such discrimination makes it hard for low-income tenants to find affordable housing in a market that is already punishing and limits the ability of families to move into transit- and opportunity-rich communities. More than 90% of voucher holders in the District are African American,⁵ so this practice also reinforces the racial segregation in housing that has robbed African-American communities of wealth and security for generations.

In a 2015 report, the D.C. Office of Human Rights found that nearly half of District employers would prefer to hire a less qualified cisgender⁶ applicant than a more qualified transgender individual.⁷ OAG recognizes that this type of bias locks people out of opportunity and cannot be tolerated in the District.

In the face of this evidence of bias and discrimination, OAG launched its new Civil Rights Section in April 2019. The section, comprising a permanent staff of four attorneys and one investigator, protects the civil rights of District residents by bringing lawsuits to challenge discrimination, advocating for legislation to strengthen antidiscrimination laws, and engaging in educational community outreach so that residents know their rights. Meant to complement the important enforcement work that the D.C. Office of Human Rights does, OAG’s Civil Rights Section focuses on large scale discriminatory practices in order to serve as a significant deterrent to illegal discriminatory conduct.

Community Listening Sessions

In order to inform the priorities of the Civil Rights Section, OAG hosted a series of five community listening sessions across the District this summer. These sessions gave attendees the chance to influence

the new section's priorities and provided OAG a unique opportunity to hear directly from residents regarding their civil rights concerns. The five listening sessions were held at the following locations⁸:

- The Woodridge Library, 1801 Hamlin St. NE, Ward 5
- Emery Heights Community Center, 5701 Georgia Ave. NW, Wards 3 and 4
- Reeves Center, 2000 14th St. NW, Ward 1
- Georgetown University Law Center, 120 F St. NW, Wards 2 and 6
- Fort Stanton Recreation Center, 1812 Erie St. SE, Wards 7 and 8

Chairman Phil Mendelson and Councilmembers Brianne Nadeau and Trayon White joined Attorney General Karl Racine at various sessions to hear directly from constituents. Attorney General Racine was also pleased to welcome staff from the D.C. Office of Human Rights, including Director Mónica Palacio, several Advisory Neighborhood Commissioners, and other community leaders.

In all, over 90 residents from across the District participated in the listening sessions. The participants provided OAG with valuable feedback about their personal experiences with discrimination and highlighted civil rights issues that concern them.

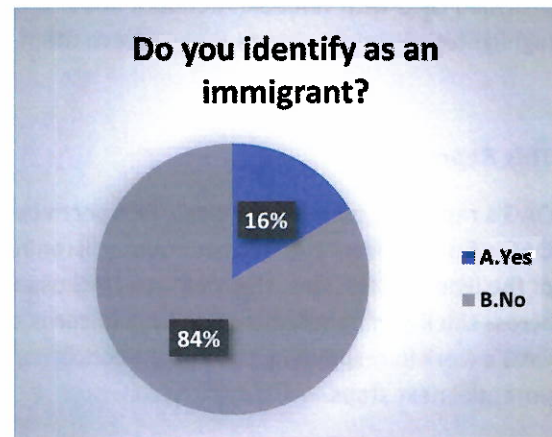
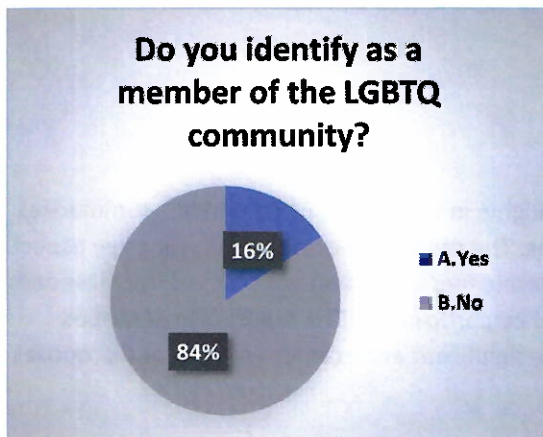
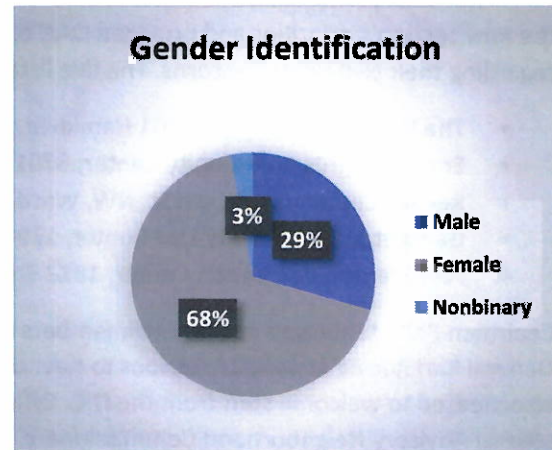
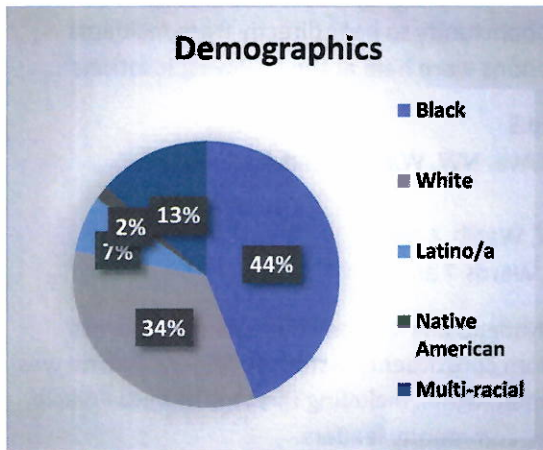
This Report

OAG's report, "Community Voices: Perspectives on Civil Rights in the District of Columbia," summarizes OAG's findings from the five community listening sessions. The report explores the following key aspects of the listening sessions: the methods OAG used for gathering feedback; demographics of the attendees across the listening sessions; and key concerns expressed by participants. The report also describes OAG's work in responding to resident concerns, including significant enforcement efforts, and proposes potential next steps.

METHODOLOGY AND DEMOGRAPHICS OF PARTICIPANTS

At each listening session, OAG provided background on the new Civil Rights Section and explained the scope of the District's civil rights laws. OAG then gave the floor to the community members, who were able to share their experiences and views on what the section should prioritize. During the listening sessions, OAG conducted real-time polling that allowed OAG to collect demographic information and ask attendees to prioritize which issues the section should tackle. OAG then facilitated conversations in small groups with attendees about the civil rights issues that concern them most. Because answering the real-time polling questions was optional, some participants declined to respond: In all, of the 94 people who participated in the listening sessions, 90 provided a response to at least one of the real-time polling questions. The percentages given throughout this report are out of those who chose to respond to each question.

Using real-time polling, OAG first asked basic demographic questions of the residents who attended the listening sessions. These questions helped determine which communities were represented during the sessions and which communities might need further outreach.



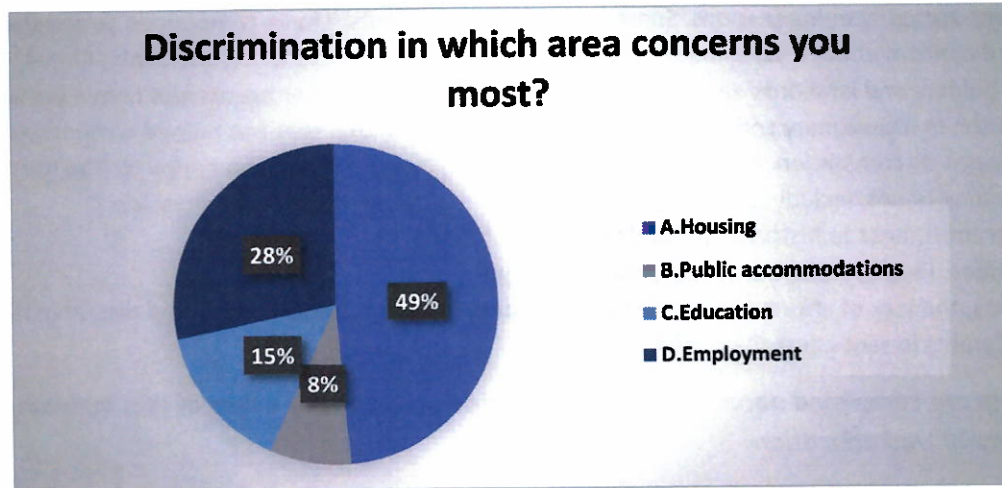
- Race: 44% of participants identified as black; 34% identified as white; 13% identified as multiracial; 7% identified as Latino/a; and 2% identified as Native American.
- Sex: The sessions were majority female. 68% of participants identified as female, 29% as male, and 3% as nonbinary.
- LGBTQ+: 16% of responding participants identified as members of the LGBTQ+ community.
- National Origin: Likewise, 16% of responding participants identified as immigrants.

KEY FINDINGS

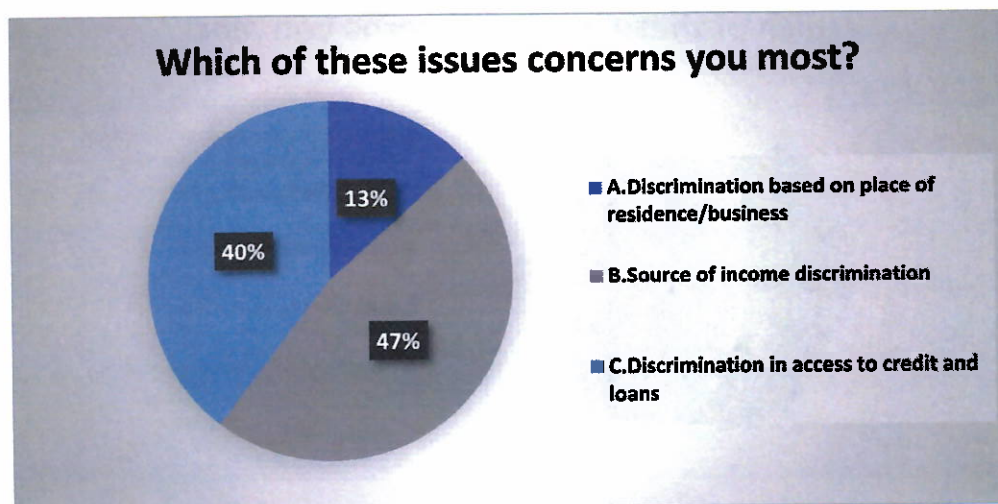
Throughout the listening sessions, attendees raised several issues ranging from individual complaints of discrimination to large structural issues affecting their communities. While many concerns were discussed, a few stood out: housing discrimination in all its forms, racial discrimination across areas of life, bias-motivated violence and discrimination against LGBTQ+ individuals, discrimination against religious minorities and immigrants, and potentially discriminatory government actions. This section includes key takeaways from both the real-time polling and the small group discussions and describes participants' concerns in greater detail.

Residents are concerned about access to safe and affordable housing without fear of discrimination, including source of income discrimination.

Overall, housing discrimination in all its forms was a top priority throughout the District. Listening session attendees were asked to identify which area of discrimination – housing, public accommodation, education, and employment – concerned them the most. Forty-nine percent of participants chose housing, 28% chose employment, 15% chose education, and 8% chose public accommodations.



Relatedly, listening session attendees were asked which form of discrimination – place of residence or business, source of income, or access to credit and loans – concerned them the most. Forty-seven percent of respondents identified source of income discrimination, 40% chose access to credit and loans, and 13% chose place of residence or business discrimination.



These results varied somewhat by Ward. Respondents in Wards 1, 2, 3, 4, and 6 were most likely to be concerned with source of income discrimination in the District by a substantial margin; on the other hand, Ward 5, 7, and 8 residents were markedly likely to be most concerned with discrimination in access to credit and loans.

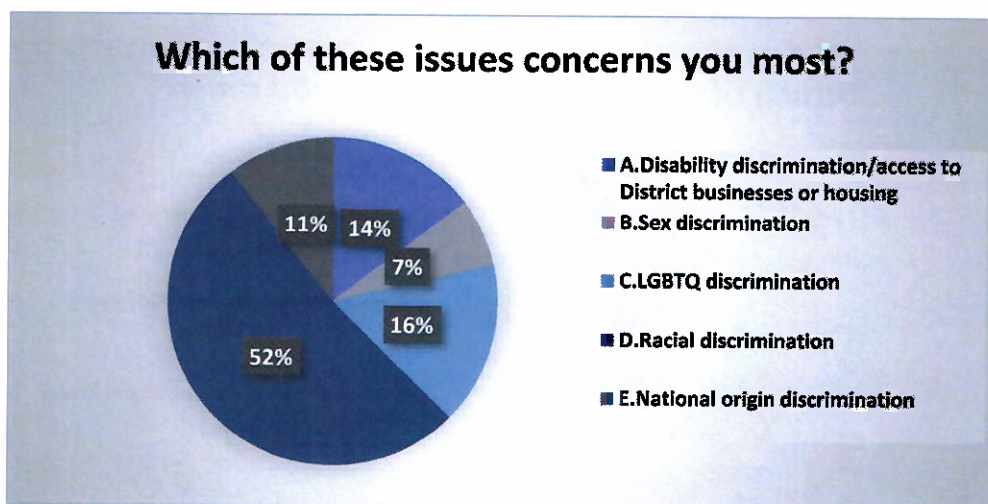
Despite these differences, it appears that all of these concerns can be traced back to a fundamental fear about losing out on housing opportunity. The lack of affordable housing was a consistent issue in discussions across listening sessions. Some residents expressed concern about discrimination against voucher holders and landlords' use of their participation in inclusionary zoning programs as a basis for such discrimination. Attendees also spoke about lending issues, including the targeting of predatory mortgages to historically marginalized communities. Finally, seniors expressed concern about rising rents, the lack of affordable housing options, discrimination based on age, and discrimination against tenants in rent-controlled units.

“

“I am a realtor ... and I have tried repeatedly to place [housing v]oucher clients. I have complained to anyone who would listen all in vain, I have polled other agents and I have yet to find one that has helped a client with a voucher. I was so happy to find [out about this listening session.]”

Residents are concerned about racial discrimination across many areas of life, including employment and education.

Residents expressed the concern that racial discrimination was a salient barrier in any number of areas of life. Listening session attendees were asked which form of discrimination – disability, sex, LGBTQ+, race, or national origin – concerned them the most. Fifty-two percent of participants chose race discrimination, 16% chose LGBTQ+ discrimination, 11% chose disability discrimination, 7% chose national origin discrimination, and 4% chose sex discrimination.



While respondents across wards were most concerned about racial discrimination, the concern was most pronounced in Wards 5, 7, and 8.

“

“I am concerned about “[p]rivate and public employers who discriminate against applicants and employees based on their hairstyle of choice -- more specifically braids, twist or locks.”

These numbers were born out in small group discussions. In addition to generally reporting significant concern about employment discrimination – residents in Wards 3 and 4 were most concerned with employment discrimination, and residents in Wards 7 and 8 were evenly split between housing and employment – residents talked about race discrimination in the workplace as a barrier to opportunity and advancement. Residents also expressed concern about criminalizing

innocuous student behavior in schools and potentially biased enforcement against students of color. As detailed more fully below, residents also talked about potentially racially-biased police practices in community settings.

Residents are concerned about increases in bias-motivated violence, harassment, and discrimination against the LGBTQ+ community.

As noted in the graph above, 16% of respondents were most concerned about discrimination against LGBTQ+ individuals. Several attendees expressed concern about the prevalence of hate crimes and hate speech toward members of the LGBTQ+ community. In addition to bias-motivated violence, attendees spoke about discrimination and harassment they faced in the workplace because of their sexual orientation or gender identity, including the inability to access a gender-appropriate restroom. Attendees expressed concern about ensuring access to gender-neutral restrooms in public accommodations, and, finally, about the bullying of LGBTQ+ youth.

Residents are concerned about increasing discrimination against religious minorities and immigrants.

Residents expressed concern in small group discussions about the rise in anti-Semitism and anti-Muslim bias, citing the current political climate. Attendees were also concerned that immigrants faced increasing discrimination but were afraid to report illegal conduct because they did not want to call attention to their legal status. Finally, attendees were worried that many immigrants did not know their rights or how to exercise those rights when interacting with law enforcement.

Residents are concerned about certain interactions with District government, including the nature of police-resident interactions and the potentially disparate investment of resources across the District.

At every listening session, attendees spoke at length about police escalating tensions in ordinary interactions with residents. Attendees noted that many of the interactions they witnessed had troubling racial dynamics. Specifically, residents discussed that they witnessed or themselves were subject to unnecessarily harsh treatment by officers, such as during traffic stops or after the police were called to resolve a dispute. Residents suggested what they perceived as over-policing in certain neighborhoods—particularly in Wards 7 and 8—led community members to distrust the police. Finally, residents

expressed concern about criminalizing behavior in schools and potentially biased enforcement of school-discipline policies against students of color and students with disabilities.

Additionally, residents expressed concern that both city resources and private resources were being concentrated into the most well-off neighborhoods. Residents expressed concern about access to grocery stores, restaurants, hospitals, and schools and shared significant concern about disparities in education funding in different neighborhoods in the District. Wards 7 and 8 residents in particular expressed that, in general, not enough attention or resources were being directed to their part of the city.

COMBATING DISCRIMINATION IN THE DISTRICT

OAG's Civil Rights Section is actively incorporating feedback from this summer's listening sessions into its work and has already begun to focus on some of the concerns raised by residents.

OAG is working hard to combat housing and source of income discrimination.

OAG has filed two lawsuits against landlords who refused to accept housing vouchers as rent payments. The first, against [Evolve LLC](#), alleges that the company had an online system that prevented potential tenants from scheduling showings if they planned to use vouchers to pay their rent. The second, against [Curtis Investment Group, Inc.](#), a major landlord in Wards 7 and 8, alleges that the company violated District civil rights law by discriminating against voucher holders and posting discriminatory advertisements.

In addition, OAG has worked collaboratively with technology companies, including Zillow and [CoStar Group](#), the company that owns Apartments.com, to reduce discriminatory advertisements on these platforms. In response to OAG's efforts, these companies agreed to ban language in advertisements that suggested discrimination against voucher holders, update their fair housing pages to emphasize source of income discrimination, and study other potential changes to their platforms.

OAG has taken action to enforce the District's civil hate crimes statute.

In order to further combat bias-motivated violence and harassment, on October 22, 2019, OAG [introduced a bill](#) in the Council of the District of Columbia to allow the office to sue offenders who commit bias-motivated crimes or otherwise interfere with another person's rights. With this authority, OAG will work to ensure that all District residents can enjoy their rights and freedoms without fear of violence or intimidation. In addition, OAG has endorsed repeal of the anti-LGBTQ+ panic defense. This defense to a criminal prosecution allows perpetrators to escape responsibility based on the identity of a victim; repealing it sends a message that bigotry is not an excuse for violence.

“

“As an advocate [and] mentor for women who are homeless or transitioning out of homelessness you've made my service for them so much easier, especially when dealing with landlords, who don't want to do right. I now can go on your website and refer to what happens when they don't. ... It makes a world of difference.”

OAG has brought and resolved cases to ensure that all District communities have equal access to services.

OAG has pursued two matters to ensure that contractors and home-improvement services are available on equal terms in all parts of the District. In August of this year, OAG reached a settlement with a [window-replacement company](#) that requires the company to pay a \$50,000 penalty and end its practice of refusing to provide services east of the Anacostia River.

In addition, in October of this year OAG filed a [friend-of-the-court brief](#) in a case that could have significant effect on whether businesses can discriminate in providing services. OAG's brief argues that all businesses, including businesses that do not maintain a physical location in the District, must provide services evenly across the District. Such a ruling would ensure that online platforms and businesses cannot discriminate in contravention of D.C.'s Human Rights Act.

OAG has continued to push back on the Trump administration's anti-immigrant policies.

Since January 2017, OAG has vigorously defended the rights of our immigrant community against federal incursion. This summer, among other actions, OAG sued the administration over the so-called "[public charge](#)" rule that discourages immigrants from accessing important social services, and opposed a [proposal to deny housing assistance](#) to any households containing undocumented immigrants.

OAG is educating residents about their rights under District civil rights laws.

The Civil Rights Section is producing [educational materials](#) and further engaging community members to ensure that people know their rights and how to vindicate them. For example, after hearing concerns about racial discrimination in employment, specifically with respect to natural hairstyles, OAG put out [materials](#) explaining that such discrimination is illegal under the D.C. Human Rights Act because "personal appearance" is a protected trait. All materials explain how to report discrimination both to OAG's Civil Rights Section and to the D.C. Office of Human Rights.

LOOKING AHEAD

This summer's listening sessions are the first step in the Civil Rights Section's relationship with District residents. The sessions gave OAG a sense of which civil rights issues concern District residents the most and how the section might prioritize its work. Yet, the engagement is not over: OAG plans to report back to leading advocates and community members on these findings and actions in order to engender further conversation and garner additional insight. This engagement will include a particular focus on Wards 7 and 8, where community members were frustrated by insufficient attention being paid to their concerns. The Civil Rights Section is also actively looking for cases, especially in the issue areas identified in this report. People who feel they have been discriminated against in the District can call, email, or otherwise notify OAG for investigation.

OAG will continue to work hand in hand with community members and activists to complement the work of the Office of Human Rights and target large-scale discrimination that shuts District residents out of opportunity.

CIVIL RIGHTS RESOURCES

OAG protects the civil rights of District residents by bringing lawsuits to challenge discrimination, advocating for legislation to strengthen antidiscrimination laws, and engaging in educational community outreach so that residents know their rights. Learn more about illegal discrimination and how OAG is working to defend your civil rights.

If you believe you have been a victim of discrimination, you may contact the OAG by:

- Calling OAG at (202) 727-3400
- E-mailing the Civil Rights Section at OAGCivilRights@dc.gov
- Mailing OAG, ATTN: Civil Rights Section at 441 4th Street N.W., Suite 600S, Washington, D.C. 20001

OAG's goal is to ensure equal treatment and meaningful opportunity for all District residents by complementing the work of the Office of Human Rights, the primary District agency that investigates individual complaints of discrimination. You can file a complaint with OHR at <https://ohr.dc.gov/> or call 202-727-4559.

¹ D.C. Code §2-1401.01; 2-1402.01.

² The DCHRA prohibits discrimination based upon the following 21 traits: race; color; religion; national origin; sex; age; marital status; personal appearance; sexual orientation; gender identity or expression; family responsibilities; political affiliation; disability; matriculation; familial status; source of income; genetic information; place of resident or business; credit information; status as a victim of an intrafamily offense; and status as a victim or family member of a victim of domestic violence, a sexual offense, or stalking.

³ See Metropolitan Police Department, "Bias-Related Crimes (Hate Crimes) Data," <https://mpdc.dc.gov/hatecrimes>.

⁴ Urban Institute, "Do Landlords Accept Housing Choice Vouchers? Findings from Washington, DC," (Sept. 20, 2018), https://www.urban.org/sites/default/files/do_landlords_accept_housing_choice_vouchers_washington_dc.pdf.

⁵ Asha Uprety and Kate Scott, "In The District, Source Of Income Discrimination Is Race Discrimination Too," (Oct. 12, 2018), <https://equalrightscenter.org/source-of-income-and-race-discrimination-dc/>.

⁶ The term "cisgender" is used to refer to a person whose personal identity and gender corresponds with their birth sex.

⁷ District of Columbia Office of Human Rights, "qualified and transgender: A report on results of resume testing for employment discrimination based on gender identity," (Nov. 2015), https://ohr.dc.gov/sites/default/files/dc/sites/ohr/publication/attachments/QualifiedAndTransgender_FullReport_1.pdf.

⁸ The wards associated with each session correspond with where OAG marketed each listening session. The session labeled "Wards 2 and 6," for example, was held in Ward 6, but was advertised to residents in both Wards 2 and 6. In this way, OAG made significant efforts to reach out to residents in all eight wards.



Statement of Toni Michelle Jackson
Deputy Attorney General, Public Interest Division
Office of the Attorney General

Before

The Committee on the Judiciary & Public Safety
The Honorable Charles Allen, Chairperson

Public Hearing

B23-0513—Hate Crime Civil
Enforcement Clarification Amendment Act of 2019

March 3, 2020
Time 2:30 pm
Room 120
John A. Wilson Building
1350 Pennsylvania Avenue, N.W.
Washington, District of Columbia 20004

Introduction

Greetings Chairman Allen, Councilmembers, staff, and residents of the District of Columbia. My name is Toni Michelle Jackson, and I have the privilege to serve as the Deputy Attorney General of the Public Interest Division in the Office of the Attorney General for the District of Columbia. I am pleased to appear before the Committee on Judiciary and Public Safety on behalf of Attorney General Karl A. Racine to testify on B23-0513 “The Hate Crime Civil Enforcement Clarification Amendment Act of 2019,” which was introduced in response to the scourge of bias-motivated violence afflicting our community.

This legislation ensures that the Office of the Attorney General (OAG) has the tools it needs to respond to discrimination and civil rights violations that harm the people of the District. It expressly authorizes OAG to bring civil hate crimes charges, and it expands the range of rights that OAG and individuals can protect.

This legislation is about justice and accountability. With this bill, we are telling all members of our community who have been marginalized by illegal acts of intolerance that we see them, we care about them, and we want to seek justice on their behalf. There must be consequences for bias-motivated crimes.

I will first provide some context for the urgent need for this legislative reform before turning to the major provisions of this bill.

Bias-Motivated Violence is on the Rise But Our Laws Are Not Adequately Enforced

Bias-motivated violence is on the rise in the District of Columbia. MPD’s data show that the total number of bias-motivated violent incidents more than doubled

from 2011 to 2019.¹ The LGBTQ+ community bears the brunt of this burden: bias-motivated crimes based on sexual orientation and gender identity account for nearly half of all reported bias crimes in recent years.² Just this past December, LGBTQ staff at a local Mexican restaurant received homophobic phone calls and death threats after they hosted gatherings for the queer community. And, violence against transgender people has been particularly extreme. Tragically, three transgender women were murdered in the D.C. area last year alone.³

Unfortunately, attacks based on ethnicity, race and national origin are also increasing. Preliminary MPD data from 2019 suggest that this category of crimes increased by 20% last year. Given that bias-motivated crimes often go unreported, the actual numbers are likely even higher.

We know that bias-motivated violence is a problem not just from data, but from the lived experiences of our neighbors and constituents. Last year, OAG held a series

¹ There were 92 reported bias-motivated violent incidents in 2011 and 203 such incidents in 2019. Metropolitan Police Department, Bias-Related Crimes (Hate Crimes Data), <https://mpdc.dc.gov/hatecrimes>.

² METRO. POLICE DEP'T, 2018 ANNUAL REPORT 42, https://mpdc.dc.gov/sites/default/files/dc/sites/mpdc/publication/attachments/MPD%20Annual%20Report%202018_lowres_0.pdf.

³ Two of these victims were District residents. Lynh Bui, *Baltimore man arrested in killing of transgender woman found shot outside D.C.*, WASH. POST (July 18, 2019), https://www.washingtonpost.com/local/public-safety/baltimore-man-arrested-in-killing-of-transgender-woman-found-shot-outside-dc/2019/07/18/bf04ff58-a972-11e9-9214-246e594de5d5_story.html; Lou Chibbaro, Jr., *Death of trans woman in vacant apartment shrouded in mystery*, WASH. BLADE (Jan.15, 2020), <https://www.washingtonblade.com/2020/01/15/death-of-trans-woman-in-vacant-apartment-shrouded-in-mystery/>.

of five listening sessions across the District to hear directly from residents about civil rights issues in their communities. In every listening session, we heard from attendees about violence against the LGBTQ+ community and the rise of anti-Semitic, anti-Muslim and anti-immigrant violence. In addition, Attorney General Racine met with LGBTQ+ advocates last summer to discuss civil rights issues, and the spike in violence targeting that community was their primary concern.

Our local police department deserves credit for its leadership in responding to these problems. MPD is known around the country for its rigorous data collection and reporting of bias-motivated incidents. MPD also has a dedicated, experienced unit that examines these cases to ensure a comprehensive response. This work should be commended. We're falling short, however, when it comes to enforcement of our hate crimes statute.

Here in the District, it is the U.S. Attorney's Office, and not OAG, that prosecutes adults for most crimes. So, it is the U.S. Attorney's Office that decides whether to enforce our statute that enhances penalties for bias-motivated violence. And time and again, the USAO has failed to pursue this bias enhancement. Last year, *The Washington Post* profiled the case of a lesbian construction worker who was shot in the chest by a man who perceived her clothing as too masculine. The USAO declined to treat this shooting as a bias-motivated crime.⁴ And last year, although police

⁴ Michael E. Miller & Steven Rich, WASH. POST, *Hate crime reports have soared in D.C. Prosecutions have plummeted* (Aug. 21, 2019), <https://www.washingtonpost.com/graphics/2019/local/dc-hate-prosecutions-drop/>.

referred more than 50 bias-motivated cases for prosecution, the USAO sought bias-related enhancements in fewer than a dozen.⁵

These examples show why the people of the District need a government that is accountable to them; our anti-discrimination laws were passed for a reason, and they should be enforced. That is why we are grateful to the Council for investing in OAG's ability to do just that. As of this fiscal year, we have a new Civil Rights Section staffed by four attorneys and an investigator working to address discrimination, harassment, and, importantly, violence. In its first months, our Civil Right Section brought a lawsuit against a property company with nearly 250 rental units east of the Anacostia River that refused to rent to people who use housing vouchers and posted discriminatory advertisements. We investigated, filed suit, and obtained a preliminary injunction halting the illegal practices. In settlement of the case, the property company will pay \$900,000 to the District and provide anti-discrimination training to its employees. We also sued three other property companies and a real estate broker for discriminating against low-income tenants in their portfolio of almost 1,000 rental units in Wards 1, 2, and 3.

⁵ Of the 201 bias motivated incidents reported in 2019, MPD gathered enough evidence to refer 52 to the USAO for prosecution. USAO prosecuted only 11 as hate crimes and dropped two of those bias enhancements in plea deals. Michael E. Miller, *Federal prosecutors release D.C. hate-crime figures for the first time in years*, WASH. POST (Jan. 23, 2020), https://www.washingtonpost.com/local/federal-prosecutors-release-dc-hate-crime-figures-for-the-first-time-in-years/2020/01/23/f36e1bde-3e1f-11ea-baca-eb7ace0a3455_story.html.

We have a bill before Councilmember Todd's Committee on Government Operations that clarifies our ability to bring these lawsuits under the Human Rights Act, and we encourage the Council to bring that bill forward for a vote.

**This Legislation Equips OAG to Address
Bias-Motivated Offenses Under Civil Law**

Turning to the legislation before you today, there are important civil actions we can bring to combat the rise in bias-motivated violence. The "Hate Crime Civil Enforcement Clarification Amendment" Act will allow us to fully harness the power of our office to bring this type of litigation to achieve justice and accountability for the people of the District.

This legislation makes several meaningful changes to the District's existing bias crimes statute. It empowers the Office of the Attorney General to hold perpetrators of bias-motivated offenses accountable with civil penalties and injunctions; it expands the types of rights protected under the statute; and it clarifies that protections extend to people with all sorts of disabilities, not just physical. I will touch on each of these provisions in turn.

First, this bill empowers OAG to pursue civil penalties, restitution, and other legal relief against perpetrators of bias-motivated crimes—regardless of whether the U.S. Attorney's Office prosecutes these offenses. This clarification recognizes the important role the Office of the Attorney General plays in enforcing such crimes and signals to the entire District that we stand in partnership with crime victims to eradicate this form of discrimination and violence in the District. Under current law, crime victims carry the burden of bringing a private lawsuit if they wish to seek

financial penalties from their abusers, an onerous task because victims are often focused on recovering from trauma and because of the difficulty of finding a lawyer where financial recovery is uncertain.⁶ We should not ask victims who are recovering from trauma to shoulder this burden on their own.

It is the government's job to enforce our laws, particularly for matters of such significant public importance as the safety, wellbeing, and inclusion of all people of the District. By spelling out OAG's civil authority to act in the face of bias-motivated violence, this legislation enables OAG to seek justice for marginalized members of our community and gives them a voice even when federal prosecutors fail to act.

Second, this bill expands the types of rights protected under the statute by broadening the conduct that qualifies as a bias-motivated offense. In addition to providing a cause of action against those who commit violent offenses based on protected classes like race, gender identity, religion or national origin, this bill creates a cause of action for offenses that interfere with rights protected by District and federal law. That means, for example, that if an individual commits a violent offense to interfere with a person's right to vote, the victim or the Attorney General can bring a civil cause of action under the statute.

Finally, this legislation makes a technical but meaningful clarification when it comes to bias against people with disabilities. Existing law creates a civil cause of

⁶ This existing provision has been used infrequently. Since 2011, only two lawsuits with reported decisions have been filed under the statute since 2011 despite more than 1,000 bias-motivated violent incidents during this same period. There are likely other unreported cases.

action for offenses motivated by the victim's *physical* disability. This bill eliminates the word "physical," making it clear that bias-motivated offenses are actionable when based on *any* disability—physical or not.

This legislation brings District law in line with other states that are leading the civil rights charge. For instance, Maine and Massachusetts have had laws like this on the books for decades and have used them to meaningful effect.⁷ The Maine Attorney General has obtained 300 civil injunctions for bias-motivated incidents since 1992. In just one of many examples from Massachusetts, the Attorney General obtained a preliminary injunction against a man who used a homophobic slur and violently attacked three people at a bar. Meanwhile, the Michigan Attorney General is organizing a special unit to pursue criminal and civil action for bias-motivated incidents. The District's Human Rights Act has afforded residents some of the most sweeping civil rights protections for more than forty years. By matching those protections with explicit public enforcement powers related to hate crimes, this bill preserves our place as a leading civil rights jurisdiction.

But more important than our rank among our sister jurisdictions is our accountability to our residents and neighbors here at home. As part of our citizens' elected government, we have a responsibility to ensure that District residents are free to live their lives and express their identities safely. And when individuals harm others based on hate, we have a duty to hold them accountable and to signal to our

⁷ Mass. Gen. Laws Ann. ch. 12, § 11H (enacted in 1979); Me. Rev. Stat. tit. 5, § 4681 (enacted in 1989).

entire community that such actions are unacceptable. This bill will help us do just that.

Conclusion

I appreciate the opportunity to testify on this legislation. The Office of the Attorney General is committed to vigorously enforcing our city's laws to make the District a place where all people can live, love, work and play without fear of illegal discrimination or hate. The "Hate Crime Civil Enforcement Clarification Amendment Act of 2019" will equip us with the tools we need to combat the scourge of bias-motivated violence afflicting our city. I am happy to answer any questions that members may have.

ATTACHMENT J

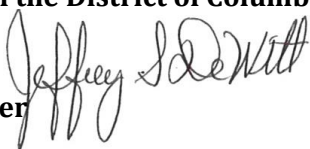
Government of the District of Columbia
Office of the Chief Financial Officer



Jeffrey S. DeWitt
Chief Financial Officer

MEMORANDUM

TO: The Honorable Phil Mendelson
Chairman, Council of the District of Columbia

FROM: Jeffrey S. DeWitt
Chief Financial Officer 

DATE: November 23, 2020

SUBJECT: Fiscal Impact Statement – Bella Evangelista and Tony Hunter Panic
Defense Prohibition and Hate Crimes Response Amendment Act of
2020

REFERENCE: Bill 23-409, Draft Committee Print as circulated on November 20, 2020

Conclusion

Funds are not sufficient in the fiscal year 2021 through fiscal year 2024 budget and financial plan to implement the bill. The bill's implementation will cost approximately \$241,000 in fiscal year 2021 and \$951,000 over the four-year financial plan period.

The bill's provision amending the definition of "place of public accommodation" is subject to the required resources being included in an approved budget and financial plan for the Office of Human Rights (OHR). The remaining provisions can be implemented beginning on the bill's effective date.

Background

The bill makes several changes to how laws establishing discrimination-based crimes, such as hate crimes and bias-related crimes, are applied, enforced, and defended.

The bill redefines "place of public accommodation" under the Human Rights Act¹ to include a place or offeror that provides access to an accommodation, service, or good, regardless of whether the provider or offeror charges a fee and regardless of whether the offeror is physically located in the District.

¹ Human Rights Act of 1977, effective December 13, 1977 (D.C. Law 2-38; D.C. Official Code § 2-1401.02(24)).

Current law² makes it illegal to burn, desecrate, mar, deface, or damage a religious or secular symbol on public property or private religious, educational, residential, memorial, charity, or cemetery properties. The bill expands the protections to include protection of religious and secular symbols on all property in the District regardless of property use.

The bill amends the definition of a bias-related crime to ensure that all disabilities are included, not just physical disabilities, and clarifies that the crime does not have to be based solely on the accused's prejudice. The bill also authorizes the Attorney General to fully investigate and bring civil action in the name of the District of Columbia against any person who commits a bias-related crime, interferes with any individual's exercise of rights protected by the United States Constitution or District law, or deprives any individual of their equal protection rights under the Constitution or District law. The bill allows the Attorney General to seek injunctive relief, damages for economic or non-economic loss, punitive damages, reasonable attorney fees and costs, a civil penalty of up to \$10,000, or any other relief as determined by the court.

The bill establishes that in any criminal proceeding, prosecution, or criminal trial, it is not an adequate "heat of passion," self-defense, or insanity defense claim if that status is based on the discovery of the victim's actual or perceived gender identity, gender expression, or sexual orientation. However, the bill allows the defense to present evidence of prior trauma to excuse the defendant's conduct or mitigate the severity of the offense.

Financial Plan Impact

Funds are not sufficient in the fiscal year 2021 through fiscal year 2024 budget and financial plan to implement the bill. The bill's expansion of the definition of "place of public accommodation" will increase the number of inquiries and complaints received by the OHR for review and investigation. OHR requires an additional specialist and attorney in order to manage the increase in activity. This staff will cost \$230,000 in fiscal year 2021 and \$925,000 over the four-year financial plan period. OHR will also require one-time administrative resources and ongoing outreach resources of approximately \$11,000 in fiscal year 2021 and \$26,000 over the four-year financial plan period.

The bill expands the Attorney General's authority to bring civil action in bias-related crimes and enhances the civil penalties available to the court. The Office of the Attorney General can absorb any costs associated with this expanded civil enforcement authority.

There are no costs associated with the bill's expanded protections for religious and secular symbols on all properties. There are also no costs associated with establishment that insanity and self-defense are not adequate defenses to a crime if that claim is made based on the discovery of the victim's actual or perceived gender identity, gender expression, or sexual orientation.

The chart on the following page summarizes the bill's fiscal impact.

² Omnibus Public Safety and Justice Amendment Act of 2009, effective December 10, 2009 (D.C. Law 18-88; D.C. Official Code § 22-3131 et seq.).

The Honorable Phil Mendelson

FIS: Bill 23-409, "Bella Evangelista and Tony Hunter Panic Defense Prohibition and Hate Crimes Response Amendment Act of 2020," Draft Committee Print as circulated on November 20, 2020

Bella Evangelista and Tony Hunter Panic Defense Prohibition and Hate Crimes Response Amendment Act of 2020 Bill 23-409 Implementation Costs Fiscal Year 2021 – Fiscal Year 2022 (\$ thousands)					
	FY 2021	FY 2022	FY 2023	FY 2024	Total
Staff	\$230	\$231	\$232	\$232	\$925
Administration and Outreach	\$11	\$5	\$5	\$5	\$26
Total Costs	\$241	\$236	\$237	\$237	\$951

ATTACHMENT K



OFFICE OF THE GENERAL COUNSEL

Council of the District of Columbia
1350 Pennsylvania Avenue NW, Suite 4
Washington, DC 20004
(202) 724-8026

MEMORANDUM

TO: Councilmember Charles Allen

FROM: Nicole L. Streeter, General Counsel *NLS*

DATE: November 21, 2020

RE: Legal sufficiency determination for Bill 23-409, the Bella Evangelista and Tony Hunter Panic Defense Prohibition and Hate Crimes Response Amendment Act of 2020

The measure is legally and technically sufficient for Council consideration.

The bill would amend the Human Rights Act of 1977 to clarify the definition of “place of public accommodation”.

The bill would amend the Anti-Intimidation and Defacing of Public or Private Property Criminal Penalty Act of 1982 to expand the offense of defacement of certain symbols or display of certain emblems.

The bill would amend the Bias-Related Crime Act of 1989 to add definitions, clarify the definition of “bias-related crime”, provide civil enforcement authority to the Attorney General against persons who commit bias-related crimes or, through certain acts, interfere or attempt to interfere with an individual’s exercise of constitutional or District rights, or deprive an individual of equal protection, to provide subpoena authority, and specify appropriate relief.

The bill would amend Chapter 1 of Title 23 to limit the scope of the defenses of heat of passion caused by adequate provocation, insanity, self-defense, defense of others, and defense of property if certain elements of the defense are based on the victim’s actual or perceived gender identity, gender expression, or sexual orientation.

I am available if you have any questions.

ATTACHMENT L

1 **Comparative Committee Print**
2 **B23-0409**
3 **Committee on the Judiciary & Public Safety**
4 **November 23, 2020**

5
6 **Section 2**
7

8 **D.C. Official Code § 2-1401.02. Definitions.**
9

10 The following words and terms when used in this chapter have the following meanings:
11 [...]

12 (24) "Place of public accommodation" means ~~all places included in the meaning of such~~
13 terms any person or place that provides, to a person in the District, access to an accommodation,
14 service, or good, whether or not that person or place maintains a physical location in the District
15 or charges for those goods or services, such as inns, taverns, road houses, hotels, motels, whether
16 conducted for the entertainment of transient guests or for the accommodation of those seeking
17 health, recreation or rest; restaurants or eating houses, or any place where food is sold for
18 consumption on the premises; buffets, saloons, barrooms, or any store, park or enclosure where
19 spirituous or malt liquors are sold; ice cream parlors, confectioneries, soda fountains and all stores
20 where ice cream, ice and fruit preparation or their derivatives, or where beverages of any kind are
21 retailed for consumption on the premises; wholesale and retail stores, and establishments dealing
22 with goods or services of any kind, including, but not limited to, the credit facilities thereof; banks,
23 savings and loan associations, establishments of mortgage bankers and brokers, all other financial
24 institutions, and credit information bureaus; insurance companies and establishments of insurance
25 policy brokers; dispensaries, clinics, hospitals, bath-houses, swimming pools, laundries and all
26 other cleaning establishments; barber shops, beauty parlors, theaters, motion picture houses,
27 airdromes, roof gardens, music halls, race courses, skating rinks, amusement and recreation parks,
28 trailer camps, resort camps, fairs, bowling alleys, golf courses, gymnasiums, shooting galleries,
29 billiards and pool parlors; garages, all public conveyances operated on land or water or in the air,
30 as well as the stations and terminals thereof; travel or tour advisory services, agencies or bureaus;
31 public halls and public elevators of buildings and structures, occupied by 2 or more tenants, or by
32 the owner and 1 or more tenants. Such term shall not include any institution, club, or place of
33 accommodation which is in its nature distinctly private except, that any such institution, club or
34 place of accommodation shall be subject to the provisions of § 2-1402.67. A place of
35 accommodation, institution, or club shall not be considered in its nature distinctly private if the
36 place of accommodation, institution, or club:

- 37 (A) Has 350 or more members;
38 (B) Serves meals on a regular basis; and
39 (C) Regularly receives payment for dues, fees, use of space, facilities, services,
40 meals, or beverages directly or indirectly from or on behalf of nonmembers for the furtherance of
41 trade or business.

42 [...]
43

44 **Section 3**

45
46 **D.C. Official Code § 22-3312.02. ~~Defacing or burning cross or religious~~ Defacement of**
47 **certain symbols; display of certain emblems.**

48
49 (a) It shall be unlawful for any person to burn, desecrate, mar, deface, or damage a religious
50 or secular symbol on any private premises or property in the District of Columbia primarily used
51 for religious, educational, residential, memorial, charitable, or cemetery purposes, or for assembly
52 by persons of a particular race, color, creed, religion, or any other category listed in § 2-1401.01,
53 or on any public property in the District of Columbia; or to place or to display in any of these
54 locations a sign, mark, symbol, emblem, or other physical impression including, but not limited
55 to, a Nazi swastika, a noose, or any manner of exhibit which includes a burning cross, real or
56 simulated, where it is probable that a reasonable person would perceive that the intent is:

57 (1) To deprive any person or class of persons of equal protection of the law or of
58 equal privileges and immunities under the law, or for the purpose of preventing or hindering the
59 constituted authorities of the United States or the District of Columbia from giving or securing to
60 all persons within the District of Columbia equal protection of the law;

61 (2) To injure, intimidate, or interfere with any person because of his or her exercise
62 of any right secured by federal or District of Columbia laws, or to intimidate any person or any
63 class of persons from exercising any right secured by federal or District of Columbia laws;

64 (3) To threaten another person whereby the threat is a serious expression of an
65 intent to inflict harm; or

66 (4) To cause another person to fear for his or her personal safety, or where it is
67 probable that reasonable persons will be put in fear for their personal safety by the defendant's
68 actions, with reckless disregard for that probability.

69 (b) Repealed.

70 (c) Nothing in this section shall be deemed to amend or repeal any provision of the District
71 of Columbia Fire Prevention Code (7 DCCR).

72 (a) It shall be unlawful for any person to burn, desecrate, mar, deface, or damage a religious
73 or secular symbol, or place or display a sign, mark, symbol, impression, or other emblem, including
74 a Nazi swastika, noose, or real or simulated burning cross, on the private property of another,
75 without the permission of the owner or the owner's designee, or on public property, where the
76 person acts reckless to the fact that a reasonable person would perceive that the intent of the person
77 acting is to:

78 (1) Deprive a person or class of persons of equal protection under federal or District
79 law;

80 (2) Hinder or interfere with, or retaliate for, a person's exercise of any right secured
81 by federal or District law;

82 (3) Threaten to injure, break, or destroy a person's property or harm a person's
83 financial interests; or

84 (4) Threaten to do bodily harm to a person.

85 **Section 4**

86
87 **D.C. Official Code § 22–3701. Definitions.**

88
89 For the purposes of this chapter, the term:

90 (1) “Attorney General” means the Attorney General for the District of Columbia.

91 (1A) “Bias-related crime” means a designated act that demonstrates an accused’s
92 prejudice based on the actual or perceived race, color, religion, national origin, sex, age, marital
93 status, personal appearance, sexual orientation, gender identity or expression, family
94 responsibility, homelessness, physical disability, matriculation, or political affiliation of a victim
95 of the subject designated act. A designated act need not solely be based on or because of an
96 accused’s prejudice.

97 (2) “Designated act” means a criminal act, including arson, assault, burglary, injury
98 to property, kidnapping, manslaughter, murder, rape, robbery, theft, or unlawful entry, and
99 attempting, aiding, abetting, advising, inciting, conniving, or conspiring to commit arson, assault,
100 burglary, injury to property, kidnapping, manslaughter, murder, rape, robbery, theft, or unlawful
101 entry.

102 (2A) “Discrimination” means differential treatment on the basis of a trait identified
103 in section 101 of the Human Rights Act of 1977, effective December 13, 1977 (D.C. Law 2-38;
104 D.C. Official Code 2-1401.01).

105 (3) “Gender identity or expression” shall have the same meaning as provided in §
106 2-1401.02(12A).

107 (4) “Homelessness” means:

108 (A) The status or circumstance of an individual who lacks a fixed, regular,
109 and adequate nighttime residence; or

110 (B) The status or circumstance of an individual who has a primary nighttime
111 residence that is:

112 (i) A supervised publicly or privately operated shelter designed to
113 provide temporary living accommodations, including welfare motels, hotels, congregate shelters,
114 and transitional housing for the mentally ill;

115 (ii) An institution that provides a temporary residence for
116 individuals intended to be institutionalized; or

117 (iii) A public or private place not designed for, or ordinarily used as,
118 a regular sleeping accommodation for human beings.

119 (5) “Person” means any individual, firm, corporation, partnership, cooperative,
120 association, or any other organization, legal entity, or group of individuals however organized;
121 provided, that for the purposes of a civil action brought against an individual pursuant to section
122 6, the term “person” shall not include an individual who is 17 years of age or younger.

123
124 **D.C. Official Code § 22–3702. Collection and publication of data.**

125
126 (a) The Metropolitan Police ~~force~~ Department shall afford each crime victim the
127 opportunity to submit with the complaint a written statement that contains information to support
128 a claim that the designated act constitutes a bias-related crime.

129 (b) The Mayor shall collect and compile data on the incidence of bias-related crime.

(c) Data collected under subsection (b) of this section shall be used for research or statistical purposes and may not contain information that may reveal the identity of an individual crime victim.

(d) The Mayor shall publish an annual summary of the data collected under subsection (b) of this section and transmit the summary and recommendations based on the summary to the Council.

D.C. Official Code § 22–3704. Civil action.

(a) Irrespective of any criminal prosecution or the result of a criminal prosecution, any person who incurs injury to his or her person or property as a result of an intentional act that demonstrates an accused's prejudice based on the actual or perceived race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, gender identity or expression, family responsibilities, homelessness, ~~physical~~ disability, matriculation, or political affiliation of a victim of the subject designated act shall have a civil cause of action in a court of competent jurisdiction for appropriate relief, which includes:

- (1) An injunction;
- (2) Actual or nominal damages for economic or non-economic loss, including damages for emotional distress;
- (3) Punitive damages in an amount to be determined by a jury or a court sitting without a jury; or
- (4) Reasonable attorneys' fees and costs.

(b) In a civil action pursuant to subsection (a) of this section, whether an intentional act has occurred that demonstrates an accused's prejudice based on the actual or perceived color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, family responsibilities, homelessness, ~~physical~~ disability, matriculation, or political affiliation of a victim of the subject designated act shall be determined by reliable, probative, and substantial evidence.

(c) The parent of a minor shall be liable for any damages that a minor is required to pay under subsection (a) of this section, if any action or omission of the parent or legal guardian contributed to the actions of the minor.

New Section (D.C. Official Code § 22-3705)

Sec. 6. Attorney General civil enforcement.

(a) The Attorney General may, irrespective of any criminal prosecution, the result of any criminal prosecution, or any cause of action brought pursuant to section 5, bring, in the name of the District of Columbia, a civil action for appropriate relief whenever any person, whether or not acting under color of law:

- (1) Commits a bias-related crime; or
- (2) Through any act of violence, force, fraud, intimidation, or discrimination:
 - (A) Interferes or attempts to interfere with an individual's exercise of any right secured by the United States Constitution or District law; or
 - (B) Deprives any individual of the equal protection of the United States Constitution or District law.

(b) In the course of an investigation to determine whether to seek relief under this section, the Attorney General may subpoena witnesses, administer oaths, require sworn written responses

to written questions, examine an individual under oath, and compel production of records, books, papers, contracts, and other documents and materials, subject to the procedures in section 108d and 108e of the Attorney General for the District Columbia Clarification and Elected Term Amendment Act of 2010, as added October 22, 2015 (D.C. Law 21-36; D.C. Official Code §§ 1-301.88d and 1-301.88e).

(c) Appropriate relief under this section may include:

(1) Injunctive relief;

(2) Actual or nominal damages for economic or non-economic loss, including damages for emotional distress;

(3) Punitive damages in an amount to be determined by a jury or a court sitting without a jury, which may include treble damages for any economic or non-economic loss the person suffered;

(4) Reasonable attorneys' fees and costs;

(5) A civil penalty of up to \$10,000 per act giving rise to a cause of action under subsection (a) of this section; or

(6) Any other relief which the court determines proper.

Section 5

Chapter 1. General Provisions.

§ 23–101. Conduct of prosecutions.

§ 23–102. Abandonment of prosecution; enlargement of time for taking action.

§ 23–103. Statements prior to sentence.

§ 23–103a. Rights of victims of crime. [Repealed]

§ 23–104. Appeals by United States and District of Columbia.

§ 23–105. Challenges to jurors.

§ 23–106. Witnesses for defense; fees.

§ 23–107. Discharge or acquittal of joint defendant during trial in order to be witness.

§ 23–108. Depositions.

§ 23–109. Powers of investigators assigned to United States Attorney.

§ 23–110. Remedies on motion attacking sentence.

§ 23–111. Proceedings to establish previous convictions.

§ 23–112. Consecutive and concurrent sentences.

§ 23–112a. Notice at sentencing of child support modification.

§ 23–113. Limitations on actions for criminal violations.

§ 23–114. Corroboration of a child witness' testimony not required.

§ 23-115. Limits on defenses that justify, excuse, or mitigate a defendant's conduct on the basis of a victim's gender identity, gender expression, or sexual orientation.

New Section (D.C. Official Code § 23-115)

D.C. Official Code § 23-115. Limits on defenses that justify, excuse, or mitigate a defendant's conduct on the basis of a victim's gender identity, gender expression, or sexual orientation.

221 (a) In any prosecution, criminal proceeding, or criminal trial, when applicable to the
222 offense charged, for the purposes of proving:

223 (1) Heat of passion caused by adequate provocation, a defendant's provocation was
224 not objectively adequate if it was based on discovery of, knowledge about, or the potential
225 disclosure of the victim's actual or perceived gender identity, gender expression, or sexual
226 orientation;

227 (2) Insanity, the defendant did not lack substantial capacity if the mental disease or
228 defect at issue was based on discovery of, knowledge about, or the potential disclosure of the
229 victim's actual or perceived gender identity, gender expression, or sexual orientation; or

230 (3) Self-defense, defense of others, or defense of property, the defendant was not
231 justified in using force if the basis for their belief in imminent danger was based on discovery of,
232 knowledge about, or the potential disclosure of the victim's actual or perceived gender identity,
233 gender expression, or sexual orientation.

234 (b) Notwithstanding subsection (a) of this section, the defense may present evidence of
235 prior trauma to the defendant for the purposes of excusing or justifying the defendant's conduct or
236 mitigating the severity of the offense.

ATTACHMENT M

Committee Print
B23-0409
Committee on the Judiciary & Public Safety
November 23, 2020

A BILL

23-0409

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

To amend the Human Rights Act of 1977 to clarify the definition of “place of public accommodation”; to amend the Anti-Intimidation and Defacing of Public or Private Property Criminal Penalty Act of 1982 to expand the offense of defacement of certain symbols or display of certain emblems; amend the Bias-Related Crime Act of 1989 to add definitions, clarify the definition of “bias-related crime”, provide civil enforcement authority to the Attorney General against persons who commit bias-related crimes or, through certain acts, interfere or attempt to interfere with an individual’s exercise of constitutional or District rights, or deprive an individual of equal protection, to provide subpoena authority, and specify appropriate relief; and to amend Chapter 1 of Title 23 to limit the scope of the defenses of heat of passion caused by adequate provocation, insanity, self-defense, defense of others, and defense of property if certain elements of the defense are based on the victim’s actual or perceived gender identity, gender expression, or sexual orientation.

BE IT ENACTED BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this act may be cited as the “Bella Evangelista and Tony Hunter Panic Defense Prohibition and Hate Crimes Response Amendment Act of 2020”.

Sec. 2. Section 102(24) of the Human Rights Act of 1977, effective December 13, 1977 (D.C. Law 2-38; D.C. Official Code § 2-1401.02(24)), is amended by striking the phrase “all places included in the meaning of such terms as inns” and inserting the phrase “any person or place that provides, to a person in the District, access to an accommodation, service, or good, whether or not that person or place maintains a physical location in the District or charges for those goods or services, such as inns” in its place.

41 Sec. 3. Section 3 of the Anti-Intimidation and Defacing of Public or Private Property
42 Criminal Penalty Act of 1982, effective March 10, 1983 (D.C. Law 4-203; D.C. Official Code §
43 22-3312.02), is amended to read as follows:

44 “Sec. 3. Defacement of certain symbols; display of certain emblems.

45 “It shall be unlawful for any person to burn, desecrate, mar, deface, or damage a religious
46 or secular symbol, or place or display a sign, mark, symbol, impression, or other emblem, including
47 a Nazi swastika, noose, or real or simulated burning cross, on the private property of another,
48 without the permission of the owner or the owner’s designee, or on public property, where the
49 person acts reckless to the fact that a reasonable person would perceive that the intent of the person
50 acting is to:

51 “(1) Deprive a person or class of persons of equal protection under federal or
52 District law;

53 “(2) Hinder or interfere with, or retaliate for, a person’s exercise of any right
54 secured by federal or District law;

55 “(3) Threaten to injure, break, or destroy a person’s property or harm a person’s
56 financial interests; or

57 “(4) Threaten to do bodily harm to a person.”.

58 Sec. 4. The Bias-Related Crime Act of 1989, effective May 8, 1990 (D.C. Law 8-121; D.C.
59 Official Code § 22-3701 *et seq.*), is amended as follows:

60 (a) Section 2 (D.C. Official Code § 22-3701) is amended as follows:

61 (1) Paragraph (1) is redesignated as paragraph (1A).

62 (2) A new paragraph (1) is added to read as follows:

63 “(1) “Attorney General” means the Attorney General for the District of Columbia.”.

(3) The newly redesignated paragraph (1A) is amended by striking the phrase “physical disability, matriculation, or political affiliation of a victim of the subject designated act” and inserting the phrase “disability, matriculation, or political affiliation of a victim of the subject designated act. A designated act need not solely be based on or because of an accused’s prejudice.” in its place.

(4) A new paragraph (2A) is added to read as follows:

“(2A) “Discrimination” means differential treatment on the basis of a trait identified in section 101 of the Human Rights Act of 1977, effective December 13, 1977 (D.C. Law 2-38; D.C. Official Code 2-1401.01).”.

(5) A new paragraph (5) is added to read as follows:

“(5) “Person” means any individual, firm, corporation, partnership, cooperative, association, or any other organization, legal entity, or group of individuals however organized; provided, that for the purposes of a civil action brought against an individual pursuant to section 6, the term “person” shall not include an individual who is 17 years of age or younger.”.

(b) Section 3(a) (D.C. Official Code § 22-3702(a)) is amended by striking the phrase “Police force” and inserting the phrase “Police Department” in its place.

(c) Section 5 (D.C. Official Code § 22-3704) is amended by striking the phrase “physical disability,” both times it appears and inserting the phrase “disability,” in its place.

(d) A new section 6 is added to read as follows:

“Sec. 6. Attorney General civil enforcement.

“(a) The Attorney General may, irrespective of any criminal prosecution, the result of any criminal prosecution, or any cause of action brought pursuant to section 5, bring, in the name of

the District of Columbia, a civil action for appropriate relief whenever any person, whether or not acting under color of law:

“(1) Commits a bias-related crime; or

“(2) Through any act of violence, force, fraud, intimidation, or discrimination:

“(A) Interferes or attempts to interfere with an individual’s exercise of any right secured by the United States Constitution or District law; or

“(B) Deprives any individual of the equal protection of the United States Constitution or District law.

“(b) In the course of an investigation to determine whether to seek relief under this section, the Attorney General may subpoena witnesses, administer oaths, require sworn written responses to written questions, examine an individual under oath, and compel production of records, books, papers, contracts, and other documents and materials, subject to the procedures in section 108d and 108e of the Attorney General for the District Columbia Clarification and Elected Term Amendment Act of 2010, as added October 22, 2015 (D.C. Law 21-36; D.C. Official Code §§ 1-301.88d and 1-301.88e).

“(c) Appropriate relief under this section may include:

“(1) Injunctive relief;

“(2) Actual or nominal damages for economic or non-economic loss, including damages for emotional distress;

“(3) Punitive damages in an amount to be determined by a jury or a court sitting without a jury, which may include treble damages for any economic or non-economic loss the person suffered;

“(4) Reasonable attorneys’ fees and costs;

““(5) A civil penalty of up to \$10,000 per act giving rise to a cause of action under subsection (a) of this section; or

“(6) Any other relief which the court determines proper.”.

Sec. 5. Chapter 1 of Title 23 of the District of Columbia Official Code is amended as follows:

(a) The table of contents is amended by adding a new section designation to read as follows:

“23-115. Limits on defenses that justify, excuse, or mitigate a defendant’s conduct on the basis of a victim’s gender identity, gender expression, or sexual orientation.”.

(b) A new section 23-115 is added to read as follows:

“§ 23-115. Limits on defenses that justify, excuse, or mitigate a defendant’s conduct on the basis of a victim’s gender identity, gender expression, or sexual orientation.

“(a) In any prosecution, criminal proceeding, or criminal trial, when applicable to the offense charged, for the purposes of proving:

“(1) Heat of passion caused by adequate provocation, a defendant’s provocation was not objectively adequate if it was based on discovery of, knowledge about, or the potential disclosure of the victim’s actual or perceived gender identity, gender expression, or sexual orientation;

“(2) Insanity, the defendant did not lack substantial capacity if the mental disease or defect at issue was based on discovery of, knowledge about, or the potential disclosure of the victim’s actual or perceived gender identity, gender expression, or sexual orientation; or

“(3) Self-defense, defense of others, or defense of property, the defendant was not justified in using force if the basis for their belief in imminent danger was based on discovery of,

131 knowledge about, or the potential disclosure of the victim's actual or perceived gender identity,
132 gender expression, or sexual orientation.

133 “(b) Notwithstanding subsection (a) of this section, the defense may present evidence of
134 prior trauma to the defendant for the purposes of excusing or justifying the defendant's conduct or
135 mitigating the severity of the offense.”.

136 Sec. 6. Applicability.

137 (a) Section 2 of this act shall apply upon the date of inclusion of its fiscal effect in an
138 approved budget and financial plan.

139 (b) The Chief Financial Officer shall certify the date of the inclusion of the fiscal effect in
140 an approved budget and financial plan, and provide notice to the Budget Director of the Council
141 of the certification.

142 (c)(1) The Budget Director shall cause the notice of the certification to be published in the
143 District of Columbia Register.

144 (2) The date of publication of the notice of the certification shall not affect the
145 applicability of the provision identified in subsection (a) of this section.

146 Sec. 7. Fiscal impact statement.

147 The Council adopts the fiscal impact statement in the committee report as the fiscal impact
148 statement required by section 4a of the General Legislative Procedures Act of 1975, approved
149 October 16, 2006 (120 Stat. 2038; D.C. Official Code § 1-301.47a).

150 Sec. 8. Effective date.

151 This act shall take effect following approval by the Mayor (or in the event of veto by the
152 Mayor, action by the Council to override the veto), a 60-day period of congressional review as
153 provided in section 602(c)(2) of the District of Columbia Home Rule Act, approved December 24,

154 1973 (87 Stat. 813; D.C. Official Code § 1-206.02(c)(2)), and publication in the District of
155 Columbia Register.