

Bill 18-151, the “Public Safety and Justice Amendments Act of 2009”

Introduced by Councilmember Mendelson on February 17, 2009.

Section 101. Anti-Gang Civil Enforcement

Background: In Bill 17-951, the “Omnibus Anti-Crime Amendment Act of 2008” the Mayor first proposed using civil gang injunctions as a mechanism to reduce gang related crime, impede gang growth, and generally interfere with gangs’ ability to function. Since the introduction of that bill and the roundtable testimony on December 5, 2008, in front of the Committee on Public Safety and the Judiciary, the Mayor’s original proposal has gone through a number of revisions leading to the language that was proposed in Bill 18-138, the Omnibus Anti-Crime Amendment Act of 2009” (the Mayor’s Omnibus) The proposal for civil gang injunctions in the Mayor’s Omnibus is different in many important aspects from those proposed in Bill 18-151, the “Public Safety and Justice Amendments Act of 2009.”

The Anti-Gang Enforcement section of Bill 18-151 adopted much of the Mayor’s original proposal; however, Councilmember Mendelson did not have the benefit of the many hours of meetings, discussions and ultimately the changes made by the Mayor when he sought to improve upon the original submission. The following is a comparison of provisions of the Mayor’s Omnibus with those of Bill 18-151.

(a) Findings and Declaration of Necessity.

We are very pleased to see Chairman Mendelson adopt word for word in Bill 18-151 the “Findings and Declaration of Necessity” as originally proposed in the Mayor’s 2008 Omnibus, and retained in the Mayor’s 2009 Omnibus, which recognizes the growth of gangs and the injurious effect of gang activity on neighborhoods and the need for creative action.

(b) Definitions

“Criminal Street Gang” - It is proposed that criminal street gang have the same definition as DC Code §22-951(e). The Mayor has proposed a more expansive definition in Bill 18-138 and proposed changing DC Code §22-951(e) to conform. The US Attorney’s Office recently won its first conviction under §22-951(e) and, based on that experience, is opposed to changing that statute. As the civil gang injunction and the criminal statute have two distinct purposes and therefore do not need to have mirroring language, we would propose adopting the definition in the Mayor’s Omnibus and leaving the language in §22-951(e) as it is currently written.

“Gang Activity” - Bill 18-151 uses the same language originally proposed by the Mayor in 2008, however in the revisions made and submitted in Bill 18-138 the Mayor has significantly expanded and clarified the definition of gang activity by listing specific activities and violations of the law.

“Public Nuisance; Use of Public Space”- Bill 18-151 uses the same language originally proposed by the Mayor in 2008, however in the revisions made and submitted in Bill 18-138 the Mayor modeled the new definition after the drug related nuisance abatement statute found in

D.C. Official Code § 42-3101, et seq. which we believe provides a clearer definition consistent with the existing nuisance statutes.

(e) Suit to Abate Nuisance

Once again the Mayor has proposed numerous changes in the 2009 Omnibus to his original proposal. Bill 18-151 anticipated at least one of those changes by adopting a “clear and convincing” standard of proof rather than a “preponderance of evidence” standard. We agree that the “clear and convincing” standard for proving the existence of the public nuisance is the correct standard.

The Mayor has also proposed procedural changes that include consolidating the motion for preliminary injunction with the motion to designate persons to be served on behalf of the entity. This was done to streamline the procedure and reduce the need for unnecessary court hearings. Further we have proposed that service be accomplished consistent with Rule 4 of the Superior Court Rules of Civil Procedure.

In response to citizen input, in recognition that gangs contain both adults and juveniles, and to avoid a power vacuum fillable by juveniles that could result if gang injunctions were issued only against adult gang members, the Mayor’s Omnibus contains provisions that would allow gang injunctions also to be issued against juvenile gang members. In addition, the Mayor’s Omnibus includes provisions for maintaining juvenile confidentiality.

Both the Mayor’s Omnibus and Bill 18-151 contain a provision which will protect the identity of non-law enforcement witnesses. However, Bill 18-151 requires the Mayor to establish by “clear and convincing” evidence to believe that there is “any other reason not to disclose” identifying witness information. First, the burden should be a “preponderance of evidence” and second, the Mayor has included an opportunity for the respondent to show by “clear and convincing” evidence that disclosure would not put the witness at risk. We believe this is a more equitable standard.

Bill 18-151 and the Mayor’s Omnibus differ on the criminal penalty for violating the injunction. Bill 18-151 proposes a fine of not less than \$1000 nor more than 10,000, imprisonment for not less than 180 days nor more than 1 year; or both. The Mayor proposes a penalty of a fine of not less than \$1000 nor more than 10,000, imprisonment for not less than 30 days nor more than 180 days. The Mayor’s proposal would not require a jury trial.

Bill 18-151 would require a periodic review by the court every two years of “all relevant and reliable information concerning gang membership and affiliation for each person subject to enforcement of the gang injunction.” Bill 18-151 also includes a rebuttable presumption that a person subject to the injunction should be removed in three years if during that time they have not been arrested or charged with a crime. We believe that periodic reviews will put a heavy burden on OAG and MPD and may make this much needed new tool impractical to use. Those agencies would have to choose between releasing investigatory information every two years to keep someone under the gang injunction and releasing the information and jeopardize investigations and prosecutions. The Mayor’s approach in the Omnibus allows any person who is the subject of a gang injunction to petition the court at any time to have the injunction lifted because that person has both dissociated themselves from the gang and are no longer engaged in criminal activity. The Mayor’s Omnibus, unlike the 2008 version, also lists several factors that

may be considered by the judge when considering whether the injunction should be lifted concerning a particular individual. Finally under the Mayor's Omnibus, OAG, in consultation with MPD, will promulgate regulations detailing the process by which a person may obtain the government's assistance in lifting an injunction.

Section 102 Correctional Facilities

(a) Arrest Power:

Bill 18-151 would grant correctional officers of the DOC with the power of arrest within a correctional facility. While we fully support the granting of limited arrest powers, it is respectfully submitted that the limitation to the rank of Major or above is severely restrictive. There are at most 2 majors in the DOC on any given shift. If the qualification of Major was selected to ensure that the authority is bestowed on officers who will exercise it appropriately, the better qualification should be to bestow it upon officers designated by the Director who have undergone the Metropolitan Police Department's (MPD) training.

(b) Prohibition of Cellular telephone or other portable communication device.

Bill 18-151 seeks to make it a misdemeanor to introduce any (a) written communication or any currency or coin, (b) any article of food or clothing, and any (c) cellular telephone or other portable communication device. Under current law,¹ the introduction of a contraband letter or message is a felony, and thus the proposed law making it a misdemeanor is a step back. This is troubling because messages coming in or going out of the institution circumventing the mail or phone system may be used to issue threats, intimidate witnesses, tamper with testimony, run criminal enterprises, plan escapes or assaults and a variety of other dangerous activities and should be a felony. The amendment also makes the smuggling of a cellphone or other communication devices a misdemeanor. Cellphones are extremely dangerous in the correctional setting and have become an epidemic across the country. Inmates have used phones to issue threats, intimidate witnesses, tamper with testimony, run criminal enterprises, plan escapes or assaults, coordinate riots and kill staff. Many are smuggled in on visits or by corrupt staff motivated by the high price inmates will pay for a phone up to \$5,000. The introduction of a cellphone or its accessories, a PDA or other communication device is very serious and should be a felony, not a misdemeanor.

¹ § 22-2603. Introducing contraband into penal institution

Any person, not authorized by law, or by the Mayor of the District of Columbia, or by the Director of the Department of Corrections of the District of Columbia, who introduces or attempts to introduce into or upon the grounds of any penal institution of the District of Columbia, whether located within the District of Columbia or elsewhere, any narcotic drug, weapon, or any other contraband article or thing, or any contraband letter or message intended to be received by an inmate thereof, shall be guilty of a felony, and, upon conviction thereof in the Superior Court of the District of Columbia or in any court of the United States, shall be punished by imprisonment for not more than 10 years.

Section 103 Spousal Privilege

This is identical to the Spousal Privilege proposal in the Mayor's Omnibus and we support this proposal.

Section 104 Destruction or Defacing campaign material

We do not have a position on this at this time.

Section 105 Interspousal Immunity

In 2008, the Council amended D.C. Code § 16-1002. The amendment, which is projected to go into effect next week, reads:

A petitioner has a right to seek relief under this subchapter. This right does not depend on the decision of the Attorney General, the United States Attorney for the District of Columbia, or a prosecuting attorney in any jurisdiction to initiate or not to initiate a criminal or delinquency case or on the pendency or termination of a criminal or delinquency case involving the same parties or issues. Testimony of the respondent in any civil proceedings under this subchapter shall be inadmissible as evidence in a criminal trial or delinquency proceeding except in a prosecution for perjury or false statement.

Section 3(b), Intrafamily Offenses Act of 2008.

Although we had hoped that the Council would have considered permitting the use of a respondent's statements in a Civil Protective Order for impeachment in a later criminal trial, it did not. However, the Council did make the more important change by deleting the phrase "or the fruits thereof." Bill 18-151, unfortunately, reinserts this phrase while, at the same time, permitting derivative use. Those two concepts are mutually exclusive.

In a recent decision, the D.C. Court of Appeals held that a victim cannot testify in a criminal case if she has heard her assailant's testimony in a civil protective order hearing, unless the government can prove that her testimony was not affected, even subtly, by his. *Aiken v. United States*, 956 A.2d 33 (D.C. 2008). The Court opined that it was "doubtful" that the government could "surmount such a difficult obstacle." *Id.* at XX. In the vast majority of cases (70%), the respondent has not be arrested when a CPO is sought. If the petitioner goes forward, and the respondent testifies, the chances of a future criminal prosecution are virtually eliminated. Since many petitioners proceed without a lawyer, they would not know that their need for immediate protection could have this effect. Even if she does know, it forces her to choose between obtaining immediate protection, an act within her control, or gambling on the uncertain possibility of future criminal prosecution, an act outside of her control – an impossible choice that the 1982 amendments were intended to ensure she never had to make. Therefore, we oppose this section of the bill.

Section 106 Disorderly Conduct

Section 106 revises the disorderly conduct statutes that have served the District well for more than a century. Our statutes might be characterized as criminal nuisance statutes, which are used

to address a broad array of crimes that significantly negatively impact the quality of life in our neighborhoods. They permit the police to arrest people who are urinating in public, fighting in public, disturbing the neighbors by loud parties or other gatherings, blocking the sidewalk, blocking the entrance to private buildings, and peeping toms. They have been used in the fight against street prostitution. They also may be useful in addressing some of the nuisance issues that have plagued some of our neighborhoods. With a maximum penalty of 90 days, or \$250 fine, or both, the current disorderly conduct statutes are on the lower end of the misdemeanor scale and can be disposed of expeditiously.

Disorderly conduct, however, rarely rises to the level of “the reasonable fear of bodily harm resulting from the awareness of being endangered” as Bill 18-151 defines “alarm.”² Nor does disorderly conduct necessarily create “public violence.” (There is a separate statute, D.C. Official Code § 22-1322, for “rioting,” that prohibits five or more people engaging in tumultuous and violent conduct or threat thereof that creates a grave danger to property). It is unclear what the objective of Section 106 is and what it hopes to accomplish. As drafted, section 106 would significantly reduce the ability of the police to address less serious offenses that reduce the quality of life in our city. At the same time, by making what remains jury demandable, section 106 would significantly increase the burden on the court to dispose of such cases expeditiously. It will have an adverse effect on public safety and should be rejected.

Section 107 Penalties for Repeat Offenders

We do not disagree in principle with imposing higher sentences on chronic offenders or recidivists. Indeed, under current law, a person convicted the third time for unlawful use of a vehicle, for example, may be sentenced up to thirty years, D.C. Official Code § 18-1804a(a)(1), and such a sentence would be compliant with the voluntary sentencing guidelines. See Sentencing Guidelines Practice Manual, Appendix H-1. Section 107(a) of Bill 18-151, however, would impose a non-mandatory minimum of 8 years. It would be more effective and a more likely sentence, in our view, if the minimum penalty were somewhat lower and mandatory.

Under D.C. Official Code § 22-1804a(a)(2), the maximum penalty for the third crime of violence is life without release. Section 107(b) adds a section (e) that would simply double the maximum for the underlying crime of violence. It is not clear how the court would interpret contradictory provisions. Under the rule of lenity, it might decide that the lower maximum applied. We do not think that the proposed subsection (e) is helpful and, therefore, oppose it.

Section 107(c) would make the third conviction for misdemeanor prostitution, theft, or burglary a five- year, \$10,000 felony. Burglary is not a misdemeanor.³ We have no objection to

² Substituting the definition of alarm in the substantive provision, the government would have to prove that person was “threatening or harming another’s person or property in such a manner that is likely to cause an immediate public reasonable fear of bodily harm resulting from the awareness of being endangered or public violence.” This would be a difficult burden to meet.

³ First degree burglary has a maximum prison sentence of 30 years and second degree burglary has a maximum prison sentence of 15 years for the first offense. Burglary is a crime of violence so that, under D.C. Official Code § 22-1804a(a)(2), the maximum penalty for the third offense would be up to life without release.

making the third strike for misdemeanor theft or prostitution a five-year, \$10,000-fine felony. However, Section 108 of Bill 18-151 makes the third strike for prostitution a two-year, \$4,000 fine felony. It would probably be preferable to select an appropriate sentence and amend only one of the two sections.

Finally, the change from “may” to “shall” in D.C. Official Code § 22-1802a mandated by Section 107(a)(1) would have no effect since the existing provisions permit a judge to sentence a person “up to, and including, 30 years” or “up to, and including, life without release.”

Section 108 Prostitution

We are not aware of any jurisdiction where prostitution itself is a felony. We have no objection to making the third offense a felony. If the object is to get prostitutes off the street, however, a mandatory minimum may be a way of achieving more determinate penalties. However, we would question the value of instituting too harsh of a penalty for this crime when, treatment programs for prostitutes are more beneficial when available.

Section 110 Theft from a Motor Vehicle

Section 110 adds the new offense of theft from motor vehicle. Thefts from automobiles are a significant problem in many areas of our city. They are often committed in the middle of the night when people are asleep or in the middle of the day when people are not at home. Sometimes an alert neighbor spots an offender, but by the time the police get there, he or she is likely to be gone. It is, therefore, difficult to identify and arrest those responsible. The problem, we think, lies more in the nature of the offense than in a statutory flaw.

Indeed, the substantive offense added by Section 110 appears to be identical in all respects to the theft statute except that it adds the element that the property has to be stolen from a motor vehicle. The maximum term of incarceration of 15 years for the third offense is lower than the 30-year maximum which would be available for theft under D.C. Official Code § 22-1804(a) or § 22-1804a(a)(1). Section 110, therefore, does not really offer an advantage over current law except for mandating a 3-year mandatory minimum. We, therefore, recommend that section (c) be amended slightly and added to D.C. Official Code § 22-3212., Penalties for Theft.

Section 111 Unlawful Entry

The same considerations apply to section 111 as to section 110. There is currently on the books a provision that prohibits tampering with a motor vehicle:

Except as provided in this section, it shall be unlawful for any person, except the owner, a person authorized by the owner in writing, an employee of the District government in connection with the performance of official duties, or a tow crane operator who has valid authorization from the District government, to do any of the following:

(1) Tamper with, remove, or attempt to tamper with or remove any vehicle owned by another person; . . .

D.C. Official Code § 50-2421.04 (d).

It has a fine of not more than \$500, imprisonment of not more than 90 days, or both, and is prosecuted by the Office of the Attorney General. Adding a provision to the unlawful entry

statute with its current 6-month penalty would make this crime jury demandable, and may inhibit swift prosecution in those cases where there has been an arrest. It might be more beneficial to amend the tampering statute, to the extent necessary, to incorporate the concept of entering or being in another person's vehicle without permission. We would be pleased to work with the Committee to develop such language.

Section 112 Vagrancy Repeal

We support this proposal.

Section 113 Homelessness as a Protected Class

We support this proposal.

Section 114 Massage Establishments

We would suggest removing altogether from the statute any reference to "Turkish, Russian, or medicated baths" as those terms are undefined. Further, licensing for "spa" type facilities are currently available under a separate statute.

Section 115 Drug Free Zones

We do not have a position on this at this time.

Section 201 Appointment of the Chief Medical Examiner

We support this proposal, legislation which was also introduced by Chairman Gray on behalf of the Mayor. As you know, this section is the permanent version of emergency legislation already passed by the Council in December that exempts the Chief Medical Examiner (CME), through the end of her current term, from the statutory requirement that she be board certified. We appreciate the Committee Chairman's continued support of Dr. Marie Pierre-Louis, our CME, and the great work of the Office of the Chief Medical Examiner, and look forward to swift passage of this legislation.

Section 301 and 302 GPS Anti-tampering Act of 2009

D.C. Official Code § 22-1322(b)(1), authorizes the court to release a person who is otherwise subject to pretrial detention if there is "any condition or combination of conditions set forth in § 23-1321(c) will reasonably assure the appearance of the person as required and the safety of any other person and the community." Pursuant to this authorization, the court has released persons charged with serious crimes with the condition that they wear a GPS device or other electronic monitoring equipment. Some defendants have attempted to interfere with the operation of these devices or to remove them altogether, thereby thwarting the condition that made them eligible for release in the first place. We appreciate and support the Council's approval of emergency legislation in December criminalizing this activity. While we do not have an accurate count of the number of cases brought under the emergency legislation that involve removing or interfering with a GPS device, anecdotally there have been several and we are already taking advantage of the new law.

Section 301 would, on a permanent basis, criminalize removing, altering or interfering with such devices or attempting to do so. Section 302 makes it a probable cause misdemeanor so that

the police can arrest a person without a warrant even if they have not personally observed the misconduct.

Law enforcement officials have been able to link defendants to crimes because they were wearing a GPS device and were able to quickly apprehend them and take them off the street. Wearing a GPS device contributes significantly to public safety. A person who tampers with the device is likely violating his conditions of release and may be planning additional crimes and, therefore, should be penalized. We support this legislation.

Section 401 Disclosure of Mental Health Information

The proposed amendment Title III of the D.C. Mental Health Information Act would require disclosure for ensuring the delivery of “shorter seamless treatment services;” protecting the individual from serious physical harm while incarcerated; and protecting public safety through reporting compliance with mental health treatment through pretrial and probation authorities.

We are opposed to the proposed amendment to Title III of the D.C. Mental Health Information Act as it is overly broad. Current law already addresses emergency concerns and a more narrowly tailored amendment could accomplish the goals of this proposed legislation. In addition, the amendment may violate the D.C. Mental Health Consumer Protection Act, raise disproportionate impact concerns under D.C. Human Rights Act, and likely is preempted by the more stringent procedural safeguards found in HIPAA regulations, 45 C.F.R. §§ 164.508,164.512.

Current law authorizes the disclosure of mental health information, without a signed release, in an emergency to a defendant’s spouse, parent, legal guardian, an officer-agent of the District, DMH, a provider, MPD, or intended victim if there is a reasonable belief that disclosure is necessary to initiate or seek emergency hospitalization or protect the client or another individual from a substantial risk of imminent and serious physical injury. *See* D.C. Official Code § 7-1203.03.

The existing Mental Health Information Act authorizes provider-to-provider disclosures for purposes of ensuring continuity of treatment without the need for a consumer authorization. *See* D.C. Official Code § 7-1203.01(b). Therefore, to address coordination of information between DOC and DMH, DMH is in the process of drafting a business associate agreement with DOC to allow for the exchange of mental health information to facilitate the delivery of mental health services and supports for DMH consumers in the custody of DOC.

To address the court’s need for mental health information in criminal cases, DMH proposes an amendment to the Mental Health Information Act, specifically D.C. Official Code 7-1204.03, that would allow the Court to order the disclosure of mental health information to monitor compliance with court-ordered conditions of pretrial release, probation, and diversion.